THE HONORABLE JOHN R. RUHL

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
SUZIE BURKE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendants.	**CERTAIN PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CITY'S MOTION FOR SUMMARY JUDGMENT**
DENA LEVINE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, Defendant.	
ECONOMIC OPPORTUNITY INSTITUTE, Intervenor.	

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Plaintiffs Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale ("Levine Plaintiffs"), and Plaintiffs 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 ("Burke Plaintiffs") file this memorandum in support of their motion for summary judgment pursuant to CR 56(a), and in opposition to the Defendant City of Seattle's Motion for Summary Judgment. Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny the City's motion for summary judgment, and enter declaratory judgment that Ordinance 125339 (the "Ordinance") is illegal, invalid and void.

I. INTRODUCTION AND RELIEF REQUESTED

Despite multiple binding Washington Supreme Court cases holding otherwise, the City of Seattle is now certain that its tax on income is not a tax on "property." The City thinks it may have enacted an excise tax, or maybe its own category, a *sui generis*, tax.[1] One would expect the City to know what type of tax it enacted, and with what power. The City's uncertainty is understandable since, as the City concedes, no state statute specifically authorizes cities to tax income. The only statute on the subject specifically *prohibits* cities from taxing net income. Because Washington law requires that cities have express authority from the Legislature to levy the specific tax in question, the City's inability to specify legislative authority under which it is acting – its ordinance cites a smorgasbord of five different statutes to choose from – belies the fact that statutory authority is entirely lacking. Without specific statutory authority, its tax on income must be declared invalid.

Seattle does have the power to tax property, but only uniformly. Seattle concedes that this court is bound by multiple state Supreme Court decisions holding that income is property;

[1] The City's position at this stage – that its tax is not a property tax – evolved from the first hearing in this case: "We'll require Your Honor to decide what kind of tax an income tax is, is it a property tax, is it something unique unto itself, is it an excise tax. We haven't decided that. We'll look at the various statutory authorities for those kinds of taxes, to see if the City of Seattle has the authority . . . ." Transcript, August 16, 2017 (Pre-trial conference on consolidation, among other things, and discussing possible bifurcation of issues for briefing).

that taxes must be uniform within each class of property; that income constitutes a single class; and therefore, that Seattle's graduated income tax violates the Constitution's uniformity requirement. So, the City asks this Superior Court to overrule the Washington Supreme Court decisions and adopt a new constitutional interpretation of the term "property" that excludes income. The Court should reject the City's invitation. Because the Ordinance is invalid under the general laws of the state, the Court should decline to rule on a question of constitutional interpretation that it can avoid. Even if there were merit to the City's constitutional arguments, which there is not, this Court is absolutely bound by principles of vertical *stare decisis* to follow the Washington Supreme Court precedent that the City itself concedes is determinative.

How did we arrive at a lawsuit over the City's enactment of an Ordinance that levies a graduated tax on property that the City itself concedes is unconstitutional? The undisputed evidence is that members of the City Council have been coordinating with longtime income tax advocates, and working behind closed doors for at least 18 months to enact the Ordinance for the express purpose of drawing a constitutional challenge. Under their strategy, that legal challenge would give a "sympathetic" Supreme Court the opportunity to overrule its prior decisions in *Culliton*, *Jensen*, and *Huntley*, which established that income is a class of property. This lawsuit is the culmination of a "local government" strategy intended to open the door to the "progressive" *state-wide* income tax Washington voters have rejected at least ten times.

This entire exercise is a misuse of judicial process and an affront to democracy. Five times the voters of Washington have been asked to amend the Constitution to allow a graduated income tax—essentially, to correct the allegedly mistaken rulings of *Culliton* and *Jensen*—and every time they have refused. There have been ten statewide votes against income taxes and, in 2016, the voters of the City of Olympia rejected a graduated income tax virtually identical to the one at issue here and promoted by the same affiliates of EOI. The proponents of this income tax do not trust democracy to choose the progressive tax they

prefer, and so they ran this controversial measure through the City Council in a period of *weeks* without a vote of Seattle residents. That way, no opposition had time to organize to debunk their misleading public relations messaging that the City was taxing only its "wealthiest" residents. The Plaintiffs in this lawsuit – some of whom are people of modest means who would be taxed on gains when they sell homes they've owned for decades, or their small businesses to fund retirement – tell a different story.

Make no mistake, the City's motion asks this Court not only to overrule controlling precedent and ignore legislative intent, but also to substitute its own judgment for the will of the people, expressed on numerous occasions. The Court should refuse to do so. The Court should declare the City's ordinance illegal and invalid because it was enacted without statutory authority and is contrary to state law prohibiting local income taxes. The Court should not reward certain City Councilmembers and income tax advocates for manipulating the machinery of local government and wasting City funds to achieve a statewide political agenda. Avoiding unnecessary constitutional questions by deciding this case on purely statutory grounds, which are open and shut, will avoid rewarding this subterfuge.

II. RELEVANT BACKGROUND

The City's motion states that Seattle officials levied an income tax to generate "much needed revenue"[2] to address critical needs. City Mot. at 1. The evidence shows, however, that tax activists have worked for years to overcome Washington's constitutional prohibition on graduated income taxes, and the City's 2017 Ordinance is principally the product of political opportunism aimed at our state Supreme Court, not to avert fiscal harm. The evidence also shows that City officials set out to levy a tax on net income that they understood to be prohibited by the Constitution and general state law¸ not an excise or "sui generis" tax as the City's brief claims. With revenues increasing substantially, the City of Seattle has not submitted admissible evidence or established undisputed facts that it would suffer harm if the courts continue to respect strong constitutional precedent. On the other hand, Plaintiffs and

[2] *Contra* Section II.E (showing remarkable growth in Seattle City budgets in just a few years' time).

thousands like them have made decisions to live in the City and build their family, business and community relationships in reliance on a constitutional prohibition of graduated income taxes. Their reliance interests should be respected.

A. Washington Voters Have Rejected An Income Tax Ten Times.

Since 1934, Washington voters have rejected five referendums or initiatives to amend the Constitution to pave the way to graduated taxes on income.[3] Over roughly the same period, Washington voters also rejected five statewide votes to codify an income tax by statute.[4] From this decades-long string of defeats, former Governor Christine Gregoire observed: "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."[5]

B. EOI's "Local" Strategy to Create a "Legal Pathway" To the Washington Supreme Court.

It is no surprise that Economic Opportunity Institute ("EOI") intervened in this lawsuit. EOI and its executive director, John Burbank, have been architects of the Ordinance, building on their multi-year efforts to pass state and local income taxes. For example, EOI was heavily involved in I-1098, which was the statewide initiative that would have levied a "progressive," graduated tax on income.[6] In 2010, that initiative was defeated when 64% of voters voted against it.[7]

In response to the statewide defeat in 2010, income tax advocates developed a "local" strategy, concluding that they would "need to pass an income tax somewhere" to generate a

---

[3] 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).

[4] 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).

[5] KIRO Radio, *Washington state has no 'appetite' for income tax*, (Oct. 6, 2017), http://mynorthwest.com/775412/no-appetite-for-state-income-tax/.

[6] Tabor Decl., Ex.A (Olympia City Council Meeting, April 19, 2016, Tr. 5:1-6; 49:1-4).

