Honorable John R. Ruhl
Dept. 8
Noted for hearing Nov. 17, 2017, 10 am

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' RESPONSE TO MOTIONS FOR SUMMARY JUDGMENT FILED BY THE CITY AND DEFENDANT-INTERVENOR AND CROSS-MOTION FOR SUMMARY JUDGMENT**
SUZIE BURKE, *et al.*, Plaintiffs, v. CITY OF SEATTLE, *et al.*, Defendant.	
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.	

RELIEF REQUESTED

Plaintiffs Scott Shock, Sally Oljar, Steve Davies, and John Palmer request that this Court deny the motions for summary judgment filed by Defendant City of Seattle and Intervenor-Defendant Economic Opportunity Institute. Plaintiffs further request that this Court grant their cross-motion for summary judgment, and declare that City of Seattle Ordinance 125339, imposing a graduated income tax currently targeting "high-income residents," violates Article VII, Section 1, of the Washington State Constitution, as well as the Takings and Equal Protection Clauses of the U.S. Constitution and Washington State Constitution. Plaintiffs additionally request a permanent injunction forbidding the City from enforcing the unconstitutional income tax.

INTRODUCTION

The City of Seattle adopted its targeted "high-earner" income tax ordinance in purposeful violation of a long line of Washington Supreme Court case law that holds income taxes subject to the Uniformity Clause of the of Article VII, Section 1, of the Washington State Constitution. *See*

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Aberdeen Savings & Loan Assoc. v. Chase, 157 Wash. 351, 289 P. 536 (1930); *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933); *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 55 P.2d 1056 (1936); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951); *Apartment Operators Ass'n of Seattle v. Schumacher*, 56 Wn.2d 46, 351 P.2d 124 (1960); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 989 P.2d 542 (1999); *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003). The law in this regard is well-settled: Income is property; thus, a tax upon income must therefore be uniform. Wash. Const. Art. VII, § 1 ("[A]ll taxes shall be uniform upon the same class of property.").

The City adopted a targeted income tax as part of a strategy to create a "test case" in which to ask the courts to reconsider this large body of precedent and set a new statewide tax policy.[1] *See* Ordinance 125339, § 1(5). The Washington Supreme Court, however, has already considered and rejected all of Seattle's arguments for targeted taxation, concluding that uniformity is the "highest and most important of all requirements applicable to taxation under our system." *Belas v. Kiga*, 135 Wn.2d 913, 937-938, 959 P.2d 1037 (1998); *Boeing Co. v. King Cty.*, 75 Wn.2d 160, 165, 449 P.2d 404 (1969); *Savage v. Pierce Cty*, 68 Wash. 623, 625, 123 P. 1088 (1912). Enforcing this constitutional limitation is essential because "[o]f all the powers conferred upon the Government that of taxation is most liable to abuse. . . . This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there are no implied limitations of the uses for which the power may

[1] *Seattle passes income tax. Next: lawsuits?* Crosscut.com (July 10, 2017) (http://crosscut.com/2017/07/seattle-passes-an-income-tax-next-court-action/)

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be exercised." *Citizens' Savings & Loan Association v. Topeka*, 87 U.S. 655, 662-664, 22 L. Ed. 455, 20 Wall. 655 (1874).

For the sake of judicial economy, the Shock plaintiffs incorporate the facts and arguments set out by the Levine and Burke plaintiffs.

STATEMENT OF ISSUES

Issue No. 1. Does the City of Seattle's income tax targeting only "high earners" violate the Uniformity Clause of Art. VII, § 1, of the Washington State Constitution?

Issue No. 2. Does this Court lack the authority to declare that income is not property where the Washington Supreme Court has consistently held that income is property?

Issue No. 3. Is Seattle's income tax an arbitrary and discriminatory tax which violates the Equal Protection Clauses of the State and Federal Constitutions?

EVIDENCE RELIED UPON

Plaintiffs rely upon the records and files herein.

