Honorable John R. Ruhl
Dept. 8
Noted for hearing Nov. 17, 2017, 10:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

S. MICHAEL KUNATH, Plaintiff, v. CITY OF SEATTLE, Defendant, and ECONOMIC OPPORTUNITY INSTITUTE, Intervenor-Defendant.	CONSOLIDATED Case No. 17-2-18848-4 SEA **SHOCK PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**
SUZIE BURKE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendants.	
DENA LEVINE, *et al.*, Plaintiffs,	

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v. CITY OF SEATTLE, Defendant.	
SCOTT SHOCK, *et al.*, Plaintiffs, v. THE CITY OF SEATTLE, a Washington Municipal corporation, Defendant.	

INTRODUCTION

This case is controlled by the doctrine of stare decisis. *Matter of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017) ("Adherence is mandatory, regardless of the merits of the higher court's decision."). Sixty-six years ago, the Washington State Supreme Court declared, "It is no longer subject to question in this court that income is property." *Power, Inc. v. Huntley*, 39 Wn.2d 191, 194, 235 P.2d 173 (1951). Thus, when the government last challenged the Uniformity Clause's application to income in 1960, the High Court directed the government that, if it believed that changed circumstances warrant an income tax not allowed by the Constitution, then the proper course of action is to follow the legislative procedure to amend the Constitution. *Apartment Operators Ass'n of Seattle v. Schumacher*, 56 Wn.2d 46, 47-48, 351 P.2d 124 (1960). The City of Seattle's decision to ignore this direction and instead to try to force such a change through City Hall "violate[s] the constitutional blueprint [and] frustrate[s] the mandates of the people of the State as a whole." *1000 Friends of Wash. v. McFarland*, 159 Wn.2d 165, 168, 149 P.3d 616 (2006).

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Seattle insists that this Court should ignore stare decisis in the interest of "justice," but justice is not served by stripping the people of Washington of their well-settled constitutional protections. Indeed, the City's argument that income should only be characterized as property once it is invested is dangerously short-sighted.

Ownership of the fruits of one's labor is at the very heart of personhood. Recall Frederick Douglass's account of walking toward the wharves shortly after he arrived in New Bedford. Douglass saw a pile of coal in front of the Reverend Peabody's home and asked Mrs. Peabody if he might put the coal away. She agreed and paid Douglass two silver half dollars for his work. Douglass recounted the immense pride he felt from his earnings:

> To understand the emotion which swelled my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin, one must have been in some sense himself a slave. . . . I was not only a freeman but a free-working man, and no master Hugh stood ready at the end of the week to seize my hard earnings.

Frederick Douglass, *Life and Times of Frederick Douglass, Written by Himself* 259 (De Wolfe & Fiske Co., 1892). Seattle would have this Court tell Douglass that those coins were not his property after all. Worse yet, Seattle asks this Court to characterize income in a way that favors the wealthy—who can readily invest income into hard assets—while depriving the poor and much of the middle-class—many of whom live paycheck-to-paycheck with little left to invest—of any constitutional protections.

The judiciary exists to ensure constitutional protection of property rights, not to second-guess them. *See* Wash. Const. art. IV, § 28. As such, this Court must uphold the Constitution regardless of the City's changing needs, wants, or policy arguments. Wash. Const. art. I, § 29 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."). The state constitution *itself* manifests public policy. *Roberts v. Dudley*, 140 Wn.2d

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58, 65, 993 P.2d 901 (2000). Indeed, if a settled constitutional guarantee was subject to change by each and every trial court, as Seattle suggests, it would be no constitutional guarantee at all. *City of Seattle v. Evans*, 182 Wn. App. 188, 196 n.25, 327 P.3d 1303 (2014), *aff'd on other grounds*, 184 Wn.2d 856, 366 P.3d 906 (2015) (citation omitted). Seattle's desire to change the Constitution must go to the State Legislature, which operates subject to the will of the people of Washington. Only that process guarantees that all voices are heard and all contingencies are vetted.