[7] *See* Washington Secretary of State, Initiative Measure 1098 Concerning establishing a state income tax and reducing other taxes (last updated Nov 29, 2010, 9:49 AM), http://results.vote.wa.gov/results/20101102/Initiative-Measure-1098-Concerning-establishing-a-state-income-tax-and-reducing-other-taxes.html.

lawsuit that could allow the Supreme Court to reconsider its precedent that graduated income taxes violate the state constitution.[8] "And that somewhere," according to advocates, was Seattle.[9] The record shows that EOI and Burbank were working with the City to come up with an income tax ordinance for Seattle by January 2015.[10] Meanwhile, EOI was also pursuing its "local" strategy elsewhere. In 2016, EOI campaigned to have an income tax initiative placed on the ballot in the City of Olympia,[11] promoted as a revenue source for community college funding.[12] In November 2016, that effort failed, because the voters of Olympia rejected that income tax measure.[13]

Leading up to the 2016 vote on the Olympia citizen's initiative, the City of Olympia asked Hugh Spitzer, attorney for the City of Seattle in this matter, to advise Olympia's city officials in an open meeting whether state law authorized cities to levy graduated income taxes. Professor Spitzer advised that Washington courts have repeatedly held that "[c]ities can impose only those taxes which are expressly granted by the Legislature."[14] As a result, he further advised that courts are likely to avoid deciding the constitutional issue under the Uniformity clause that income tax advocates were seeking to tee up.[15]

After the Olympia ballot measure failed, John Burbank reassured supporters, "we are planning to move forward this local strategy for income taxes in 2017, in Olympia, Seattle … I have had good positive talks in the past few weeks with Councilmembers Herbold, Burgess, O'Brien and Sawant."[16] Their goal was to invite a legal challenge with the hope that a "sympathetic" Supreme Court would open the door to statewide income taxes.[17] An EOI

---

[8] Goldy, The Road to a State Income Tax Runs Through Seattle, The Stranger (Nov. 5, 2013), http://www.thestranger.com/slog/archives/2013/11/05/the-road-to-a-state-income-tax-runs-through-seattle.
[9] *Id.*
[10] Mercier Decl., Ex.A at 1-4.
[11] Jason Mercier, *History of Income Tax Votes in Washington*, Washington Policy Center (Oct. 17, 2016); Tabor Decl., Ex.B.
[12] *See id.*
[13] Thurston County Elections, *Thurston County November 8, 2016 General Election* (last updated Nov. 29, 2016 9:08 AM), http://results.vote.wa.gov/results/20161108/thurston/.
[14] Tabor Decl., Ex.B (Olympia City Council Meeting, April 19, 2016, Tr. at 12:2-4).
[15] *Id.* (Olympia City Council Meeting, April 19, 2016, Tr. at 15:16-25).
[16] Mercier Decl., Ex.A, at 26.
[17] *Id.* at 24, 64; *see also id.* at 63 (EOI counsel opining: "If the Court ultimately determines that the City lacks the

action plan entitled "Seattle: Creating the Pathway to a Statewide Income Tax" explained, the defeat in Olympia

> provides us with the necessary and rich background to pursue a local income tax in another jurisdiction. If passed, whether by city council action or by initiative, the ordinance will be immediately challenged by income tax opponents as unconstitutional.
>
> This is what we want, as it provides a pathway to the state supreme court, enabling that court to review and reverse their decisions from 1935 and 1933 in which they equated income to property and thereby disallowed a progressive income tax.
>
> Let's consider Seattle:
>
> We can be forthright in Seattle about the need for a state income tax and the pathway which could be pursued by the city to enable that.[18]

C. Seattle Councilmembers Work With EOI To Tax "High-income Residents."

The Seattle City Council willingly adopted EOI's statewide political strategy as City policy, passing a Resolution to pursue a city income tax on Seattle's "wealthiest citizens" so that "the City of Seattle can pioneer a legal pathway and build political momentum to enable the State of Washington and other local municipalities to put in place progressive tax systems [i.e., income taxes].").[19]

In January 2017 and shortly thereafter, EOI and its allies changed messaging following the 2016 election. Specifically, they proposed in February 2017 to safeguard Seattle against a threatened reduction in federal funds (that has never materialized) by enacting a 2.5% tax on unearned income (i.e., income from capital gains, interest, and dividends) for

---

authority to enact the tax law in question, it will not necessarily address the income as property case, but it very well may do so, or *at the very least might provide some openings and suggestions for us to follow in devising future progressive tax strategies.*) (emphasis added).

[18] Mercier Decl., Ex.A at 24.

[19] Tabor Decl., Ex.C (City of Seattle Resolution No. 31747, at 2 (May 1, 2017)).

households with adjusted gross income exceeding $250,000.[20] EOI's and the coalition's PR efforts were accompanied by slogans like "Tax the Rich."[21]

On May 1, 2017, the City Council passed a resolution of intent "to adopt a progressive income tax targeting high-income households."[22] Over the next several weeks the City moved the Ordinance through Committee.[23]

In June 2017, EOI's Managing Director advised one Councilmember that "the legality of this ordinance proposal should not be the focus [of public relations] – that is not our campaign's strength."[24] In July 2017, struggling to design a tax that appeared to avoid state law prohibiting taxes on net income, the same Councilmember admitted in a private email to John Burbank, that "we may not be making the policy decisions we'd otherwise like to make … simply because a tax on 'net' income is not legal and we have made a commitment to policy choices based upon the best 'legal' pathway."[25] Trying to evade the state's prohibition on net income taxes was having undesirable consequences, as Rep. Noel Frame observed in an email with the subject, "Inadvertently including LLCs, S-Corps and Sole Proprietorships"

> Form 1040 ('total income'), we're inadvertently hitting LLCs, S-Corporations and sole proprietorships. If that is true, I want to make sure it's corrected to the best of our ability before the ordinance goes through. … Mostly because it's a lot of little guys that we want to help, not hurt. And the B&O tax on gross, rather than net, receipts already sucks for them.[26]

---

[20] Daniel Beekman, *Coalition wants to 'Trump-proof' Seattle with income tax,* Seattle Times (Feb. 27, 2017) https://www.seattletimes.com/seattle-news/politics/coalition-wants-to-trump-proof-seattle-with-income-tax/
[21] *See, e.g.*, Mercier Decl., Ex.A 84-86.
[22] Tabor Decl., Ex.C (City of Seattle Resolution 31747, at 1 (May 1, 2017)).
[23] *See, e.g.*, Mercier Decl., Ex.A 82, 88, 113.
[24] *Id.* at 95.
[25] *Id.* at 131.
[26] *Id.* at 129.

John Burbank dismissed these concerns as "trying to stir up opposition with pity for small businesses."[27] He candidly replied that these tax effects were a feature, not a bug, of the Ordinance.[28] As explained below, the "corrections" requested by Rep. Frame were not made.

The Ordinance was referred to committee on June 19, 2017.[29] The City Council passed City of Seattle CB 119002 to create and direct the implementation of a city-wide income tax on "high-income residents" three weeks later, on July 10, 2017,[30] the same week that the City entered into a consulting contract to pay EOI $49,500 for their services.[31] Of that amount, $35,000 was paid to Smith & Lowney, EOI's lawyers of record in this action.[32] Immediately before the July 10 vote, City Council member and bill sponsor Kshama Sawant convened a rally of supporters outside City Hall.[33] Acknowledging the inevitability of legal challenges to the income tax, she said more public pressure may be needed, and asked her supporters, "If we need to pack the courts, will you be there with me?"[34] Mayor Ed Murray signed City of Seattle the Ordinance into law on July 14, 2017.[35]

The City Council did not submit the Ordinance to a popular vote by initiative. The City Council also did not lobby the Legislature to repeal RCW 36.65.030, the statute that prohibits any local government from taxing net income, or to enact a law providing cities with express authorization to levy a tax on "total income," or any other form of income.

D. EOI helped the City identify politically popular uses for tax revenues.

Relying on the language of the Ordinance itself, the City's motion suggests that Seattle's City Council identified a series of critical funding needs and then designed an

---

[27] *Id.* at 130.
[28] *Id.* ("There is nothing inadvertent about the design, legally or in terms of revenue.").
[29] Seattle City Council: Record No. 119002 *available at* http://seattle.legistar.com/LegislationDetail.aspx?ID=3085475&GUID=03909BA9-0535-4A39-9B4A-7C561C7A604D (last visited Oct. 21, 2017).
[30] *Id.*
[31] Mercier Decl., Ex.A at 145-151.
[32] *Id.*
[33] Daniel Beekman, *Seattle City Council approves income tax on the rich, but quick legal challenge likely*, Seattle Times (July 10, 2017), https://www.seattletimes.com/seattle-news/politics/seattle-council-to-vote-today-on-income-tax-on-the-wealthy/.
[34] *See id.*
[35] City Mot. Wong Decl., Ex.A.

income tax to fund these needs.[36] The evidence, however, demonstrates that the City resolved to pursue an income tax, and only later did it identify "restricted uses" to which the funds might be put. Moreover, as consultant and architect of the income tax ordinance, EOI played a major role in compiling the list of politically appealing "uses" in the Ordinance and related PR.

