No. 95295-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, *et al.*,

Respondents,

v.

CITY OF SEATTLE, *et al.*,

Appellants.

RESPONSE BRIEF OF LEVINE AND BURKE RESPONDENTS

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I. INTRODUCTION[1]

The City of Seattle seeks reversal of the lower court's judgment that Seattle's income tax is invalid. The Court should affirm. The City's ordinance was enacted without statutory authority and is contrary to state law prohibiting local income taxes.

One would expect the City to know what type of tax it enacted and with what legislative authority, but it does not. In the hope that a court might find a statute that fits, its Ordinance offers five tax statutes to choose from. In the trial court, the City had difficulty deciding exactly what kind of tax it had passed, and it was not until its reply brief on summary judgment that it landed firmly on an excise on the privilege of choosing to live in Seattle. CP 973. No reported Washington decision has ever held that continuing to live in a city is a "voluntary choice" that can be taxed. Nor does the income tax meet the well-established tests for an excise tax.

If that avenue is unsuccessful, the City suggests that the Court could construe RCW 35A.11.020's reference to "all powers of taxation for local purposes" to be a plenary grant of tax authority. Construing RCW

[1] Two groups of Plaintiffs jointly files this brief seeking affirmance of the trial court's judgment. The "Levine Plaintiffs" are Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale. The "Burke Plaintiffs" are 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.

35A.11.020 to be a plenary grant of tax power would render all other statutory grants of taxing authority superfluous, an astounding change in Washington tax law. The City refers to "home rule" principles to buttress its argument, but they are unavailing. The fact that no court in 50 years has construed RCW 35A.11.020 to grant such expansive taxing authority to municipalities shows the argument to be without merit.

Seattle also recognizes that RCW 36.65.030 prohibits all local taxes on "net income," but argues that it is not barred because it is taxing "total income." This claim does not withstand analysis. While the line of the federal income tax return Seattle chose as the basis for the City's income tax may be labeled "total income"; it is a sum of multiple net income figures, calculated after various deductions. And to further its objective of targeting the "rich", the ordinance deducts the first $250,000 of "total income" from tax. Semantics aside, Seattle's tax is a tax on net income that is prohibited by state law.

The City also asks the court to overrule nearly a century of precedent holding that income is "property" under Article VII, Section 1, of the State Constitution, and subject to the Constitution's uniformity provision. Washington's voters have rejected ballot measures for a statewide graduated income tax ten times, most recently in 2010, and among those rejected measures were six proposed constitutional amendments that would

have excluded "income" from "property." Certain city councilmembers disagree with the voters, and with their co-appellant they have manipulated the machinery of local government to achieve a statewide agenda – enacting a local income tax as a vehicle to ask the Supreme Court to overturn well-settled constitutional law prohibiting "progressive" income taxes. Avoiding unnecessary constitutional questions by deciding this case on purely statutory grounds will avoid rewarding an undemocratic gambit. In any event, *stare decisis* should be respected because the City has not shown the decisions to be incorrect or harmful, Washington voters have rejected efforts to change the rule ten times, and overturning this precedent will frustrate settled expectations of numerous Seattle residents.

For all of these reasons, the judgment below should be affirmed.

II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the City's income tax is invalid because the Legislature has not granted municipalities express authority to levy a tax on personal income.

2. Whether the City's income tax is a valid excise tax on the privilege of living in Seattle if one's choice of residence is not a voluntary taxable act or a privilege a city can revoke, and the amount of tax on residents' income bears no relationship to the relative benefits they enjoy.

3. Whether "home rule" or RCW 35A.11.020 constitutes a plenary grant of authority to cities to levy any constitutionally permissible taxes, including income taxes, in the absence of specific legislative authority, when no court has recognized such plenary authority, and this construction would render superfluous all specific grants of authority to cities, in violation of rules of statutory construction.

4. Whether the City's income tax violates RCW 36.65.030, which prohibits taxes on "net income," because line 22 on IRS Form 1040 is the sum of multiple sources of income, each of which is a net income figure (gross income less deductions of expenses and losses).

5. Should this Court apply binding *stare decisis* holding that income is property subject to the Constitution's uniformity provision when Washington voters have rejected graduated taxes on income ten times, overturning *stare decisis* will frustrate settled expectations of Seattle residents and Washington voters, and where Appellants have not shown that the rule was decided incorrectly and causes harm.

III. COUNTERSTATEMENT OF THE CASE

A. Washington voters have rejected an income tax ten times.

Since 1934, Washington voters have rejected six proposals to amend the Constitution to allow graduated taxes on income.[2] Over roughly the

[2] H.R.J. Res. 12 (Wash. 1934); S.J. Res. 7 (Wash. 1936); S.J. Res. 5 (Wash. 1938);

same period, Washington voters also rejected four statewide ballot measures to codify an income tax by statute.[3]

B. Seattle collaborated with EOI on an ordinance to serve as a "legal pathway" to the Supreme Court for a "statewide" income tax.

It is no surprise that Economic Opportunity Institute ("EOI") intervened in this lawsuit. EOI and its executive director, John Burbank, were architects of SMC Chapter 5.65 ("the Ordinance"), building on their multi-year efforts to pass state and local income taxes. For example, EOI was heavily involved in I-1098 (Olympia City Council Meeting, April 19, 2016), the 2010 statewide initiative for a graduated tax on income that was rejected by 64% of voters.[4] CP 862-911, RP. 5:1-6; 49:1-4.

In response to their 2010 statewide defeat, EOI and income tax advocates developed a "local" strategy "to pass an income tax somewhere" to generate a lawsuit that could allow the Supreme Court to reconsider its precedent that graduated income taxes violate the state constitution.[5] "And that somewhere" was Seattle.[6] The record shows that EOI and Burbank

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Constitutional Amendment (Wash. 1942); H.R.J. Res. 42 (Wash. 1970); H.R.J. Res. 37 (Wash. 1973).