STATEMENT OF FACTS

On July 10, 2017, the Seattle City Council unanimously voted to amend and adopt Council Bill 119002 to establish a city-wide income tax initially targeting wealthy residents. Four days later, on July 14, 2017, former Seattle Mayor Ed Murray signed into law Ordinance 125339, titled in part, "AN ORDINANCE imposing an income tax on high-income residents." *See* Defendant City of Seattle's Motion for Summary Judgment, Exhibit A. If not enjoined, the Ordinance will go into effect on January 1, 2018. SMC § 5.65.030(A).

The Ordinance imposes an annual "tax on the total income of every resident taxpayer," defining "total income" as "the amount reported as income before any adjustments, deductions, or credits on a resident taxpayer's United States individual income tax return for the tax year,

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currently listed as 'total income' on line 22 of Internal Revenue Service Form 1040 or 'total income' on line 15 of Internal Revenue Service Form 1040A." SMC §§ 5.65.020, .030. Although the City uses the phrase "total income," the Ordinance imposes a tax on net income because the income reported on line 22 of Internal Revenue Service Form 1040 or line 15 of IRS Form 1040A is determined after calculating certain deductions, exclusions, and expenses. SMC § 5.65.020.

Despite stating that the tax is intended to target only "high-earners," the Ordinance does not limit the definition of "total income" to salary. Instead, an individual's "total income" can include moneys received from the sale of a home or business, an inheritance, or other one-time occurrences.

The Ordinance does not impose the tax at a uniform rate as required by Article VII, Section 1, of the Washington State Constitution, which states that "all taxes shall be uniform upon the same class of property." *See Aberdeen Savings & Loan*, 157 Wash. 351; *Culliton*, 174 Wash. 363; *Jensen*, 185 Wash. 209; *Petroleum Nav.*, 185 Wash. 495; *Power*, 39 Wn.2d 191; *Apartment Operators Ass'n of Seattle*, 56 Wn.2d 46; *Harbour Village Apartments*, 139 Wn.2d 604; *Washington Public Ports Ass'n*, 148 Wn.2d 637. Instead, the Ordinance states that individuals who earn over $250,000 in total income per year, or married couples earning over $500,000 in total income per year, must pay a 2.25% income tax. SMC § 5.65.030(B). Persons with incomes below those amounts are subject to the tax ordinance but, for the time being, are taxed at a rate of 0%. SMC § 5.65.030(B) ("There is imposed a tax on the total income of every resident taxpayer in the amount of their total income multiplied by the applicable rates as follows.").

The threshold income and tax rates are subject to change. The Ordinance states that the City will adjust the threshold total income amounts annually for inflation and based on adjustments

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to the Consumer Price Index. SMC § 5.65.030(C). Nothing in the Ordinance limits the City's authority to adopt new rates or set new income thresholds.

The Shock plaintiffs reside in the City of Seattle and plan to remain for the foreseeable future. Plaintiffs pay Seattle's property and sales taxes and will be subject to the Ordinance, which "impose[s] a tax on the total income of *every resident taxpayer* in the amount of their total income multiplied by the applicable rates as follows." SMC § 5.65.030(B).

ARGUMENT AND AUTHORITIES

I. BINDING PRECEDENT FROM THE WASHINGTON SUPREME COURT ORDAINS THAT SEATTLE'S TARGETED INCOME TAX IS UNCONSTITUTIONAL

The City's motion for summary judgment misstates the doctrine of stare decisis to suggest that Supreme Court precedents are not binding on this Court. Not so. The doctrine has two applications: vertical stare decisis and horizontal stare decisis. *Matter of Arnold*, 198 Wn. App. 842, 846, 396 P.3d 375 (2017). Under vertical stare decisis—which is the application at issue in this case—"courts are required to follow decisions handed down by higher courts in the same jurisdiction." *Id*. "Adherence is mandatory, regardless of the merits of the higher court's decision." *Id*. (citing *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)).