As it was being developed in 2016, the income tax had been proposed to fund free community college tuition for Seattle residents.[37] That proposed use disappeared entirely by the summer of 2017. Despite working to tax the income of wealthy residents for more than a year, with the Council vote approaching, the City and EOI worked to identify the "uses" to be "funded."[38] Around this time, EOI also provided its polling data to the City to identify uses that would be most popular with the public.[39] EOI supplied the restricted "uses" a little over two weeks before the Council voted on the bill that became the Ordinance.[40] As one concerned Seattle resident aptly put it, the City's proposed income tax was a "solution in search of a problem."[41]

Based on the EOI compilation, the Ordinance itself recites a series of proposed funding needs.[42] It then specifies restricted uses of the receipts, SMC 5.65.010 (A), but the Ordinance itself creates no dedicated trust or sub-fund into which income tax revenues are to be deposited to pay for those uses. The title of the Ordinance also refers to "providing solutions for lowering property tax burden and the impact of other regressive taxes," and one restricted use is to "lower[] the property tax burden and the impact of other regressive taxes, including the [B&O] tax rate," but the Ordinance does not include any provisions to do these

---

[36] City Mot. at 1-2.
[37] Mercier Decl. at 17, 25.
[38] *See, e.g.*, *id.*, Ex.A at 102-103.
[39] *Id.* at 107-108.
[40] *Id.* at 111.
[41] *Id.* at 101.
[42] City Mot., Wong. Decl., Ex.A ("a homelessness state of emergency, an affordable housing crisis, inadequate provision of mental and public health services, the growing demand for transit, education equity and racial achievement gaps; escalating threats from climate change").

things.[43] Another restricted use is to "[provide] affordable housing,"[44] but the only impact on housing is to add a new tax on the sale of houses to the City's existing excise and property taxes, further increasing the price of housing to buyers and reducing the money that sellers can use to purchase their next home.

For evidence of harm, the City relies solely on self-serving statements placed in the Ordinance itself.[45] Under ER 803, these statements are inadmissible hearsay and must be disregarded for purposes of this motion under CR 56. The City also submits no testimony and makes no effort to correlate revenues with specific uses (having failed to create separate funds), has not demonstrated that the City's burgeoning fiscal resources are so critically deficient to meet specifically identified needs that it is suffering harm, and has not explained why its existing taxing authority is inadequate. The City's motion has not proved by undisputed evidence that it will suffer substantial harm if it is unable to tax residents' income. *See* CR 56 (movant has burden to show there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law").

E. The current favorable tax environment has promoted opportunity in Seattle.

The Ordinance states that "Seattle is a growing and prosperous city that can offer great schools, good jobs, and healthy communities for all." Ordinance No. 125339, § 1.1. Seattle's unique combination of dynamic companies among global leaders, vibrant entrepreneurial environment, world-class institutions, and quality of life have made it the fastest growing city in the United States.[46] The Ordinance recognizes that "robust economic growth has created significant opportunity and wealth,"[47] funding state and local government through numerous existing fees and taxes. The Washington State Department of Commerce touts the fact that

---

[43] *Id.*
[44] *Id.*
[45] City Mot. at 2-3 (citing Wong Decl., Ex. A).
[46] *Id.* § 1.3. As the Seattle Times remarked in May 2017, "For the first time, Seattle is adding more people on average each year than during the post-Gold-Rush boom years. We've never grown this fast, and we've never been this populous." Gene Balk, *Seattle once again nation's fastest-growing big city; population exceeds 700,000* Seattle Times (May 25, 2017), https://www.seattletimes.com/seattle-news/data/seattle-once-again-nations-fastest-growing-big-city-population-exceeds-700000/ .
[47] *See* Ordinance No. § 1.2.

Washington has no income taxes as a significant competitive advantage in its promotional materials to attract businesses and citizens to locate in Washington.[48]

Seattle has been creating job opportunities at twice the national average.[49] Workers in a range of fields make more per hour than their national counterparts, from computer programmers and human resources managers to cashiers and fast food cooks.[50] As of September 27, 2017, according to the Bureau of Labor Statistics, Seattle's total wages and benefits have been increasing at approximately 3.5% annually, compared to 2.5% nationally.[51]

Seattle's vibrant economy has buoyed strong growth in per capita household income. Seattle's median household income increased by nearly $10,000 from 2014 to 2015, when it reached more than $80,000 per year.[52] This was the largest increase of the 50 most populous cities in the country.[53] Over the ten years from 2006 to 2015, a period renowned nationally for wage stagnation, the Washington Bureau of Economic Analysis reported that per capita personal income in the Seattle metropolitan division increased from $52,000 to more than $65,800—an increase of more than 25%.[54] Seattle's economic formula, including no income state and local taxes, is producing strong growth in personal income and wages.

---

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

[49] *See* United States Bureau of Labor Statistics, Seattle Area Economic Summary, available at https://www.bls.gov/regions/west/summary/blssummary_seattle.pdf (last visited Oct. 23, 2017).

[50] *See id.*

[51] *See id.*

[52] Gene Balk, *$80,000 median: Income gain in Seattle far outpaces other cities*, Seattle Times (Sept. 15, 2016), https://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/ .

[53] *Id.*

[54] U.S. Bureau of Economic Analysis, *Table CA1 Personal Income Summary: Personal Income, Population, Per Capita Personal Income*, https://www.bea.gov/itable/iTable.cfm?ReqID=70&step=1#reqid=70&step=30&isuri=1&7022=20&7023=7&7033=-1&7024=non-industry&7025=8&7026=42644&7027=2015,2014,2013,2012,2011 2010,2009,2008,2007,2006&7001=720&7028=3&7031=8&7040=-1&7083=levels&7029=20&7090=70 (last visited Oct. 23, 2017).

The Ordinance references the strain that allegedly regressive taxes place on "low- and middle-income households."[55] But, Seattle's higher incomes are not concentrated in a tiny minority of households – more than one in five Seattle households earned income greater than $150,000.[56] The Ordinance also claims that regressive taxes "disproportionately harm communities of color,"[57] but the 2016 census showed that median income has risen for whites, Asians, blacks and multiracial residents, with African Americans showing particularly strong gains in median income.[58] The gender pay gap has also decreased.[59] Seattle's unique economy is distributing financial benefits across its diverse population.

As its businesses have flourished and its citizens have prospered, the City of Seattle's revenues have ballooned. 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.[60] The City's General Fund revenues have nearly matched this substantial growth, growing from $926 million in 2011 to $1.19 billion in 2017 adopted budget, a nearly 29% increase in General Fund revenues.[61] By comparison, the City Budget Office originally projects that the Income Tax will raise $140 million annually,[62] which would be an increase of less than 3% in annual total revenues relative to current levels.

---

[55] Ordinance No. § 1.5.

[56] Gene Balk, *$80,000 median: Income gain in Seattle far outpaces other cities*, The Seattle Times (Sept. 15, 2016), https://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/ .

[57] Ordinance No. § 1.5.

[58] *See* Gene Balk, *$80,000 median: Income gain in Seattle far outpaces other cities*, Seattle Times (Sept. 15, 2016), https://www.seattletimes.com/seattle-news/data/80000-median-wage-income-gain-in-seattle-far-outpaces-other-cities/.

[59] *See id.*

[60] *Compare* City of Seattle, *2013 Adopted and 2014 Endorsed Budget* (2013) ("2013 Seattle Budget Book"), at 44 *available at* http://www.seattle.gov/financedepartment/13adoptedbudget/documents/Full2013Adopted2014EndorsedBudget_000.pdf *with* City of Seattle, *2018 Proposed Budget* ("2018 Seattle Proposed Budget Book") at 100 *available at* http://www.seattle.gov/financedepartment/18proposedbudget/documents/2018ProposedBudgetBook.pdf.