[3] Initiative 158 (Wash. 1944); Initiative 314 (Wash. 1975); Initiative 435 (Wash. 1982); Initiative 1098 (Wash. 2010).

[4] *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), https://perma.cc/V7VJ-YZAH.

[5] Goldy, *The Road to a State Income Tax Runs Through Seattle*, The Stranger (Nov. 5, 2013), https://perma.cc/FXA9-CHEK.

[6] *Id.*

were working with the City to come up with an income tax ordinance for Seattle by January 2015. CP 1719-22.

After voters rejected a 2016 income tax initiative EOI had placed on the ballot in the Olympia,[7] EOI 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." CP 1744. Their common goal was to invite a legal challenge with the hope that a "sympathetic" Supreme Court would open the door to *statewide* income taxes. CP 1742, 1782. EOI opined:

> If the Court ultimately determines that the City lacks the 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.

CP 1781. An EOI action plan entitled "Seattle: Creating the Pathway to a Statewide Income Tax" further explained that 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.
>
> <u>This is what we want</u>, as it provides a pathway to the state supreme court, enabling that court to review and reverse

[7] Thurston County Elections, *Thurston County November 8, 2016 General Election* (last updated Nov. 29, 2016 9:08 AM), https://perma.cc/NVB8-KSVR.

> 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.

CP 1742 (emphasis in original).

Seattle was happy to oblige. Putting the machinery of city government to work for statewide political purposes, the Council adopted EOI's statewide "pathway" 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]."). CP 916-922 (City of Seattle Resolution No. 31747, at 2 (May 1, 2017)) (emphasis added). On May 1, 2017, City Council resolved "to adopt a progressive income tax targeting high-income households." *Id.* Over the next several weeks, the Ordinance moved through Committee. CP 1800, 1806, 1851.

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.*" CP 1813 (emphasis added). In July 2017, struggling to design a tax that at least

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." CP 1849. Trying to evade the state's prohibition on net income taxes was having undesirable consequences. State Rep. Noel Frame protested that "we're inadvertently hitting LLCs, S-Corporations and sole proprietorships…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." CP 1847. EOI's John Burbank dismissed these concerns as "trying to stir up opposition with pity for small businesses." CP 1848. He candidly replied that these tax effects were a feature, not a bug, of the Ordinance. *Id.* ("There is nothing inadvertent about the design, legally or in terms of revenue.").

Relying on the language of the Ordinance itself, the City asserts that Seattle's City Council designed an income tax to fund certain fiscal "challenges." City Br. at 3-4. The evidence, however, demonstrated that the City resolved to pursue an income tax in pursuit of a political agenda; only later did it identify "restricted uses" to which the funds might be put, and those "uses" were chosen for public relations value. Initially, the income tax had been proposed to fund free community college for Seattle residents. CP

1735, 1743. That proposed use disappeared by the summer of 2017. As the Council vote approached, despite working on their income tax strategy for over a year, the City and EOI were just beginning to identify the "uses" to be "funded." *See, e.g.*, CP 1820-21. EOI provided its polling data to the City to identify uses that would be most popular with the public. CP 1825-26. Based on this data, EOI supplied the "restricted uses" for the tax funds two weeks before the Council voted, but after the Council had already committed itself to an income tax. CP 1829. As one concerned Seattle resident aptly put it, the City's proposed income tax was a "solution in search of a problem." CP 1819.

Based on the EOI compilation, the Ordinance recites numerous diverse proposed funding needs. CP 372 ("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"). It then specifies restricted uses of the receipts, SMC 5.65.010 (A), but the Ordinance 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 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 provision to relieve the tax burdens on low- or middle-income residents allegedly "harmed" by regressive taxes. CP 375 Another restricted use is to "[provide] affordable housing," *id*, but the only impact on housing is to add to the City's existing excise and property taxes a new tax on gains on sale.

The Ordinance was referred to committee on June 19, 2017.[8] 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.[9] Mayor Murray signed the Ordinance into law on July 14, 2017. CP 369-399.

C. The trial court's rulings on summary judgment.

On an extensive record on cross motions for summary judgment, the trial court denied the City's and EOI's motions and granted Plaintiffs'. Recognizing the need to "'have express authority … to levy taxes,'" CP 1305, Judge Ruhl systematically reviewed and rejected each of the City's arguments for such authority. The court rejected all of the City's attempts to relabel its "Income Tax" as an excise tax on other privileges. CP1308. As to the privilege of "resident taxpayers' receipts of income within Seattle," the court found no authority to tax the privilege of receiving pay

[8] Seattle City Council: Record No. 119002 *available at* https://perma.cc/BG6A-3GA8 (last visited Oct. 21, 2017).

[9] *Id.*

for labor. Id. The City's "alternative" that "choosing to live in Seattle is a [taxable] 'lawful activity'" was rejected because Washington law did not allow the City to tax "the right to exist.'" CP 1308 (citations omitted). The court also rejected the City's argument that RCW 35A.11.020 was a "general grant of taxing power," or perhaps, *sui generis*. CP 1309 (citations omitted). "Regardless of what label" the City chose, the court held that "the Legislature must specifically authorize the tax," and the City had failed to identify specific statutory authority. Id. The court had no trouble finding that the Ordinance was unlawful because it taxed "net income" in violation of RCW 36.65.030. CP 1310-12. The court prudently avoided deciding Defendants' constitutional arguments.

IV. ARGUMENT

The City has no inherent authority to levy taxes. The Washington Constitution dictates that municipalities only have the taxing authority expressly granted to them by the Legislature. The Legislature has never authorized municipalities to levy an income tax, nor do any of the general grants of municipal authority to impose excise taxes on business activities in Chapters 35 and 35A RCW permit a tax on an individual's income. Indeed, Washington courts have long recognized that municipalities cannot impose an excise 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 cannot be disputed that an individual's "total income," as that amount is identified on line 22 of IRS Form 1040, is the sum of multiple sources of income, each of which is a net income figure (gross income less deductions of expenses and losses). The sum of these multiple net income figures is itself a "net income" figure under the plain meaning of the statute.