ARGUMENT AND AUTHORITIES

The Shock plaintiffs incorporate the arguments set forth in the reply brief filed by the Levine and Burke plaintiffs. This reply brief focuses on the City's constitutional arguments.

I. INCOME IS PROPERTY

The law of Washington is settled: income is property and therefore subject to the Uniformity Clause. *See Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607-08, 989 P.2d 542 (1999); *Apartment Operators Ass'n of Seattle v. Schumacher*, 56 Wn.2d at 47-48; *Power, Inc. v. Huntley*, 39 Wn.2d at 194-95; *Jensen v. Henneford*, 185 Wash. 209, 218-19, 53 P.2d 607 (1936); *Culliton v. Chase*, 174 Wash. 363, 376, 378, 25 P.2d 81 (1933); *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 361, 289 P. 536 (1930).

Despite this clear and controlling precedent, Seattle argues that "Plaintiffs fail to establish how and why income is property." City Reply Br. at 11-24. Not so. Property is defined by state law. *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010). And since 1930, the Washington Supreme Court has consistently held that income is property subject to the Uniformity Clause. The City's criticism of the Washington Supreme Court's reasoning across those eight opinions has no bearing on this Court's duty to abide by those decisions. *Eilers Music House v. Ritner*, 88 Wash. 218, 224, 154 P. 787

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(1916) (A decision establishing a rule of property law "demands it be followed," unless and until the Legislature acts to amend the law.); *Stop the Beach Renourishment*, 560 U.S. at 715, 735 (A court's power does not include the ability "to eliminate or change established property rights.").

Federal law requires the same result. Both the Washington and U.S. Supreme Courts hold that income is property subject to the protections of the Due Process and Takings Clauses. *See Dean v. Lehman*, 143 Wn.2d 12, 35, 18 P.3d 523 (2001) (Noting that "interest income 'is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause.'") quoting *Schneider v. California Department of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) ("[W]e hold that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."). The City's attempt to distinguish these cases fails.

The City provides no support for its argument that only certain types of income (*e.g.*, income derived from interest, rental property, an investment, a partnership, etc.) receive constitutional protection whereas, wages earned in exchange for one's labor are not constitutionally protected. Indeed, the City's argument fails to acknowledge the foundational understanding that each individual has proprietary interest in the fruits of his or her labor. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S. Ct. 2863, 81 L. Ed. 2d 815 (1984) (finding a common law property right in the fruits of one's labor) (citing 2 W. Blackstone, *Commentaries*; J. Locke, *Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947)); 1 E. Coke Institutes ch. 1, § 1 (1st Am. ed. 1812) ("[W]hat is the land, but the profits thereof[?]"), *quoted in Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). Moreover, because Seattle's tax ordinance applies to all income, regardless of

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its source, under either the Washington Supreme Court's definition of income or Seattle's definition, the tax ordinance unquestionably violates the Uniformity Clause.

This Court may not accept the City's invitation to cite "justice" as a reason to ignore the plain command of the Constitution. Under Seattle's proposal, only the wealthy—those who have a surplus of money to invest, or owners of companies, etc.—would enjoy constitutional protections for their income; those who are employed by someone else and/or live paycheck-to-paycheck would not enjoy the same constitutional protections. That argument is anathema to our constitutional system and does violence to fundamental concepts of justice.

This Court is bound by prior on-point decisions from the Washington State Supreme Court holding that an income tax is a tax on property and must, therefore, comply with the Uniformity Clause of Article VII, Section 1, of the Washington State Constitution. The Shock plaintiffs are entitled to summary judgment.

II. SEATTLE'S TARGETED INCOME TAX VIOLATES EQUAL PROTECTION

Seattle's response brief fails to respond to the substance of Shock's Equal Protection challenge. To comply with Equal Protection, a classification must meet three requirements: (1) the legislation must apply alike to all persons within a designated class; (2) there must be reasonable grounds for distinguishing between those who fall within the class and those who do not; and (3) the disparity in treatment must be germane to the object of the laws in which it appears. *City of Seattle v. Rogers Clothing for Men Inc.*, 114 Wn.2d 213, 234-35, 787 P.2d 39 (1990).