The City's brief focuses instead on horizontal stare decisis, which allows the Supreme Court to reconsider its own past rulings under certain circumstances. *Id*. But even this allowance is not as flexible as the City suggests. "Adherence to past decisions through the doctrine of stare decisis promotes clarity and stability in the law, thereby enabling those impacted by the courts' decisions to make personal and professional decisions that comply with legal mandates." *Id*. at 846-47 (citing *See In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Indeed, stare decisis is even more important in cases involving property rights, where

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reliance interests are involved. Accordingly our High Court held that a decision establishing a rule of property law fixes and determines property rights and stare decisis "demands [the rule] be followed," unless and until the Legislature acts to amend the law. *Eilers Music House v. Ritner*, 88 Wash. 218, 224, 154 P. 787, 788 (1916); *see also Payne v. Tennessee*, 501 U.S. 808, 827-28, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (stare decisis strongly favored where a prior decision settled contract or property rights). Thus, a party seeking to reverse settled Supreme Court case law "faces an arduous task." *Arnold*, 198 Wn. App. at 847.

This Court is bound by precedent 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 the of Article VII, Section 1, of the Washington State Constitution.

II. TAX UNIFORMITY PROTECTS AGAINST ARBITRARY AND DISCRIMINATORY TAXATION

Washington's Supreme Court has repeatedly concluded that the Uniformity Clause is the "highest and most important of all requirements applicable to taxation under our system" because it protects against arbitrary and discriminatory taxation. *See, e.g.*, *Belas*, 135 Wn.2d at 937-938. Indeed, protecting individuals from arbitrary and discriminatory taxation is at the very cornerstone of our nation's founding. *See* Charles Adams, *For Good and Evil, the Impact of Taxes on the Course of Civilization* 262 (1993); William Blackstone, *Commentaries on the Laws of England*, Bk. I, Ch. 8, at 308 (1765) ("[T]he rigour and arbitrary proceedings of excise-laws seem hardly compatible with the temper of a free nation."); *see also* Glenn W. Fisher, *The Worst Tax? A History of the Property Tax in America* 60 (1996) ("Indirect taxation is a cheat. Unequal taxation is an injustice. Unnecessary taxation is robbery.").

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Washington's unique constitutional requirement that all property—whether tangible or intangible—be taxed uniformly as a single class was adopted as part of Amendment 14 to the state constitution in 1930. Prior to that time, the constitution contemplated that public revenues would be raised by a general property tax, and that all property (both real and personal) would be taxed uniformly. *See* Original Text of Const. Art. VII, §§ 1 and 2. The tax uniformity clause in the original constitution was interpreted to allow the exclusion of intangibles (stocks, bonds, and other choses in action) from taxation on the theory that it was sufficient if all tangible wealth in the state was taxed uniformly. *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 177, 96 P. 1047 (1908).

Many critics (especially farmers and homeowners) argued that this structure placed an undue tax burden on real estate, and reformers sought to lower this burden by adding intangible property to the tax base. It was widely accepted that intangibles could not be taxed at the high tax rates applicable under the general property tax. *Parmenter,* 50 Wash. at 178. Popular reform proposals called for amending the constitution to permit the Legislature to classify property so that a low tax rate could be applied to intangibles. Reformers reasoned that the state could successfully expand the tax base to include intangibles if the tax rate were low enough to remove the incentive to conceal the intangibles from assessment. *See* Voters Pamphlet for 1928 General Election, at 5-6.

Reformers proposed a classification amendment in each biennial legislative session after *Parmenter* (except 1917) until finally, in 1927, the proposal was approved by the Legislature and placed on the 1928 general election ballot. Laws of 1927, ch. 180. This proposal would have allowed the tax classification of any property, real or personal. Opponents feared that this would open the door to legislative favoritism among real estate interests with constant efforts to shift the

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tax burden back and forth among the various classes of real estate. The opponents urged the voters not to give the Legislature unlimited classification powers:

> Granting the Legislature a free hand simply means pushing the tax burden onto the weak. This amendment opens the doors to special interests at each legislative session in which each group will try to "get out from under." There will be more lobbyists than legislators, and a new set of tax laws at each session. You need one guess as to which group will come out on top in the end. What will become of equality and uniformity then?