Although the Court should affirm on statutory grounds and prudently avoid ruling on the constitutionality of the Ordinance, the City admits that binding *stare decisis* compels the Court to conclude that the Ordinance violates the uniformity provision of Article VII, Section 1. The City asks the Supreme Court to overrule its precedent, arguing that the decision in *Culliton v. Chase*, 174 Wash 363, 25 P.2d 81 (1933), was wrong, and that its legal underpinnings have eroded with time. Those arguments are without merit. *Culliton* is grounded in the plain language of Amendment 14 and was not "clearly incorrect" in holding that income is within the scope of the Constitution's broad definition of "property" - "everything, tangible and intangible, subject to ownership." The City cannot collaterally attack *stare decisis* by citing cases from other states interpreting different constitutional provisions, or by debating the "nature" of income. The City

also fails to demonstrate that the *Culliton* rule is causing harm. Thus, if required to rule on an issue of constitutional interpretation, the Court should apply *stare decisis*. Whether a graduated income tax is desirable is a political policy question to be resolved by democratic processes, where the voters have frequently and consistently expressed their opposition.

A. The City lacks statutory authority to levy an income tax.

Under our State Constitution, municipalities have no inherent power to tax; the Legislature must delegate them such power. *City of Spokane v. Horton*, 189 Wn.2d 696, 702, 406 P.3d 638 (2017); *Watson v. City of Seattle*, 189 Wn.2d 149, 165, 401 P.3d 1 (2017); *see* 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 settled that "municipalities must have *express* authority" to levy the tax in question. *King Cty. v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984); *see also Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 366, 89 P.3d 217 (2004); *Hillis Homes, Inc. v. Snohomish Cty.*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982). "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); *see also Arborwood*, 151 Wn.2d at 374 (same).[10]

The City does not point to any *express* statutory authority that allows it to levy an income tax on its residents. There is none. This Court must affirm the trial court on this basis alone. *Arborwood*, 151 Wn.2d at 375 (invalidating tax for lack of express statutory authority); *Algona*, 101 Wn.2d at 795 (same); *Hillis Homes*, 97 Wn.2d at 811 (same). Although the Ordinance is squarely invalid under our state courts' case law, this Court does not need to revisit those decisions here. As explained in the sections that follow, the Ordinance cannot be characterized as an excise tax, nor is it authorized by the general grant of taxing authority found in the Optional Municipal Code.[11] On the contrary, the Legislature has affirmatively

[10] This Court can easily reject EOI's semantic argument that the trial court erred in striking down the Ordinance for lack of "specific" statutory authority, when all that is needed is "express" authority. EOI Br. at 9-11. The terms "express" and "specific" mean the same thing in this context and, like the trial court, Washington courts use the two terms synonymously in cases like this one. *See City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 694 n.8, 743 P.2d 793 (1987) ("we require specific express statutory authority."); *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 23, 735 P.2d 673 (1987) ("there must be a specific legislative pronouncement allowing for the tax"); *City of Seattle v. T-Mobile W. Corp.*, 199 Wn. App. 79, 86, 397 P.3d 931 (2017) ("absence of specific statutory authority"). However framed, the issue is whether the Legislature authorized the City to tax the income of its residents. It didn't.

[11] Even if this Court accepted the City's suggestion to treat income tax as *sui generis* "apart from property and excise taxes," *see* City Br. at 44, the Ordinance still must be authorized by express statutory authority, and here there is none.

prohibited municipalities from levying taxes on "net income," which is exactly what the Ordinance impermissibly seeks to do.

1. The Ordinance is not a valid excise tax.

The Ordinance does not fall within RCW 35.22.280(32)'s or RCW 35A.82.020's grant of excise tax authority. City Br. at 39-44; EOI's Br. at 12-20.[12] The Legislature granted first class cities 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). Typically invoked as authority for local business and occupation ("B&O") taxes, the statute authorizes excise taxes for purposes of regulation or revenue. *Watson*, 189 Wn.2d at 167; *Pac. Tel. & Tel Co. v. City of Seattle*, 172 Wash. 649, 654, 21 P.2d 721 (1933), *aff'd*, 291 U.S. 300 (1934). RCW 35A.82.020 effectively mirrors RCW 35.22.280(32), and likewise authorizes both first class and code cities to levy excise taxes. *Arborwood*, 151 Wn.2d at 366 n. 6 (citing *Algona*, 101 Wn.2d at 792).[13]

The Court has held that an income tax is a property tax, and is not

[12] The fact that the City Council characterized 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 Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999) ("the character of a tax is determined by its incidents, not by its name.")(citation omitted).

[13] RCW 35.22.570 grants first class cities like Seattle all powers Title 35 RCW gives to code cities. *Watson*, 189 Wn.2d at 170, n.8. Thus, RCW 35A.82.020 also applies to Seattle—although it does not actually give the City any additional taxing authority.

an excise on the "privilege of receiving income."[14] *Jensen v. Henneford*, 185 Wash. 209, 217-19, 53 P.2d 607 (1936). As discussed below, there is no reason to depart from this rule. But even in the absence of this precedent, the Ordinance cannot be characterized as an excise tax. Washington courts distinguish excise taxes and property taxes in two ways:

> First, excises are imposed on the voluntary act of the taxpayer, which affords the taxpayer benefits from conducting the occupation, business, or other activity that triggers the taxable event. By contrast, property taxes are imposed on the mere ownership or possession of property, creating an 'element of absolute and unavoidable demand.' Second, excises are directly imposed based upon the extent to which the taxpayer enjoys the taxed privilege, i.e., the volume of business done. By contrast, property taxes are imposed based upon the value of the taxpayer's assets or property.

Harbour Vill. Apartments, 139 Wn.2d at 611 (Talmadge, J., dissenting) (internal citation omitted); *Sheehan v. Cent. Puget Sound Reg'l. Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005) (same).[15]

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[14] Indeed, this Court has already rejected this as an impermissible effort to relabel as an excise tax what is in nature and effect an income tax: "[T]he 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 Legislature may declare its intended purpose in an act, but it is for the courts to declare the nature and effect of the act. The character of a tax is determined by its incidents, not by its name." *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936).