[61] *Compare* 2013 Seattle Budget Book, at 57 *available at* http://www.seattle.gov/financedepartment/13adoptedbudget/documents/Full2013Adopted2014EndorsedBudget_000.pdf *with* 2018 Seattle Proposed Budget Book at 110 *available at* http://www.seattle.gov/financedepartment/18proposedbudget/documents/2018ProposedBudgetBook.pdf.

[62] *See* Tabor Decl., Ex.D. No adjustment is made to account for residents who will move outside the City to avoid the tax.

Seattle's increased tax revenues reflect its booming economy. Sustaining a thriving business and economic climate creates and enhances opportunities for residents of all incomes and skill levels. The illegal City income tax threatens to undermine all of this.

III. STATEMENT OF ISSUES

1. A city has no inherent power to tax. Rather, the Legislature must delegate that power to the city by statute. Is the Ordinance invalid because there is no express statutory grant of authority to levy an income tax on city residents? **Yes.**

2. Even where the Legislature authorizes a city to levy a tax generally, the city cannot levy a tax that is specifically prohibited or preempted by statute. Is the Ordinance invalid because it violates RCW 36.65.030's prohibition on "net income" taxes? **Yes.**

3. Although this Court does not need to reach any constitutional issues, controlling Washington Supreme Court decisions hold that income is property, and that a graduated income tax violates the Washington Constitution's Uniformity Clause. Is this Court required to follow these decisions and, if so, do they compel this Court to similarly conclude that the Ordinance's graduated income tax violates the Uniformity Clause? **Yes.**

IV. EVIDENCE RELIED UPON

This motion relies on the Declaration of Adam Nolan Tabor and its attached exhibits; the Declaration of Jason Mercier and its attached exhibit; and the Declarations of Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lewis Horowitz, and Dorothy M. Sale.

V. AUTHORITIES AND ARGUMENT

The City has no inherent taxing authority. Its power to tax exists only where there is express statutory authority. The Legislature has never authorized an income tax, nor do any of the general grants of municipal authority to license or levy excise taxes on business activities permit a tax on an individual's income. Indeed, Washington courts have long recognized that municipalities cannot impose a tax on one's fundamental, constitutional right to earn a living—which is precisely what the Ordinance seeks to do. In any event, the Legislature removed any

doubt on this issue when it enacted RCW 36.65.030, which expressly prohibits municipalities from taxing "net income." The Ordinance is a tax on "net income." It is undisputed that an individual's "total income," as that amount is identified on their IRS Form 1040 line 22, is the sum of multiple incomes less deductions of expenses and losses. The sum of these multiple net income calculations is "net income" under Washington law.

Although this Court need not, and should not, decide whether the Ordinance is constitutional, it is not. Over 80 years of Washington Supreme Court precedent binds this Court and compels it to conclude that income is property and, consequently, the Ordinance is a non-uniform property tax. Even if this Court had discretion to ignore Washington Supreme Court precedent, which it does not, ignoring *stare decisis* is not warranted here. Whereas the City fails to show why *stare decisis* should be abandoned, Plaintiffs have shown that abandoning the precedent here would harm significant reliance interests.

A. The City Lacks Statutory Authority To Enact An Income Tax.

1. The Legislature Did Not Expressly Authorize Income Taxes.

As creatures of the state, municipalities have no inherent power to tax; the Legislature must delegate such power to them. *Watson v. City of Seattle*, — Wn.2d —, 401 P.3d 1, 9 (2017) (citing *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 365-66, 89 P.3d 217 (2004)); *see also* Wash. Const. art. XI, § 12 ("The legislature … may, by general laws, vest in the corporate authorities [of counties, cities, towns or other municipal corporations], the power to assess and collect taxes for such purposes."); *id.*, art. VII, § 9 ("For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes …").

General delegation of taxing power is not enough. It is well-settled that "municipalities must have *express* authority" to levy the tax in question. *King County v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984) (emphasis in original); *see also City of Seattle v. T-Mobile West Corp.*, 199 Wn. App. 79, 82, 397 P.2d 931 (2017); *Arborwood*, 151 Wn.2d at 366 (same); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d

193 (1982) (same). "If there is any doubt about a legislative grant of taxing authority to a municipality, it must be denied." *Okeson v. City of Seattle*, 150 Wn.2d 540, 558, 78 P.3d 1279 (2003) (citing *Pac. First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wn.2d 347, 353, 178 P.2d 351 (1947)); *see also Arborwood*, 151 Wn.2d at 374 (same).

The City does not point to any *express* statutory authority to levy an income tax on its residents. On that basis alone, this Court must invalidate the Ordinance on this basis alone. *See Arborwood*, 151 Wn.2d at 375 (invalidating tax ordinance lacking express statutory authority); *Algona*, 101 Wn.2d at 795 (same); *Hillis Homes*, 97 Wn.2d at 811 (same). Moreover, and as explained in the sections that follow, neither the general grants of taxation power on which the City relies, nor the City's theory of "home rule," authorize municipalities to impose income taxes—and no court has ever so held. On the contrary, the Legislature has affirmatively prohibited municipalities from levying taxes on "net income," which the Ordinance indisputably does.

2. RCW 35.22.280(32) Does Not Authorize Income Taxes.

This Court must reject the City's argument that the Ordinance is an excise tax, and thus falls within RCW 35.22.280(32)'s grant of local licensing authority. As a threshold matter, the fact that the City Council characterizes the Ordinance as an excise tax is irrelevant. *Power, Inc. v. Huntley*, 39 Wn.2d 191, 195, 235 P.2d 173 (1951) ("a tax is not necessarily an excise tax because the Legislature has so labeled it"); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999) ("[t]he character of a tax is determined by its incidents, not by its name.") (quoting *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936). As explained below, Washington Supreme Court precedent forecloses any such characterization because it is well settled that an income tax is a property tax, not an excise tax. *Power*, 39 Wn.2d at 196-97; *Culliton v. Chase*, 174 Wash. 363, 378, 25 P.2d 81 (1933). Indeed, in *Jensen*, the Court specifically rejected the Legislature's effort to circumvent that precedent by labeling an income tax an excise on "the privilege of receiving income." *Jensen*, 185 Wash. at 217-19. Moreover, regardless of how the Ordinance's income

tax is characterized, RCW 35.22.280(32) by its plain terms and accepted meaning does not grant the City authority to tax an individual's personal income.[63]

The City is correct that "RCW 35.22.280 enumerates the broad legislative powers delegated to first class cities, including Seattle." *Watson*, 401 P.3d at 10. But that delegation does not include the power to tax one's fundamental right—not privilege—to live and earn income in the City. As relevant here, the statute provides that first class cities "shall have the power … [t]o grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefore, and to provide for revoking the same …" RCW 35.22.280(32). Most commonly invoked as authority for local businesses and occupations taxes, the statute authorizes license taxes for purposes of regulation or revenue. *Watson*, 401 P.3d at 10; *Pac. Tel. & Tel Co. v. City of Seattle*, 172 Wash. 649, 654, 21 P.2d 721 (1933), *aff'd*, 291 U.S. 300 (1934).

It is well settled that the taxation power incident to a city's licensing authority is limited. A license is a right granted by the city to do an act that without such license would be unlawful. *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 641, 854 P.2d 23 (1993) (quoting *Diamond Parking, Inc. v. Seattle*, 78 Wn.2d 778, 780, 479 P.2d 47 (1971)). A city's right to impose excise taxes under RCW 35.22.280(32) may be levied only "upon the right to do business, not upon the right to exist; nor upon the property." *Pac. Tel. & Tel Co.*, 172 Wash. at 654; *cf. High Tide Seafoods v. State*, 106 Wn.2d 695, 699, 725 P.2d 411 (1986) ("the obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking."). Thus, a city's authority to levy a B&O *tax* goes hand-in-hand with the requirement that the taxpayer be *licensed* for the privilege of conducting its business or occupation in the City.