Voter Pamphlet for 1928 General Election at p. 3. The campaign against the proposed amendment was successful, and voters defeated the measure. *See* Abstract of Votes for 1928 General Election.

At the next legislative session in 1929, proponents again sought a classification amendment. This time, to calm discrimination concerns, the Legislature inserted a requirement that all property continue to be taxed uniformly as a single class. Continuing to require strict uniformity did not interfere with the fundamental purpose of the amendment which was to authorize the Legislature to separately classify intangible property so that it could be brought into the tax base. As explained to the voters:

> The amendment to be voted on this year [1930] differs in two important particulars from that submitted in 1928. It fixes real estate all in one class, except for lands devoted to reforestation and mineral lands, and it defines property. These two changes met the commonest objections to the 1928 amendment and were largely responsible for the different factions uniting on this amendment in the Legislature.

Voter Pamphlet for November 4, 1930, General Election at p. 29. This revised version of the property classification amendment received broad legislative support and was approved by the voters as Amendment 14 to the state constitution.

The chief policy consideration underlying tax uniformity is the principle that citizens should contribute to the support of government in proportion to ability to pay. *Belas,* 135 Wn.2d at 923; *see also Andrews v. King Cty.*, 1 Wash. 46, 51, 23 P. 409 (1890) ("[E]ach person shall pay

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a tax in proportion to the value of his property."). Uniformity in taxation expresses the fundamental principle of equality upon which constitutional democracy is based, ensuring that taxes are imposed in a fair and nondiscriminatory manner:

> For what reason ought equality to be the rule in the matter of taxation? For the reason that it ought to be so in all affairs of government. As a government ought to make no distinction of person or classes in the strength of their claims on it, whatever sacrifices it requires from them should be made to bear as nearly as possible, with the same pressure upon all, which, it must be observed, is the mode by which least sacrifice is occasioned on the whole.

J.S. Mill, *Principles of Political Economy,* Book V, Ch. II, § 2 (1848).

III. THIS COURT CANNOT CHANGE THE WELL-SETTLED CHARACTER OF INCOME AS PROPERTY

Since 1930, the Washington Supreme Court has consistently held that income is property subject to the protections guaranteed by the Constitution, including the Uniformity Clause. *See Aberdeen Savings & Loan*, 157 Wash. 351; *Culliton*, 174 Wash. 363; *Jensen*, 185 Wash. 209; *Petroleum Nav.*, 185 Wash. 495 (1936); *Power*, 39 Wn.2d 191. Indeed, the Court reasserted this conclusion so many times that—66 years ago—it tersely declared: "It is no longer subject to question in this court that income is property." *Power*, 39 Wn.2d at 194. Thus, when the government last challenged the Uniformity Clause's application to income, 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*, 56 Wn.2d at 47-48. The City of Seattle ignored that direction, opting instead to try to force a change in the state's constitution and longstanding tax policy through the courts.

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The City's effort to overturn tax uniformity via a lawsuit must fail because its argument would require this Court to act outside the scope of its authority to re-characterize income as something other than property. City of Seattle Motion for Summary Judgment at 11-18. Any challenge to the character of income as property must fail because a court's power does not include the ability "to eliminate or change established property rights." *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 735, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (J. Kennedy, concurring); *see also id.* at 715 ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (Scalia, J., lead opinion).

The City's attempt to portray Washington's property law as an outlier must also fail. The U.S. Supreme Court has long held that income is property subject to the protections guaranteed by the U.S. Constitution. *Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 215, 52 S. Ct. 120, 76 L. Ed. 248 (1931) (a tax on income must comply with due process); *Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 12, 57 S. Ct. 330, 81 L. Ed. 465 (1937) (recognizing that income is a present and transferable property interest); *see also 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)). Indeed, money—which is what income is comprised of—is also characterized as property. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161-64, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (finding a property right in money; the government cannot, by *ipse dixit*, declare one's money "public" without compensation); *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 165-67, 172, 118 S. Ct. 1925, 141 L. Ed. 2d 174

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(1998) (concluding that, because a person has a recognized property interest in his money, he also has a cognizable property right in accrued interest under the Fifth Amendment).