[15] Washington Courts' longstanding definition of an excise tax is consistent with the plain meaning as reflected in dictionary definitions. The American Heritage College Dictionary (3rd Ed. 1997) at 478 ("A licensing charge or a fee levied for certain privileges"); Webster's Third New International Dictionary at 792 ("any of various taxes upon privileges … that are often assessed in the form of a license or other fee").

The Ordinance does not satisfy either element. First, unlike a company or sole proprietor that chooses to do business within city limits, Seattle residents undertake no voluntary act to trigger a taxable event; they are subject to the tax by the simple fact that they live in the City. Contrary to the City's claim, *see* City Br. at 40, residing in Seattle is not, in and of itself, a taxable event. *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995) (rejecting argument that utility charge was an excise tax because "the tax can be avoided by residing elsewhere"); *Arborwood*, 151 Wn.2d at 368 (unlike laws authorizing special taxing districts, excise tax statute did not authorize imposition of a tax "for the privilege of living in or operating a business in" city). Put simply, a Seattle resident's "choice" not to uproot her home and move elsewhere is not a privilege or "voluntary act" for which the City can levy an excise.

Second, the tax bears no relationship to the benefits residents enjoy from "taking advantage of the City's protections." *See* City Br. at 40. A resident who earns $251,000 receives the same services as one who earns $249,000, or nothing at all. The tax is imposed based solely on the value of income—a classic property tax. *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) ("if the tax is computed upon a valuation of property, and assessed . . . where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property

tax."); *Covell*, 127 Wn.2d at 890 (liability "arises from Appellants' status as property owners and not from their use of a city service."). Of course, residents should and do pay for the services and benefits they receive from the City—through valid excise taxes on the privilege of undertaking business activities, sales taxes on purchases, and *uniform* property taxes.[16]

The Court's decision in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933) does not, as the City and EOI suggest, stand for the proposition that taxing income is a permissible excise on the "privilege" of living and receiving income in Seattle. City Br. at 32-33; EOI Br. at 14-19. *Stiner* recognizes that the opposite is true. *Stiner* upheld the state's right to levy a B&O tax. 174 Wash. at 407-08. In so holding, the Court distinguished between a tax on the privilege of doing business, *measured* by income, and a tax on an individual's receipt of income itself. *Id.* at 411 ("It needs no

[16] The City's likening of the Ordinance to a "poll tax" is a non-starter. Unlike a personal income tax, the Legislature has granted smaller municipalities specific authority to assess a "street poll tax" not exceeding two dollars per inhabitant. *See* RCW 35.23.371; RCW 35.27.500. Moreover, like property taxes, poll taxes may be subject to the state constitution's uniformity provisions. *See Town of Tekoa v. Reilly*, 47 Wash. 202, 91 P. 769 (1907); *see also Morrow v. Henneford*, 182 Wash. 625, 627, 47 P.2d 1016 (1935) ("It is generally held that a constitutional provision requiring taxation to be equal and uniform applies only to taxes on polls and property and has no reference whatever to excises.") (citation omitted). No Washington court has ever considered a poll tax to be an excise tax. *See* 16 Eugene McQuillan, *The Laws of Municipal Corporation*s § 44.242 (3d ed. July 2017) (excise taxes "include any taxes which do not fall within the classification of a poll or property tax."). And, given their historical use by some states to discourage voting by African-Americans and poor whites--a practice now prohibited by Amendment XXIV to the United States Constitution--poll taxes are appropriately viewed in a negative light, making it even more surprising that the City and its allies would liken the Ordinance's income tax to a poll tax.

argument to demonstrate that the wage-earner is properly excluded and that upon no theory can he be classed with those engaged in business."). A permissible tax on business activity *measured by* income earned from the taxed activity does not countenance an impermissible tax *on* income.[17]

The same distinction was drawn the following year in *Supply Laundry*, in which the Court again stressed the difference "between the privilege of carrying on a business of a commercial nature and the privilege merely of being employed as a wage earner." *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 77, 34 P.2d 363 (1934). Indeed, as it did in *Supply Laundry*, the Court has relied on *Stiner* for this distinction when striking down other efforts to levy taxes on individually earned income. *Cary v. City of Bellingham*, 41 Wn.2d 468, 471, 250 P.2d 114 (1952); *Jensen*, 185 Wash. at 218.

In sum, even though excise tax authority has existed for well over a century, it has never been interpreted or applied to allow a city or county to

[17] EOI's effort to analogize an income tax with the estate tax, *see* EOI Br. at 13, fails for largely the same reason. Unlike an income tax, the estate tax is not imposed on receipt of income. It is "an excise tax upon the happening of an event, namely, death, where the death brings about certain described changes in legal relationships affecting property." *Estate of Ackerley v. Dep't of Revenue*, 187 Wn.2d 906, 914, 389 P.3d 583 (2017) (citation omitted)). The "relevant transfer is the single transfer that occurs to the entire taxable estate upon death." *Id.* at 915. And, critically, the tax is imposed on the estate—the transferor—not the recipient beneficiaries. Again, Washington law is clear that excise taxes measured by the value of property, including the estate tax, must be predicated upon a taxable event, *i.e.*, the sale, use, transfer or change in ownership of that property; not mere ownership of property alone.

tax an individual's receipt of income where he or she lives. Even if the result was not foreordained as a matter of *stare decisis*, it is clear that living in Seattle simply is not a "privilege" the City can tax.