The Washington Supreme Court's clear and controlling precedent holds that there is no rational basis for ignoring the tax uniformity requirement. *Belas v. Kiga*, 135 Wn.2d 913, 941-42, 959 P.2d 1037 (1998). The City admits that it ignored the uniformity requirement by classifying residents according to their income for the purpose of taxing them at different rates in order to

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create a test case to challenge a long line of settled case law. *See* Ordinance 125339, § 1(5). As a matter of law, therefore, the City's targeted tax lacks a rational basis and violates equal protection. Seattle's response brief fails to address the principle announced by *Belas*, and as a result the City has not carried its burden of disproving an essential element of Shock's equal protection claim. And because the City has failed to address this binding decision, the degree of scrutiny applicable to its class-based classification is irrelevant—*Belas* applied minimal rational basis scrutiny.

The City provided only one justification for its "high-income" classification: that the tax targets those most capable of paying for the City's affordability crisis. That justification, as in *Belas*, cannot survive any degree of scrutiny. Seattle's claim that its income tax is a tax on "unadjusted gross income" (City Resp. Br. at 6) renders the classification arbitrary. According to the U.S. Supreme Court, classifying taxpayers upon "gross receipts" is "unjustifiably unequal, whimsical, and arbitrary." *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 557, 55 S. Ct. 525, 79 L. Ed. 1054 (1935).

The City's attempt to distinguish *Stewart Dry Goods* fails because it relies on a factual contradiction of its own creation. In response to plaintiffs' argument that the tax violates RCW 36.65.030 (prohibiting cities from levying taxes on net income), Seattle argues its income tax is a tax on "unadjusted gross income." City Resp. Br. at 6. But then, when responding to *Stewart Dry Goods*, the City claims that its tax is actually a tax on "the total amount [an individual] 'take[s] home.'" City Resp. Br. at 38. The City cannot have it both ways. Indeed, the City's attempt to equate "gross income" with "take home pay" ignores the fact that those are two very different measures of wages—gross income being the largest and take home pay being the smallest. *See Pessemier v. Pessemier*, 66 Wn.2d 117, 119, 401 P.2d 351 (1965); *see also Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007) (discussing the difference between

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these three measures of wages). The City's argument that its tax on "total income" constitutes both a tax on "unadjusted gross income" and "total take home pay" is legally and factually impossible and cannot justify the "high-earner" characterization.

Ultimately, the City makes no effort to rebut the fact that the "total income" measure does not relate to either "net income" or "take home pay." Nor does the City provide any evidence that its "high-earner" classification has anything to do with an individual's ability to pay taxes, and cannot therefore satisfy its burden of demonstrating that the income tax applies equally to all persons within a designated class. *Rogers Clothing*, 114 Wn.2d at 234-35. Indeed, the City does not even address the fact that its "high-earner" classification subjects many middle-class residents to the wealth tax based on the way they earn their money, rather than the amount of money they actually earn.

The City constructed the "total income" classification to set up this test case. The classification in no way advances the policy that citizens should contribute to the support of government in proportion to their ability to pay because, as multiple courts have concluded, there is no meaningful correlation between one's "total income" and his or her "take home pay." *Belas*, 135 Wn.2d at 923; *see also Andrews v. King County*, 1 Wash. 46, 51, 23 P. 409 (1890) ("[E]ach person shall pay a tax in proportion to the value of his property.").

The City's classification is plainly arbitrary and violates the Equal Protection Clauses of the Washington and U.S. Constitutions by subjecting similarly situated people to different tax burdens. Wash. Const. art. I, § 12; U.S. Const. amend. XIV, § 1. Shock is entitled to summary judgment.

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CONCLUSION

All of the issues in this lawsuit must be decided in compliance with the clear and controlling precedent of the Washington State Supreme Court: A targeted income tax is a tax on property and subject to the Uniformity Clause. Moreover, the City's decision to ignore the uniformity requirement and target one class of Seattle citizens to bear the entire tax burden lacks any rational basis. The City's targeted tax is unconstitutional. Shock is entitled to summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon counsel for the City of Seattle,

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