Instead of addressing the large body of case law recognizing that individuals have a protected property right in their earnings, the City argues that something must be static and subject to capture and control before it can characterized as property. [2] *See* City MSJ, at 16-17 (citing *Sims v. Ahrens*, 271 S.W. 720, 732 (Ark. 1925)). That argument, however, overlooks the fact that the courts readily recognize property rights in moving things, like water rights in rivers. *See, e.g.*, *Domrese v. City of Roslyn*, 101 Wash. 372, 373, 172 P. 243 (1918) (the right to use water is a valuable right of property); *see also Federal Power Commission v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 249-52, 74 S. Ct. 487, 98 L. Ed. 666 (1954) (recognizing a usufructary right to use waters in a navigable stream for the generation of power). The argument also overlooks the plain language of Article VII, Section 1, of the Washington State Constitution, which defines property to "include everything, **whether tangible or intangible**, subject to ownership." (emphasis added).

The characterization of income as property advances the state's tax policy by protecting against discriminatory taxation. Not long after the Legislature enacted the Uniformity Clause in 1930, the state sought to increase its revenue by adopting an income tax law which provided: "There shall be . . . a tax on all net income . . . as is derived from property located or business transacted within the state, except as hereinafter exempted." *Culliton*, 174 Wash. at 372 (quoting Rem. 1933 Sup., §§ 11200-1). The intent was clear: to select property that generated income and selectively increase the tax burden on that property's ownership. The state argued that the tax was

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[2] Whether other jurisdictions treat income differently is of no significance—property is defined by state law. *Stop the Beach Renourishment*, 560 U.S. at 707.

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not on property but was rather a tax on the income generated from use of the property and, therefore, was not subject to the Uniformity Clause. The Court rejected this argument, noting that since the Uniformity Clause defined property to mean everything subject to ownership, whether tangible or intangible, it had little trouble ruling that income was itself property subject to the uniformity requirement. *Id.* at 374. Because the income tax was a tax that imposed graduated rates, it failed to meet the uniformity requirements. *Id.* at 378.

Three years later the state tried again, passing the Personal Net Income Tax of 1935. This graduated income tax was levied "for the privilege of receiving income." *Jensen v. Henneford*, 185 Wash. 209, 212, 53 P.2d 607 (1936). Income included "gains, profits, and income derived from . . . dealings in property, whether real or personal, growing out of the ownership, use of, or interest in such property." *Id.* at 212-13. Once again, the state argued the tax was not a property tax, because it was imposed on the so-called "privilege of receiving" income rather than the income itself. The Court forcefully reminded the state that its

> legislative body cannot change the real nature and purpose of an act by giving it a different title or by declaring its nature and purpose to be otherwise, any more than a man can transform his character by changing his attire or assuming a different name. . . . The character of a tax is determined by its incidents, not by its name.

Id. at 217.

The Court found that the state was trying to do what it had done earlier in 1932: impose a graduated income tax. *Id.* at 218 ("[T]he various provisions of the act show[] clearly that the legislature was concerned with the property (income) upon which the amount of the tax was to be levied, not with the mere privilege of the individual to receive the income."). It continued, "the mere right to own and hold property cannot be made the subject of an excise tax, because to tax

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by reason of ownership of property is to tax the property itself." *Id.* In explaining that the right to receive income cannot be disconnected from the income (property) itself, the Court reiterated:

> The right to receive property (income in this instance) is but a necessary element of ownership, and, without such a right to receive, the ownership is but an empty thing and of no value whatever. . . . The right to receive, the reception, and the right to hold, are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and, therefore, the property (income) itself.

Id. at 218-19 (citations omitted); *see also* 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)).