2. The City may not impose an excise tax on an individual's constitutional right to earn an income.

The City's effort to justify the Ordinance under its excise authority is flawed for another, even more vital, reason. While a municipality can tax an individual's exercise of some voluntary, privileged business activity, it may not exact payment for an individual's exercise of the fundamental right to earn income. The Court's decision in *Cary v. Bellingham*, *supra*, is unambiguous and controlling on this point. In *Cary*, a Bellingham ordinance required all employees working in the city to obtain an annual license, with the license tax based on a percentage of the employee's income from compensation for services performed within the city. 41 Wn.2d at 468. The trial court enjoined the tax, and the sole issue on appeal was "whether the activity of working for salaries or wages may be reached by the city's excise tax." *Id.* at 471.

The Court upheld the trial court, and 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. 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 ex rel. Sampson v. City of Sheridan*, 170 P. 1, 3 (Wyo. 1918)) (internal quotation marks omitted). The Court's holding applies equally here (and, likewise, does not turn on whether income is properly classified as property). Just like the invalidated ordinance in *Cary*, the Ordinance impermissibly seeks to tax the constitutionally protected right of Seattle residents to live and earn income in the City.

Cary has never been overruled or questioned, nor can the City meaningfully distinguish it. The City points to *Cary*'s citation to *Stiner* and *Supply Laundry*—and the distinction those cases draw between a permissible excise tax *measured* by business income and an impermissible tax on worker income—to suggest that *Stiner* and *Supply Laundry* can be explained by the "then-present conditions of the Great Depression, 'when the wage-earner is barely subsisting.'" City Br. at 37 (quoting *Stiner*, 174 Wash. at 411). But *Cary* was decided long after the Depression, and its holding is based on one's "inalienable" right to work, not one's ability to

pay. Indeed, the tax at issue in *Cary*—one-tenth of one percent of gross income—would not burden even a "wager-earner barely subsisting."

Thus, the City's claim that the Ordinance's threshold "consciously avoided burdening living-wage earners" cannot avoid *Cary*'s reach. City Br. at 38. Nor does it matter that the City Council intended the tax to hit those who "typically derive income from ownership, managerial, and/or profit-sharing interests in business." *Id.* (citing CP 374-75). Putting aside the fact that many such individuals already pay B&O or other taxes on business income, the Ordinance does not exempt, and plainly imposes tax on, those who "work for wages." *Cary*, 41 Wn.2d at 472. And, regardless, the substantive privilege identified in *Cary*—"the right to earn a living"—does not depend on income source or amount. *Id.* So, not only does the Ordinance fail the test for an excise tax by targeting individuals based solely on the "privilege" of living in Seattle, it also violates those individuals' fundamental rights.[18]

[18] There is no merit to EOI's flip suggestion that the Legislature intended to "supersede" *Cary* (ten years after it was decided) with the enactment of the Optional Municipal Code. *See* EOI Br. at 16 n.4. As explained below, the Code did not give code cities any new taxing authority, but merely extended to them the same authority as other classes of city. Moreover, there is no indication in the Code's legislative history that it was meant to overrule *Cary*, and courts will not assume that the Legislature intended to do so by mere implication. *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 77, 196 P.3d 691 (2008); *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984). In all events, the Legislature cannot statutorily abrogate rights guaranteed by the Constitution. *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 695, 310 P.3d 1252 (2013).

3. Neither RCW 35A.11.020 nor the "home rule" doctrine authorize an income tax.

The City's defense of the Ordinance under the Optional Municipal Code fares no better. City Br. at 45-48; *also* EOI Br. at 11. Neither the Code nor the principles of "home rule" give municipalities plenary taxing authority. The Code provides that, "[w]ithin constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes," but that "general grant" does not, in and of itself, expressly authorize any particular kind of tax, much less an income tax. *Algona*, 101 Wn.2d at 792-93 ("[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."). Rather, RCW 35A.11.020 was intended to give code cities the same express taxing authority already statutorily granted to first class cities and other local governments—which, as explained above, has never included the power to levy an individual income tax.

The City's focus on the term "all powers of taxation" ignores the Code's other provisions, which show that the Legislature did not intend to confer code cities with any *new* taxing power, just the *same* powers given to other classes of city. *See* RCW 35A.11.020 ("code city shall have any authority ever given to any class of municipality . . . of this state"); RCW

35A.82.020 ("code city may exercise the authority authorized by general law for any class of city to license"); *see also* Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809, 841 (2015) (optional code "materially increased the substantive powers of code cities, placing them on par with first class charter cities."). Not surprisingly, no Washington court has interpreted RCW 35A.11.020, standing alone, as sufficient in and of itself to authorize a specific tax.[19]

Indeed, were RCW 35A.11.020 sufficient to give code cities (and, thus, first class cities, *see* RCW 35.22.570) authority to impose all constitutionally permissible taxes untethered to any specific statutory grant of taxing authority, then the express grants of taxing authority contained in Chapters 35 and 35A RCW would be superfluous—contrary to basic rules 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"). The City cites no legislative history to suggest that the Legislature intended to silently supersede and nullify dozens of statutes

[19] If that were the case, then RCW 35A.11.020 alone would have been enough to uphold the taxes in *Arborwood* and *Algona*, but in each case the Court looked to other statutes for express authority, and found none. *Arborwood*, 151 Wn.2d at 366; *Algona*, 101 Wn.2d at 793. Conversely, in *Watson*, the Court did not cite RCW 35A.11.020 to uphold the tax, but rather cited to the specific grants of authority in RCW 35.22.280(32), RCW 35.23.440(8) and RCW 35A.82.020. *Watson*, 189 Wn.2d at 167-68 & n.8.

through a general grant of authority found in an optional code.

And there is an even more basic point the City overlooks. Whether RCW 35A.11.020 authorizes the Ordinance turns on legislative intent—and, specifically, whether the Legislature intended to authorize code cities (and, by extension, first class cities) to tax their residents' income. *See Arborwood*, 151 Wn.2d at 367 (examining legislative intent to determine if tax statute authorized local tax). As noted, nothing in the statute's text or history shows such intent. Just as important, in 1967, when the Optional Municipal Code was enacted, it was settled law that an individual income tax was unconstitutional. *Culliton v. Chase*, 174 Wash. 363, 374, 25 P.2d 81 (1933); *Jensen*, 185 Wash. at 217-19. It is inconceivable that the Legislature intended to give cities authority to impose a tax that it, itself, lacked authority to impose. Indeed, even were the Court to revisit that constitutional rule, it would not create legislative intent that did not exist at the time.