The Ordinance, on the other hand, is not a proper exercise of the City's licensing

[63] City Mot. at 21.

power, but rather an impermissible tax "upon the right to exist." *Pac. Tel. & Tel Co.*, 172 Wash. at 654. The amount of income an individual earns in a year is not just the measure of the tax; it is the taxable event itself. The only means for a qualifying individual to avoid the tax is to move away or forego income. *Cf. Covell vs. Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995) (not an excise when tax can only "be avoided by residing elsewhere"). But the right to live in the City and earn a livelihood does not constitute a voluntary or privileged activity for which an individual must obtain a license, nor is there any activity the City revokes if an individual fails to pay; violators are not banished, fired from the jobs or required to forfeit income. *Margola Assocs.*, 121 Wn.2d at 641 ("violation of a traditional licensing ordinance leads to a revocation of the license and a cessation of the licensed activity"). RCW 35.22.280(32)'s licensing authority does not apply, because the City cannot license the right to live in the City.

3. The City May Not Levy An Excise Tax On The Constitutional Right To Earn An Income.

The City's effort to justify the Ordinance under its authority to license is flawed for another, even more fundamental, reason. While a city may impose an excise tax on an individual's exercise of some privileged business activity, it may not extract such a payment for a constitutionally protected right. *Cary v. Bellingham*, 41 Wn.2d 468, 472, 250 P.2d 114 (1952). In *Cary*, the Washington Supreme Court considered a Bellingham ordinance that required all employees working in the city to obtain an annual license, with the license tax determined as a percentage of the employee's income. *Id.* at 468. The Court struck down the ordinance. "The license required by … 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." *Id.* at 472.

The Court's reasoning and holding applies equally to the Ordinance. "We recognize the right to levy an excise tax on the privilege of doing business or exercising corporate

franchises and to base that tax on income; but the tax must be, in truth, levied for the exercise of a substantive privilege granted or permitted by the state." 41 Wn.2d at 472 (quoting *Power*, 39 Wn.2d at 197) (internal quotation marks omitted). Critically, as it relates here:

> The right to earn a living by working for wages is not a "substantive privilege granted or permitted by the state." It is … one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state Constitutions.

Id. (quoting *State v. City of Sheridan*, 25 Wyo. 347, 357, 170 Pac. 1 (1918)) (internal quotation marks omitted). Like the invalidated ordinance in *Cary*, the Ordinance impermissibly seeks to license the constitutionally protected right of Seattle residents to live and earn income in the City. For this reason too, the Ordinance is not a valid license tax authorized under RCW 35.22.280(32).

4. RCW 35A.82.020 Does Not Authorize Income Taxes.

The City's reliance on RCW 35A.82.020 fares no better. RCW 35.22.570 grants first class cities like Seattle all powers Title 35 RCW gives to code cities. *Watson*, 401 P.3d at 11, n.8. RCW 35A.82.020, in turn, authorizes code cities to "license and revoke the same for cause, to regulate, make inspections and 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[.]" The statute effectively mirrors RCW 35.22.280(32), and it authorizes cities to license or otherwise "levy a business and occupation tax." *Arborwood*, 151 Wn.2d at 366 n. 6 (citing *Algona*, 101 Wn.2d at 792).

Notably, however, like RCW 35.22.280(32), in its long laundry-list of businesses and activities subject to city license and excise taxation, RCW 35A.82.020 does not expressly authorize an income tax or an excise tax on an individual's "receipt of income." Indeed, to the extent it applies to individuals at all, the statute applies only to those engaged in some kind of business activity, not the routine incidents of life. *See Arborwood*, 151 Wn.2d at 366 n. 6

("this section only authorizes code cites to impose a business and occupation tax on those engaged in some kind of businesses, not on the users of businesses."). Moreover, and for all the same reasons set forth above, the City cannot impose an excise tax on a resident's right to earn a living in the City—for that is not a privilege that the City can withhold; an excise tax cannot be levied on one's exercise of a fundamental, constitutional right. *Cary*, 41 Wn.2d at 472. The Ordinance is not authorized by RCW 35A.82.020 either.

5. RCW 35A.11.020 Does Not Authorize Income Taxes.

The same is true for RCW 35A.11.020, which provides in part: "Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes . . . ." RCW 35A.11.020's "general grant of taxation power" to code cities does not, in and of itself, expressly authorize any particular kind of tax, much less an income tax. *Algona*, 101 Wn.2d 789 at 793 ("The general grant of taxation power on which Algona relies in RCW 35A.11.020 contains no *express* authority to levy a tax on the state or another municipality.") (emphasis in original). Rather, the statute gives code cities the same authority to levy taxes as other cities—and, as explained above, the Legislature must expressly delegate that authority by statute. As the Supreme Court held in *Algona*, "[t]o allow the City to impose the tax in this case [based on RCW 35A.11.020] would violate the established rule that municipalities must have specific legislative authority to levy a particular tax." *Id.*

Moreover, the City's argument that RCW 35A.11.020 grants code cities (and, thus, first class cities, *see* RCW 35.22.570) plenary authority to impose any and all taxes, if accepted, would render the express grants of tax authority in Chapters RCW 35 and 35A RCW superfluous—contrary to another basic rule of statutory construction. *See City of Port Angeles v. Our Water-Our Choice!*, 170 Wn.2d 1, 14 n.7, 239 P.3d 589 (2010) (refusing to interpret RCW 35A.11.020 expansively to avoid rendering another statute a "nullity"). If the Legislature intended to supersede these statutes, it would not have done so silently through a general grant of authority found in an optional municipal code. Not surprisingly, from the

time it became effective in 1969 to the present, no court has construed RCW 35A.11.020 to satisfy – much less abrogate – the well-settled rule that a city's power to tax must be expressly authorized. In any event, an income tax plainly violates the statute's caveat that taxes must comply with "constitutional limitations."

6. "Home Rule" Does Not Substitute For Legislative Authority.

Finally, the City's theory of "home rule" is no substitute for express legislative authority. As Professor Spitzer has astutely observed, Washington is "best thought of as a hybrid home rule state, with certain powers vested in cities by the constitution and other powers dependent on a legislative grant." Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809, 856 (2015). Thus, while Washington courts generally recognize broad home rule insofar as police powers and charter city governments are concerned, they continue to require express legislative authority on other matters—specifically taxation. *Id.* at 834 ("In several areas of municipal law doctrine, however, Dillon's views on limited city powers continued to have a profound influence on Washington municipal law, down to the present. For example, even charter cities have continued to be restricted in their ability to impose taxes … without clear statutory authority.").

This is mandated by the Washington Constitution itself. Whereas a city "may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws," Wash. Const. art. XI, § 11, it has authority to tax only as "may be vested" by the Legislature. *Id.*, art. VII, § 9 & art. XI, § 12; *see also Arborwood*, 151 Wn.2d at 366 ("the police powers granted to local governments by article XI, section 11 of the Washington State Constitution do not include the power to tax."); *Rivett v. City of Tacoma*, 123 Wn.2d 573, 584, 870 P.2d 299 (1994) ("neither the broad police powers nor any other general grant of power to cities and counties encompass the power to tax"); *Hillis Homes*, 97 Wn.2d at 809 ("the extensive police power of the counties does not comprehend the power to tax"). Thus, whatever the extent of home rule in Washington, because it is a tax, the controlling issue is whether the Ordinance is authorized by an express legislative grant of

taxing power. For the reasons explained above, it is not.[64]

7. RCW 36.65.030 Expressly Prohibits The Ordinance.

Although the absence of any express statutory authority is sufficient to invalidate the Ordinance's income tax, it is equally clear that the Legislature affirmatively prohibited such a tax. Even where a municipality is delegated authority to levy taxes generally, a tax is still invalid if the Legislature prohibits the tax in "specific, express statutory language." *Watson*, 401 P.3d at 11 (*quoting Enter. Leasing, Inc. v. City of Tacoma*, 93 Wn. App. 663, 669, 970 P.2d 339 (1999)). Similarly, a state statute preempts an ordinance if the statute and the ordinance irreconcilably conflict. *Id.* at 12. Conflict preemption occurs when "an ordinance permits what state law forbids or forbids what state law permits." *Lawson v. City of Pasco*, 168 Wn.2d 675, 682, 230 P.3d 1038 (2010). "When the legislature does intend to preempt taxation, it typically does so explicitly." *Watson*, 401 P.3d at 13. Here, the Legislature did just that.