The City's claim that characterizing income as property is harmful to the poor lacks merit. City MSJ at 17-18. The protections that the State and Federal Constitutions provide to property owners—including tax uniformity, the right to due process, and the guarantee that property will not be taken without payment of just compensation—are all the more important to people living paycheck-to-paycheck because they tend to have no significant property holdings besides their income. If a court were to declare that income is not property, the wealthy with diversified assets could respond by shifting their assets into other recognized forms of property, such as stocks. The poor cannot.

IV. SEATTLE'S TARGETED INCOME TAX VIOLATES EQUAL PROTECTION

If the Court decides that Seattle has the statutory authority to impose a targeted income tax, and that it does not violate the Uniformity Clause, the tax nevertheless violates the Equal Protection Clauses of the Washington and U.S. Constitutions which forbid the government from enacting laws that treat similarly situated people unequally. Wash. Const. art. 1, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or

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immunities which upon the same terms shall not equally belong to all citizens, or corporations."); U.S. Const. amend. 14, § 1 (No state shall "deny to any person within its jurisdiction the equal protection of the laws."). To comply with Equal Protection, the City's 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).

Importantly, Seattle's Income Tax Ordinance, by its plain language, lacks any legitimate basis because targets only so-called "high-income residents" to pay for all the public needs identified by the City. *See Belas*, 135 Wn.2d at 941-42 (Concluding that there can be no rational basis for ignoring the uniformity requirement.). Indeed, the Ordinance's co-sponsor, Councilmember Kshama Sawant, publicly stated that her proposal to impose a "tax on Seattle's rich" is part of a larger "battle" against wealthy citizens and is motivated by her belief that the "capitalist class" actively works to "undercut" the "social justice" efforts that she supports.[3] This type of class animus is precisely why both the U.S. and Washington Supreme Courts hold classifications based on wealth and social class subject to heightened, intermediate scrutiny. *State v. Phelan*, 100 Wn.2d 508, 513-14, 671 P.2d 1212 (1983) (citing *Plyler v. Doe*, 457 U.S. 202, 223, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982)). Under that elevated level of scrutiny, a law will be

[3] Seattle Answers Trump's War on Workers by Taxing the Rich, the Real News Network (July 12, 2017) (http://therealnews.com/t2/story:19531:Seattle-Answers-Trump%27s-War-on-Workers-by-Taxing-the-Rich); *see also "Tax the Rich! Town Hall with Kshama Sawant & Trump-Proof Seattle"* (May 19, 2017) (https://www.youtube.com/watch?v=DAqBWiIU-J8).

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upheld only if it "may fairly be viewed as furthering a substantial interest of the State." *Id.* (citing *Plyler,* 457 U.S. at 217-18); *see also United States Dep't of Agric. v. Moreno,* 413 U.S. 528, 534, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973) (a statutory classification limiting participation in the Food Stamp Act to households composed of related individuals could not be sustained by legislative history indicating that the classification was intended to prevent "hippies" from participating).

The City's "high-income" classification fails to advance the various public interests served by the tax ordinance. In fact, the only justification provided in the City's motion for summary judgment—that the tax targets those most capable of paying for the City's affordability crisis—cannot stand up to any degree of scrutiny. The City's decision to classify residents by their "total income" rather than their actual take-home pay subjects middle-earners to the so-called "wealth tax." Indeed, the City's classification relies on the central fallacy that "income" equates "wealth." It does not. *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 558, 55 S. Ct. 525, 79 L. Ed. 1054 (1935) ("[G]ross sales of a merchant do not bear a constant relation to his net profits."); *cited favorably by Power,* 39 Wn.2d at 196.

The City's decision to classify those subject to its income tax based only on "total income" is indistinguishable from the "gross receipts" classification invalidated as "unjustifiably unequal, whimsical, and arbitrary" in *Stewart Dry Goods Co. v. Lewis*, 294 U.S. at 557. In that case, the U.S. Supreme Court concluded that a statute imposing a higher tax rate on larger businesses than on small ones, as defined by their gross receipts, violated the Equal Protection Clause. *Id*. at 566. In so ruling, the Court rejected the very justification that the City relies on in this case: "that 'generally speaking' he who sells more is in receipt of a greater profit and hence has larger ability to pay." *Stewart,* 294 U.S. at 558.