Finally, the City's overstated theory of "home rule" is no substitute for statutory authority. As Professor Spitzer 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." Spitzer, *supra*, at 856. Thus, while Washington courts generally recognize home rule for police powers, they still require express statutory authority on

other matters—particularly taxation. *Id.* at 834-35 ("In several areas of municipal law . . . 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.").[20] For the above reasons, the City lacks statutory authority to tax income.

4. RCW 36.65.030 expressly prohibits the Ordinance because it imposes a tax on "net income."

Although the absence of any express statutory authority is sufficient to uphold the trial court and invalidate the Ordinance, it is equally clear that the Legislature affirmatively prohibited such a tax.[21] 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*, 189 Wn.2d at 170 (*quoting Enter. Leasing, Inc. v. City*

[20] This is not a reflection of inconsistent judicial interpretation, but a product of 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," 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").

[21] EOI candidly admits that RCW 36.65.030's legislative history shows that the statute was enacted to prohibit the very same kind of individual income taxes held to be unconstitutional in *Culliton* and *Jensen*. EOI Br. at 41 n.9 (citing CP 297 & 299); 1975 Op. Att'y Gen. 2 at 15. Of course, that means that even if the Washington Supreme Court were to revisit those decisions as a matter of constitutional law, the unambiguous meaning of RCW 36.65.030 would still prohibit such taxes.

of Tacoma, 93 Wn. App. 663, 669, 970 P.2d 339 (1999)). Similarly, a statute preempts an ordinance if the statute and the ordinance irreconcilably conflict. *Id.* at 171. 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*, 189 Wn.2d at 174. Here, the Legislature did just that.

RCW 36.65.030 provides that a city "shall not levy a tax on net income." Although the statute does not define the term "net income," its meaning is well-known and commonly understood as gross income minus expenses and losses related to that income. *See* RCW 82.56.010, ("amount arrived at by deducting expenses from gross income"); *Audit & Adjustment Co. v. Earl*, 165 Wn. App. 497, 503, 267 P.3d 441 (2011) (amount "remaining after deducting related costs and expenses," quoting *Webster's 3d New Int'l Dictionary*, at 520 (2002)). The Ordinance taxes "total income" as that term is used in "line 22 of [IRS] Form 1040" (or line 15 of Form 1040A, or line 9 of Form 1041). SMC 5.65.020.G. Thus, to determine whether the Ordinance violates RCW 36.65.030, the sole question is whether line 22 of IRS Form 1040 reflects deductions for expenses or losses related to an individual's income. It plainly does.

Line 22 of IRS Form 1040 is the sum of various income sources

listed in lines 7 through 21. It is undisputed that each such income source is determined ***after*** deduction of allowable expenses and losses related to that source—including, for example, net income from pass-through business entities, sole proprietorships, and disregarded entities; net capital gains income; net rental income; and net royalty income. CP 411; *see also* S. Oei & D. Ring, *The New "Human Equity" Transactions*, 5 Cal. L. Rev. Circuit 266, 274 (2014) ("IRS Form 1040 Line 22 . . . includes business net income, which takes into account business expenses, including allowable business interest, reported on IRS Schedule C."). The Ordinance violates RCW 36.65.030 because it is assessed against the sum of various "net income" amounts, which is therefore itself a "net income" amount. Indeed, one might view the first $250,000 of income for filers with a "single" filing status as an exemption all its own. In that sense, the tax is a tax on net income.

This Court can easily reject EOI's argument that the deductions reflected in lines 7 to 21 do not result in "net income" because "deducting business expenses from a business's *gross receipts* is in fact how one calculates gross or total *income*, of the business." EOI Br. at 40-41. Nonsense. This argument is contrary to both the plain meaning of "net income" and Washington law. Gross income is determined ***before*** any expenses or losses are deducted, not after:

> "Gross income of the business" . . . includes gross proceeds

> of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds, or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated, ***all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses***.

RCW 82.04.080 (emphasis added). Seattle defines "gross income" the same way. SMC 5.30.035(D). Line 22 of IRS Form 1040 does not reflect "gross income," because the total on Line 22 is calculated ***after*** deductions for expenses and losses. By definition, figuratively and literally, it reflects "net income."

Notably, unlike EOI, the City does not argue that line 22 of IRS Form 1040 reflects "gross income" (it doesn't), nor does it dispute that lines 7 through 21 reflect "net income" (they do). Instead, the City argues that it had "broad discretion" to treat line 22 as "an appropriate basis" for measuring gross income because it is calculated before other available "deductions, exemptions, and . . . reductions" are factored in. City Br. at 11-12. In other words, the City claims that because the amount listed on line 43 of Form 1040 (which reflects these other deductions, *see* CP 411-12 (Form 1040, lines 23-27, 40 & 42)) also—and, in the City's view, better—fits the definition of "net income," it had "discretion" to characterize line 22 as "gross income," even if that is not what it is. *Id.* EOI similarly argues

that the City is free to define its own tax categories, and that this Court must defer the City's definition as an "expert agency." EOI Br. at 38-40.

This is nonsense, too. Either the amount on line 22 reflects "net income" or it does not. The City's supposed interpretation of the Ordinance as a tax on "gross income" is irrelevant. A "city or municipality may define its taxation categories as it sees fit unless it is restrained by a constitutional provision or legislative enactment." *City of Tacoma v. Seattle-First Nat'l. Bank*, 105 Wn.2d 663, 667, 717 P.2d 760 (1986) (quoting *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 394, 502 P.2d 1024 (1972)). And, thus, a city cannot "avoid application of the relevant state definition, deduction, or exemption simply by enacting its own contrary provision." *Id.* at 668. The City cannot avoid RCW 36.65.030's prohibition on "net income" taxes by falsely characterizing the Ordinance as a tax on "gross income." The meaning of RCW 36.65.030 is all that matters here.