RCW 36.65.030 provides that a city "shall not levy a tax on net income." The Multistate Tax Compact, adopted by the Washington Legislature at Chapter 82.56 RCW, defines an "income tax" as a tax "imposed on or measured by net income" which the statute in turn defines as "an amount arrived at by deducting expenses from gross income, one or more forms of which expenses are not specifically and directly related to particular transactions." RCW 82.56.010, Art. II, § 4. Thus, when the Legislature subsequently prohibited cities from imposing taxes on net income in RCW 36.65.030, it prohibited cities from imposing income taxes.[65] The City readily and repeatedly concedes that the Ordinance imposes an "income tax." City Mot. at 1-5, 21. But the City quibbles that its income tax is not prohibited by RCW

[64] Seattle is a charter city, but its charter does not grant the City Council power to levy an income tax. The Charter grants Seattle the powers granted other cities "by the laws of this state." City Charter, Art. IV, § 15; *see also* Const. Art. 11 § 10 (city charters "shall be subject to and controlled by general laws"); *State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 679 (1965) (citing *Neils v. City of Seattle*, 185 Wash. 269, 276 (1936) ("A general law enacted by the Legislature is superior to, and supersedes, all charter provisions inconsistent therewith.")). Plaintiffs have established that Washington general laws have not conferred on cities the power to tax income.

[65] Indeed, not only did the Legislature equate a tax on "net income" with an income tax generally, it is likely that the Legislature intended to prohibit any graduated tax on income previously ruled unconstitutional by the Washington Supreme Court.

36.65.030, because the tax is measured by Line 22 on IRS Form 1040, rather than Line 43, and, therefore, does not include the particular deductions, exemptions and adjustments listed between Lines 23 and 42 of IRS Form 1040. City Mot. at 7.

This is sophistry. RCW 36.65.030 does not countenance deductions, exemptions and other reductions to gross income that are allowed under the federal income tax system while finding others to be disqualifying. As reflected in the statutory definition of "income tax" at RCW 82.56.010, as well as in the dictionary and case law definitions cited by the City, "net income" is simply the amount left after reducing gross income by "deductions, exemptions, and other reductions." City Mot. at 6 (*citing Audit & Adjustment Co. v. Earl*, 165 Wn. App. 497, 503, 267 P.3d 441 (2011).

Thus, for purposes of determining whether RCW 36.65.030 prohibits the income tax adopted by the City, the sole question is whether Line 22 of IRS Form 1040 reflects deductions for expenses, exclusions, or losses related to that income. It plainly does.[66] Line 22 is simply the sum of various income sources, listed on IRS Form 1040 in lines 7 through 21, which are determined after deduction of allowable expenses and losses related to that source—including net income from pass-through business entities, sole proprietorships, and disregarded entities; net capital gain income; net rental income; and net royalty income. *See also* S. Oei & D. Ring, *The New "Human Equity" Transactions*, 5 Cal. L. Rev. Circuit 266, 274 (2014) ("IRS Form 1040 Line 22 … total income includes business net income, which takes into account business expenses, including allowable business interest, reported on IRS Schedule C.").

The City concedes that the amounts on Lines 7 – 21 are themselves net numbers, determined after subtraction of allowable deductions, expenses and other adjustments. City Mot. at 7. Nevertheless, the City argues that the sum of those net numbers is not itself a net number because Line 22 reflects "personal income" while the netting that occurred to arrive at

[66] As John Burbank explained in an email to City officials in July, under the Ordinance "business income is net, and therefore, if you have a business loss, that subtracts from total income." *(July 10, 201 email to Newell, Herbold).*

Line 22 was all applied to "business" income. *Id.* The City is both factually wrong and legally wrong. The City is legally wrong because IRS Form 1040 makes no distinction between "personal" and business-related income, nor do the Ordinance or RCW 36.65.030. The City is factually wrong because many of the income items reflected on lines 7 – 21 of Form 1040 reflect numerous exclusions, exemptions and deductions that have nothing to do with the operation of a business.

By way of example only:

> Line 7. *Wages, salaries, tips, etc*. Wage and salary income is computed net of amounts that the taxpayer or her employer contribute to retirement plans, health insurance, child care, and even premiums paid on certain group term life insurance. IRC §§ 79, 106, 125 & 402.
>
> Line 8. *Taxable Interest*. Income from interest is net of amounts that are exempt from income for federal income tax purposes , such interest earned on municipal bonds and other federally tax exempt bonds as provided in IRC § 103.
>
> Line 13. *Capital gain or (loss).* Income from capital gains is not only net of capital losses, but is also net of certain capital gains that are statutorily excluded from federal income tax, such as the first $250,000 or $500,000 (single/married filing jointly) realized on the sale of a principal residence (pursuant to IRC § 121) or gain realized on the sale of qualified small business stock (pursuant to IRC § 1202).
>
> Line 15. *IRA distributions*. Income from distributions is net of amounts that are deemed untaxable for federal income tax purposes, including distributions from Roth IRAs and Roth 401Ks. IRC §§ 408A, and 402A.
>
> Line 20. *Social Security Income*. Social security income is also calculated on a net basis; only a portion of social security retirement benefits are included in Total Income, with the precise amount determined by the formula in IRC § 86.[67]

In short, the sum of multiple "net income" figures is itself a "net income" figure—and this is true regardless of the multiple sources of that income and regardless of whether that "total income" figure is subject to further deductions and exemptions. *See* Form 1040, lines 23-27, 40 & 42. The City's obvious effort to avoid the prohibition of RCW 36.65.030 is an exercise

[67] Note that none of the above examples deal with the computation of business income earned by the taxpayer, which are subject to their own separate adjustments on Schedules C, E and F that flow through, respectively, to Lines 12, 17 and 18 of IRS Form 1040.

in hair-splitting. Although the meaning of RCW 36.65.030 and the Legislature's intent is clear, if there is any doubt about the proper interpretation, the term "net income" must be construed in favor of Plaintiffs and against imposition of the tax. *Agrilink Foods, Inc. v. Dep't of Revenue*, 153 Wn.2d 392, 396-97, 103 P.3d 1226 (2005). This Court must invalidate the Ordinance for this reason as well.[68]

B. The Court Should Avoid Deciding Constitutional Issues.

The City lacks express statutory authority to tax income of its residents. Because the invalidity of the Ordinance may be decided on these statutory grounds, the Court need not and should not reach the constitutional issue of whether the Ordinance violates the uniformity clause of Article VII § 1 of the state constitution. "Where an issue may be resolved on statutory grounds, the court will avoid deciding the issue on constitutional grounds." *Tunstall v. Bergeson*, 141 Wn.2d 201, 210, 5 P.3d 691 (2000); *see also Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 156 Wn.2d 253, 277 n.19 (2006) (same).

In the event the Court nonetheless reaches the constitutional issue, the Washington Supreme Court has repeatedly and unambiguously held that income is "property" and, thus, a graduated income tax violates the Constitution's uniformity requirement. The principles of *stare decisis*, discussed in the next section, preclude consideration of the City's (and EOI's) arguments to reinterpret the term "property" as used in Article VII, Section 1 of the state constitution.