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The Court explained that the government cannot rationally conclude that an individual is more able to bear a greater tax burden based on total income because such a measure does not speak to whether he or she actually banks any of the money:

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large.

Stewart, 294 U.S. at 558 (citation omitted).

The City's classification fails to grasp that the true measure of wealth must begin with an individual's take-home income (and the ability to amass excess money on a year-to-year basis). Many closely held companies, like mom-n-pop restaurants, contractors, etc., may generate large amounts of gross income, but, after the costs of doing business are deducted, the owners often take home only a modest amount.[4] Others may work their entire career with the goal of funding their retirement through a sale of a business or other property—such one-time occurrences do not make a person any more "wealthy" than a neighbor who tucked away money for retirement. And, contrary to the City's claim, the distinction in how a person comes into his money (whether through a one-time occurrence or a long investment in retirement) does not make him more able to pay taxes than his neighbors. Because the City taxes "total income" rather than an individual's take-

[4] *See, e.g.*, Maureen Farrell, *The Most and Least Profitable Businesses to Start*, Forbes (Jan. 18, 2008) (https://www.forbes.com/2008/01/18/citigroup-sageworks-nyu-ent-fin-cx_mf_0118mostprofitable.html).

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home pay, the income tax reaches well into Seattle's middle class and therefore fails to apply equally to all persons within the designated class of "high-earners." *Rogers Clothing*, 114 Wn.2d at 234-35. The City's classification by "total income" circumvents State law which prohibits cities from levying taxes on "net income;" and there is no relation between "total income" and actual earnings to justify the classification. Thus, the City adopted a classification that frustrates the principle that citizens should contribute to the support of government in proportion to their ability to pay, and makes its income tax unlike the typical tax that spreads the burden in a graduated manner across several income brackets. *Belas,* 135 Wn.2d at 923; *Andrews*, 1 Wash. at 51.

Insofar as the City claims that a tax on "total income" provides an expedient method for distinguishing so-called "high-earners" from others, such a method ignores the reality that great variations exist within a class based only on "total income" alone. *Stewart*, 294 U.S. at 558. Seattle's income tax is even more discriminatory than the tax invalidated in *Stewart* because it places the entire tax burden on so-called "high earners" based on an inaccurate measure. Even accepting, for the sake of argument, the City's claim that those with more "total income" are more able to pay taxes, there is no reason why someone making $249,000 (or $125,000, or $75,000, etc.) shouldn't bear some portion of the tax burden. The City's classification is plainly arbitrary and violates Equal Protection by subjecting similarly situated people to different tax burdens.

CONCLUSION

Seattle's desire to raise additional revenues by means of an income tax targeting so-called "high-earners" raises important questions of constitutional law that, if successful, would drastically change the state's well-settled policy that tax uniformity is the "highest and most important of all requirements applicable to taxation under our system." *Belas,* 135 Wn.2d at 937-938. The City is unable to effect an amendment to the Uniformity Clause though this litigation, so instead Seattle

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asks this Court to declare that an individual's income is not property. This drastic request, however, would subject every Washingtonian to state and local income taxes without any of the protections guaranteed by the state and federal constitutions. Accordingly, over 50 years ago, the Washington Supreme Court admonished the government that, if it wanted to enact 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*, 56 Wn.2d at 47-48. Following the legislative procedure is the only way to guarantee that all voices have the opportunity to be heard—and all impacts are considered—when considering such a radical change to the state's constitution and longstanding tax policy. This Court should declare Ordinance 125339 is unconstitutional and issue a permanent injunction forbidding the City from enforcing the unconstitutional income tax.

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Certification of Compliance

I certify that this document contains 5,485 words and complies with Local Rules.

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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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