Nor is the City's interpretation of RCW 36.65.030 entitled to any deference. While a municipality may be afforded deference in interpreting its own laws, it is owed no such deference in interpreting a state statute which it has no authority to enforce. *City of Federal Way v. Town & Country Real Estate, LLC*, 161 Wn. App. 17, 38, 252 P.3d 382 (2011); *Group Health Co-op. v. City of Seattle*, 146 Wn. App. 80, 91, 189 P.3d 216 (2008). This is especially so where, as here, a state statute expressly limits a city's

authority to tax. *Group Health*, 146 Wn. App. at 91. Otherwise, a uniform law would become a patchwork, and a blanket prohibition would become meaningless—which is exactly what the City seeks here. In short, RCW 36.65.030 is not subject to the City's self-serving gloss; it means what it says, and it plainly prohibits the Ordinance's tax on "net income."

B. The Court should avoid deciding constitutional issues.

Because the invalidity of the Ordinance may be decided on 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).

C. *Stare decisis* should be upheld

1. The Court of Appeals may not disregard Supreme Court precedent.

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)(reversing Court of Appeals' choice to follow non- binding federal decisional law over Washington Supreme Court precedent). If the Court of Appeals reviews the constitutionality of the

decision below, it is bound to apply the rules of decision in *Culliton* and *Jensen*.

2. Appellants must show harm under both tests to reconsider s*tare decisis.*

The City argues that this Court's prior rulings in *Culliton, Jensen* and their progeny were either wrong when decided, or wrong because their legal underpinnings have disappeared, and urges the Court to overturn them. The City's brief fails to recite the correct test to overturn *stare decisis* because the City omits an essential element –injury. *See* City Br., at 14. To reconsider its own precedent, this Court requires either (1) a "'clear showing that an established rule is *incorrect and harmful,'*" or (2) a showing that the legal underpinnings have "*changed or disappeared altogether*." *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727-29, 381 P.3d 32 (2016) (citations omitted) (emphasis added). Neither of these related tests is met here - the City does not show that *Culliton* was incorrect when decided, or that subsequent legal developments have eroded its legal foundation.[22]

Under both of the two circumstances to reconsider *stare decisis*, Appellant must also show "harm." In *W.G. Clark Construction Co. v.*

[22] *W.G. Clark* overruled decisions applying *federal* preemption rules under ERISA after the United States Supreme Court "narrowed its ERISA preemption doctrine because "this court must have the flexibility to consider *emerging United States Supreme Court case law … on federal issues.*" *W.G. Clark*, 180 Wn.2d at 64-67 (emphasis added) ("); *see also State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2012) (overruling precedent based on United States Supreme Court's clarification of *Miranda* burdens). This case involves *state* constitutional rules, so the "underpinnings" test does not apply.

Pacific Northwest Regional Council of Carpenters, 180 Wn.2d 54, 66-67, 322 P.3d 1207 (2014), new federal precedent conflicted with existing state court precedents after a change in federal law, eroding the underpinnings of state law. The conflict between state and federal rules of decision led to "blatant forum shopping and created inconsistent and unjust results for parties in Washington," justifying the Court in overruling *stare decisis*. *Id.* at 61. The City makes no showing of this second essential element, harm.

3. The rule that income is property remains grounded in the State Constitution, and the legal underpinnings of *Culliton* and similar rulings have not changed.

The City and EOI assert this Court's rule that income is property is built on the incorrect reasoning and eroded foundation of *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933). City Br. at 18-28; EOI Br. at 44. In *Culliton*, the Court held that it has been "definitely decided in this state that an income tax is a property tax, which should set the question at rest here." 174 Wash. at 376. The City argues that "the sole authority" *Culliton* cited in support of this statement was the 1930 decision in *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930) "[b]ut *Aberdeen* includes no such holding." City Br. at 18. The City is wrong.

The main problem with the City's focus on *Aberdeen* as the "sole source" of legal authority for the rule in *Culliton* is that it is demonstrably untrue. Article VII § 2 of the State Constitution did not define property at

all when this Court decided *Aberdeen* in 1930. After *Aberdeen* was decided, the voters passed Amendment 14 to the Constitution in November 1930. City Br. at 16; *Culliton*, 174 Wash. at 373-74. As the Court in *Culliton* observed,

> [a]fter the decision by this court in [*Aberdeen*] deciding that income was property for the purpose of taxation, the people adopted the Fourteenth Amendment, supra, which made it part of the *fundamental law of the state.*

Id. at 377 (emphasis added). The bulk of the majority analysis in *Culliton* was thus devoted to distinguishing the expansive definition of "property" in Article VII, Section 1 from other States' constitutions in which the courts had ruled that income was not "property." *Id.* at 374 – 77 (explaining that cases upholding income taxes flowed from differences in Wisconsin, Idaho, and Montana constitutions). Anticipating arguments the City makes here that *Culliton* was out of step with decisions of other states (i.e., "incorrect"), the Court concluded that "[n]one of the decisions from other states have any bearing upon the law before us because of our peculiarly forceful constitutional definition and the difference in their constitutional authorization or restriction." *Id.* at 374. This constitutional analysis was unrelated to *Aberdeen*.

Nor is the City's characterization of *Aberdeen* itself accurate. While the City correctly observes that *Aberdeen* was ultimately decided on equal

protection grounds, the City makes no mention of the state law underpinnings that were essential to decide that federal question in favor of plaintiffs. The *Aberdeen* majority found a violation of *federal* equal protection guarantees, but its characterization of the tax on income as a property tax rather than an excise tax under *state* law was essential to finding discriminatory treatment.[23] There was no jurisprudential basis for this Court to turn to *federal* case law to construe Washington tax statutes, and it did not do so.[24]

The City argues that when the Supreme Court overruled *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U.S. 389 (1928) in 1973, *Aberdeen's* legal foundation disappeared, undermining *Culliton*. City Br. at 18-21. *Aberdeen* relied on *Quaker City*, but on federal equal protection grounds that are of no help to the City here. The court overruled *Quaker City* on the ground that legislatures may exercise their legislative judgment

[23] If the *Aberdeen* court had accepted the Legislature's characterization of the tax as an excise on the *privilege* of operating a *franchise*, there would have been no discrimination because *individuals* could not engage in "franchise" operations. Defining income as property under state law was essential to finding an equal protection violation because a *property* tax could "be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation." 157 Wash. at 364-5. As the *Aberdeen* dissent makes clear, that classification was *not* dependent in any way on federal law. *Id.* at 379-91 (Fullerton, J., dissenting).