C. Supreme Court Holdings That Income is "Property" Are Binding *Stare Decisis*.

1. The Superior Court Must Follow Controlling Supreme Court Precedent.

The City is forthright in conceding that, under binding Supreme Court precedent, the Ordinance's income tax violates the Washington constitution's requirement that taxes on property be uniform. "The City acknowledges that the Supreme Court previously held that

[68] In its motion for summary judgment, EOI argues that RCW 36.65.030 violates the Washington Constitution's "single-subject" and "subject-in-title" provisions and, therefore, is void and cannot prohibit the Ordinance. Plaintiffs 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).

income is 'property' and that an income tax is a 'property tax.'" City Mot. at 8 (citing *Culliton*, 174 Wash. 363 and *Jensen*, 185 Wash. 209). As the City explains:

> The basic logic of the *Culliton* court's opinion is straightforward: income is property; taxes must be uniform within each class of property; income constitutes a single class; and therefore a graduated income tax violates the Constitution's uniformity requirement.

City Mot. at 11. The City also concedes that its graduated 2.25% tax only on "total incomes" above designated thresholds is not "uniform." While it admits that the Ordinance is unconstitutional under binding Supreme Court precedent, the City argues that the prior decisions were mistaken and "it is time for Washington courts to revisit the question." *Id*. at 14. The City's request directly contravenes one of the most fundamental principles governing our courts -- a Washington *Superior* Court may not disregard the Washington *Supreme* Court. A decision by the Washington Supreme Court "is binding on all lower courts in the state." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006); *see also State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

In *Gore*, the Washington Court of Appeals found that a United States Supreme Court decision interpreting a federal statute expressed "better public policy" than the Washington Supreme Court's interpretation of a similar state statute, so it chose to disregard *stare decisis*. *Id.* The Washington Supreme Court reversed the Court of Appeals' choice to follow non-binding federal decisional law over binding state law of a superior appellate court:

> In failing to follow directly controlling authority of this court, the Court of Appeals erred. . . . While the [United States] Supreme Court's interpretation of a similar federal statute is persuasive authority, it is not controlling in our interpretation of a state statute. . . Further, once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by *this court.* . . The Court of Appeals was therefore without authority to adopt [non-binding United States Supreme Court authority] based on what it perceived to be the preferable policy.

Id. (emphasis added).

The City's argument that "Washington courts" consider "two circumstances" under which *stare decisis* may be abandoned is inapplicable because it ignores the distinction between vertical and horizontal *stare decisis*:

> The doctrine of *stare decisis* has two primary incantations: *vertical stare decisis* and *horizontal stare decisis*. Under vertical *stare decisis*, courts are required to follow decisions handed down by higher courts in the same jurisdiction.

Matter of Arnold, 198 Wn. App. 842, 846–48, 396 P.3d 375, 377–78 (2017) (citing *State v. Gore*, 101 Wn.2d at 487). Whether the Supreme Court may overrule its own precedential decisions is a matter of *horizontal stare decisis.* No doctrine, however, allows an inferior court to overrule the Supreme Court's binding precedent. "[T]rial and appellate courts in Washington must follow decisions handed down by our Supreme Court and the United States Supreme Court. Adherence is mandatory, regardless of the merits of the higher court's decision." *Id.* at 846.[69]

A long line of Washington Supreme Court decisions holds and reaffirms that income is property, and that a graduated tax on income violates the uniformity provision of Article VII, Section 1 of our state constitution. Under vertical *stare decisis*, that long line of precedent binds this Court.

2. *Stare Decisis* Has Particular Force In the Face of Strong Reliance Interests on a Constitutional Rule of Property That Has Been Sustained By the Supreme Court and the Will of the People for Many Decades.

Even if this Court possessed the power to reconsider binding Supreme Court precedent, the City's arguments here would not carry the day:

> Adherence to precedent is the nucleus of our judicial system; it binds the whole to all its parts and the parts to each other. Sometimes this concept is called *stare decisis*.
>
> Through *stare decisis*, the law has become a disciplined art-perhaps even a science-deriving balance, form and symmetry from this force which holds the components together. It makes for stability and permanence, and these, in turn, imply that a rule once declared is and shall be the law. *Stare decisis* likewise holds the courts of the land together, making them a system of justice, giving them unity and purpose, so that the decisions of the courts of last resort are held to be binding on all others.
>
> Without *stare decisis*, the law ceases to be a system; it becomes instead a formless mass of unrelated rules, policies, declarations and assertions-a kind of amorphous creed yielding to and wielded by them who administer it. Take away *stare decisis*, and

[69] The City misapplies *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 322 P.3d 1207 (2014) to a trial court. There, the Washington Supreme Court acknowledged the Superior Court's need to adhere to well-established precedent, as did the Superior Court. *Id.* at 59, 61. Further, *Clark Construction* and the City's nested parenthetical to *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136 (1st Cir. 2000) show that those decisions adhere to the framework of vertical and horizontal *stare decisis.*

what is left may have force, but it will not be law.

State ex rel. Washington State Fin. Comm. v. Martin, 62 Wn.2d 645, 665, 384 P.2d 833 (1963).

The City asks this Court to overrule binding precedent defining income as property, but the Supreme Court has refused these requests several times over many years. In 1933, the Supreme Court considered the nature of income and concluded that it is property,[70] subject to Article VII, Section 1's uniformity provision and that provision's effect of barring a graduated income tax. *See Culliton*, 174 Wash. at 374. Three years later, the Washington Attorney General urged the Supreme Court to abandon *stare decisis* for many of the same reasons the City urges here in *Jensen*. The Court rejected the Attorney General's arguments, citing the need to adhere to previous case law, distinguishing the Attorney General's cited authorities, and rejecting the idea that merely relabeling the tax as something other than a property tax could overcome its essential character under binding law. *Jensen*, 185 Wash. at 215-17. Justice Millard, who had originally dissented in *Aberdeen* and *Burr*, concurred in *Jensen*, noting the power of *stare decisis*:

> We held in [*Aberdeen* and *Culliton*], that, under our Constitution, income is property, and that an income tax is a property tax. From that declaration this court has never departed, and the people have not seen fit to amend the Constitution to permit us to hold otherwise. . .
>
> . . .
>
> Surely, the rule of *stare decisis*—a rule whereby uniformity, certainty, and stability in the law are obtained—should now apply. This is not a forum where personal predilection should obtain. … Is a legal principle more than once enunciated, and from which the court has never receded, to have no binding effect?

[70] 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 Mot. at 11, 13, *Culliton* examined the state 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) (stating that for it to reach the conclusion that the state tax there violated the Federal Constitution's Fourteenth Amendment equal protection guarantees, "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.).

Id. at 225 (Millard, J., concurring).

Some of the same arguments to overturn *stare decisis* that the City raises were again rejected several decades later in *Huntley*:

> It is no longer subject to question in this court that income is property. Art. VII, § 1, of our state constitution, as amended in 1930, see amendment 14, provides that "... The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership..."

39 Wn.2d at 194. 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 as it relates to corporations," is "a mere property tax 'masquerading as an excise.'" *Id*. at 196-97. In critical respects, the Court could have been describing the City of Seattle's income tax here. The rulings in *Culliton*, *Jensen* and *Huntley* have been followed by the Washington Supreme Court numerous times, before and since.[71]

The City argues that the United States Supreme Court has re-defined "property" to exclude income since *Aberdeen* was decided, City Mot. at 12-13, but fails to recognize that the definition of "property" is a matter of *state* constitutional interpretation. Article VII, Section 1 states that "[t]he word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." Thus, in Washington, "the term property 'is as broad and comprehensive as may well be imagined.'" *Dean*, 143 Wn.2d at 16 (quoting *Am. Smelting & Ref. Co. v. Whatcom Cty.*, 13 Wn.2d 295, 124 P.2d 963 (1942)). The City's argument that Washington's error is demonstrated by the fact that other states have excluded income from the definition of "property" has also been considered and rejected

[71] *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).

before.

> There are, of course, many decisions by the courts of other states touching the validity of income tax acts passed by their respective Legislatures. Those decisions range themselves into two classes-one holding that income is property within the meaning of the statute; the other holding that it is not, but is rather a tax on the privilege of earning an income. . . There is no state, with the possible exception of Montana, that has a Constitution containing language comparable in character to our Constitution upon that specific phase of the question. . .
>
> * * *
>
> If this were a challenge to other states to formulate a more comprehensive definition [of 'property'], it seems to me that the state of Washington has met it when it declared that 'property' shall include everything, tangible or intangible, subject to ownership. *The Constitution of this state, so far as it bears upon the characterization of property, is sui generis.*

State ex rel. Stiner v. Yelle, 174 Wash. 402, 416-17, 25 P.2d 91 (1933) (emphasis added). As these decisions make clear, it is the Washington Supreme Court's interpretation of our state's constitution, not the United States Supreme Court's or other state courts' interpretation of their laws, that binds Washington courts under *stare decisis*. *Gore*, 101 Wn.2d at 487.[72]

Rejecting *stare decisis* would undermine strong *personal* reliance interests of Seattle residents generally and Plaintiffs specifically. Martin Tobias moved to Seattle thirty years ago because of the City's vibrant tech scene and has stayed in Seattle and started multiple companies here, creating jobs and opportunities, because of the favorable business climate. Tobias Decl., ¶¶ 2-4. Nicholas Kerr and Chris McKenzie also both moved here and bought homes here to take advantage of opportunities in the tech industry. Kerr Decl., ¶ 2; McKenzie Decl., ¶ 2. Christopher Rufo determined that Seattle presented him with more opportunities to build his documentary film career than California and was able to save enough to buy a home

[72] The City argues that "[a]n income tax is best understood as an excise tax" because the U.S. Supreme Court had "observed as far back as 1937" that several state courts have held "that a net income tax is to be classified as an excise" under that state's laws. City Mot. at 18 (quoting *Hale v. Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 104-105, 58 S. Ct. 102, 82 L. Ed. 72 (1937)). The City misses the point. In *Hale*, the U.S. Supreme Court observed that while some state courts had concluded that their particular state income taxes were excises under that state's laws, a number of other states, including Washington, "teach a different doctrine." 302 U.S. at 105. Noting the competing authorities, the Court declined to opine on an issue it recognized as one of *state* law. *Id.* As discussed in Section V.A above, the state law in Washington for identifying excise taxes is well established. That other states follow different rules, as happens routinely in many areas of law, does not support a finding of error that would support rejection of *stare decisis*.

here, due in part to the lack of an income tax. Rufo Decl., ¶ 3. And they are not alone.

Many people have moved to Seattle from other places, or remained in Seattle, integrating themselves and their families deeply into educational, religious and community organizations, developing friendships and relationships, secure in the understanding that neither the City nor State would levy tax on their income unless the legally mandated political procedures for amending the state constitution were honored. Seattle residents have made life-defining decisions in reliance on a rule of constitutional law prohibiting graduated taxes on income that are so common in other states. *Stare decisis* jealously protects Plaintiffs' intimate personal reliance interests. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, 112 S. Ct. 2791, 2809, 120 L. Ed. 2d 674 (1992) (*stare decisis* protects interests of people who have organized personal relationships and made choices that define their places in society in reliance on law). Few interests are as personal, or as consequential, as the decisions affecting the choice of one's community.

With this Ordinance, many residents now face, or will face when they are about to sell their homes or small businesses, the necessity of weakening or severing the most important ties in their lives to lawfully avoid an income tax that has long been constitutionally prohibited. Lewis Horowitz's professional and personal experience shows that numerous individuals have moved from Oregon to Washington to legally avoid income taxes in the past, and Mr. Horowitz himself might well move his family out of Seattle if the Ordinance is not invalidated, and based on his professional experience, he expects many others to do the same. Horowitz Decl., ¶¶ 3-7. Dena Levine has lived in West Seattle for more than 20 years and built her own independent insurance brokerage in the neighborhood. Levine Decl., ¶ 2-3. Given that she and her husband have been planning to use the proceeds of the sale of her company to fund their retirement, she is now considering moving out of the City before she sells her business. *Id.* at ¶ 4.

The income tax is especially painful for the many people of modest income who have lived in their homes for decades, but will now face a direct tax on gains on home sales. 98-

year old Dorothy Sale is a retiree of limited means who faces an additional tax on the gain on sale of her home of the last 50 years. *See* Sale Decl.

Because *stare decisis* protects reliance interests, its continued application has particular force when property rights are threatened. *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (concerns of *stare decisis* are "at their acme" in cases involving contract and property rights). Even if a case were not "correctly decided," *stare decisis* applies "with peculiar force" when a rule of property is involved. *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 45, 275 P. 74 (1929) (applying *stare decisis* to rule that certain intangibles were not taxable "property" prior to amendment of Const. art. VII, § 1). Heightened adherence to *stare decisis* on rules of property was further demonstrated in *Key Design Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653 (1999), where a real estate investment firm argued that a rule requiring legal descriptions for real property conveyances to be effective was "harsh and outdated and produce[d] inconsistency and uncertainty." *Id*. at 881. The Court declined to overrule itself. After observing that the challenged rule had "remained the law for fifty years," the Court explained,

> [t]here is value in maintaining a well-settled rule: "we endeavor to honor the principle of *stare decisis*, which 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"

Id. at 882 (citation omitted). The value of a well-settled rule is highest when it concerns a longstanding rule of constitutional law, as the numerous cases following *Culliton* and *Jensen* over many decades demonstrate.

Finally, the City's motion makes no mention of the fact that this alleged "error" of constitutional interpretation has been put before Washington voters *four* times, and in each and every instance, the voters overwhelmingly *refused* to "correct" the allegedly mistaken definition of property to allow graduated taxation of income. Thus, the City asks this Court not only to overrule the Supreme Court, but to substitute its judgment for the will of the people. The people have said, over and over, that the courts got it right in *Aberdeen*, *Culliton*,

Jensen and *Huntley*. None of the interests offered by the City are sufficient to reform the Constitution by judicial *fiat* when the voters have repeatedly declined to do so.

VI. CONCLUSION

The City of Seattle lacks legislative authority for its tax on residents' income. This Court may not overrule the Supreme Court, and Washington courts possess no veto over the will of the people, expressed repeatedly over nearly a century. Yet that is exactly what the Seattle City Council and EOI seek. For all the reasons stated above, the Court should deny the City's motion for summary judgment, and grant Plaintiffs' motion, and enter judgment declaring the Ordinance illegal, invalid and void.

By: *s/Robert M. McKenna*
ORRICK, HERRINGTON & SUTCLIFFE LLP
Robert M. McKenna (WSBA# 18327)
Daniel J. Dunne, Jr. (WSBA# 16999)
Adam Tabor (WSBA# 50912)
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone (206) 839-4300
Fax (206) 839-4301
rmckenna@orrick.com
ddunne@orrick.com
atabor@orrick.com

BEAN, GENTRY, WHEELER & PETERNELL, PLLC
Gerry L. Alexander (WSBA# 775)
910 Lakeridge Way SW
Olympia, WA 98502
Telephone (360) 357-2852
Fax (360) 786-6943
galexander@bgwp.net

TALMADGE FITZPATRICK TRIBE PLLC
Phil Talmadge (WSBA# 6973)
2775 Harbor Ave. SW, Third Floor, Suite C
Seattle, WA 98126
Telephone (206) 574-6661
phil@tal-fitzlaw.com

Attorneys for Levine Plaintiffs

By: *s/Scott M. Edwards*
Scott M. Edwards (WSBA# 26455)
Ryan P. McBridge (WSBA# 33280)
1420 Fifth Ave., Suite 4200
Seattle, WA 98101
Telephone (206) 223-7000
Fax (206) 223-7107
edwards@lanepowell.com

THE FREEDOM FOUNDATION
David Dewhirst (WSBA# 48299)
c/o The Freedom Foundation
PO Box 552
Olympia, WA 98507
Telephone (360) 956-3482
Fax (360) 352-1874
ddewhirst@freedomfoundation.com

Attorneys for Burke Plaintiffs

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:

Kent Meyer (WSBA No. 17245)
Assistant City Attorney
Seattle City Attorney's Office
Kent.Meyer@seattle.gov

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 23rd day of October 2017.

s/Robert M. McKenna
Robert M. McKenna (WSBA# 18327)
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone (206) 839-4300
Fax (206) 839-4301
rmckenna@orrick.com