[24] The City cites *Washington Mutual Savings Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930) to support its contention that *Aberdeen* relied on *Quaker City* as legal authority to define income as property. Viewed in full context, the phrase "under the decisions of the Supreme Court of the United States," applies to the broader equal protection determination under federal law, not defining property under state law. *Id.*

to distinguish and levy taxes on corporations that differ from the taxes levied on other persons or entities, particularly individuals, without running afoul of *federal* equal protection. *Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356, 360-65 (1973). *Lehnhausen* did not need to address, let alone overrule, decisions defining income as property, and so it did not. The contention that "the legal underpinnings of *Aberdeen* and *Culliton* have changed," City Br. at 21, is without merit.

Culliton and its progeny are firmly rooted in the law interpreting the Constitution of *this* State, and as the next sections demonstrate, Washington courts and voters have embraced it and reaffirmed it many times since.

4. Washington voters have reaffirmed the constitutional underpinnings of *Culliton* ten times.

The City asks this Court not only to overrule its own precedents, but to substitute its judgment for the will of Washington's people. Since 1934, Washington voters have rejected six attempts to amend the constitution to pave the way to graduated taxes on income.[25] Over roughly the same period, Washington voters also rejected four statewide votes to codify an income tax by statute.[26] The most recent effort was I-1098 in 2010, when EOI was

[25] H.R.J. Res. 12 (Wash. 1934); S.J. Res. 7 (Wash. 1936); S.J. Res. 5 (Wash. 1938); H.R.J. Res. 4 (Wash. 1942); H.R.J. Res. 42 (Wash. 1970); H.R.J. Res. 37 (Wash. 1973).

[26] Initiative 158 (Wash. 1944); Initiative 314 (Wash. 1975) (corporate excise tax measured by income); Initiative 435 (Wash. 1982) (corporate franchise tax measured by income); Initiative 1098 (Wash. 2010).

heavily involved in a statewide initiative to levy a "progressive," graduated tax on income. CP 866, 910. (I-1098 did not propose a constitutional amendment.) Washington voters rejected a proposed income tax by a decisive margin – 64% opposed it. [27] The voters have said, over and over, that Amendment 14 must remain in its current, popularly-adopted form, and the law prohibiting non-uniform (i.e., graduated) income taxes is correct, the will of people, and should not be changed.

5. This Court has reaffirmed and followed *Culliton* without questioning its vitality.

Over the same time period, this Court's decisions interpreting the plain language of Amendment 14 have also remained consistent. And none of the interests offered by the City and within the "territorial limits" of its authority, Article VII § 1, is sufficient to reform the State Constitution by judicial *fiat* when the voters of Washington have repeatedly declined to do so by constitutional amendment or otherwise.

The City argues that the Court must be free to overturn precedent in light of "new developments," City Br. at 13 (citing *W.G. Clark*), but the issues it raises are anything but new, because they were considered in *Culliton, Jensen,* and other decisions. The Court has refused similar

[27] *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), https://perma.cc/J79S-9R9W.

requests to overrule *Culliton* over many years. Three years after *Culliton*, 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 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*, felt bound to respect *stare decisis* in *Jensen*:

> 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.

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

Arguments to ignore *stare decisis* and abandon the rule that income is property were again rejected several decades later in *Huntley*, where 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.'" *Power, Inc. v. Huntley*, 39 Wn.2d 191, 196-97, 235 P.2d 173 (1951). In critical respects, the *Huntley* Court could have been describing the City of Seattle's income tax here.

The rulings in *Culliton, Jensen,* and *Huntley* have been acknowledged and followed by this Court numerous times. *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*, 139 Wn.2d at 608 (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 (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, 496, 55 P.2d 1056 (1936) (following *Aberdeen, Culliton and Jensen* to hold that tax measured by net income is a tax on property). Appellants do not cite a single decision of any Washington court questioning whether *Culliton* was either "incorrect," or undermined by an eroded legal foundation.

6. Arguments about the "nature" of income do not show that precedent is "incorrect."

The City erroneously frames the issue as: "What is the nature of an income tax?" City Br. at 12. This leads the City away from principles of

state law and constitutional interpretation to irrelevant metaphysical musings on the "nature" of income and property, as though there were a universal truth about the nature of income only to be divined. There is not. Each state has the power and authority to *define* income and property for purposes of its tax laws, and through its Constitution, statutes, and decisions of this Court, Washington has done so. Changing those definitions—or not—is a political issue, not a philosophical question.

The City relies heavily on information from a treatise, *Constitutional Uniformity and Equality in State Taxation*, to argue that the majority of courts have ruled that income is *not* property under the peculiar constitutions and statutes of other states,[28] arguing that Washington's definition of property is out of step and must be incorrect. But as the Montana Supreme Court eloquently observed the same year that *Culliton* was decided, this is a fool's errand:

> [W]e do not feel disposed, nor do we think that it is necessary, to enter into a lengthy discussion as to the character of the tax [on income].… We satisfy ourselves by saying that there are reasons why such a tax might be classed as a property tax, and reasons why it should be classed as an excise tax. Volumes, in fact libraries, have been written in a vain endeavor to accurately classify the income tax. Courts

[28] The treatise shows that a wide variety of state uniformity provisions exists. Professor Newhouse lists 12 general "types" of state uniformity provisions and then shows, state-by-state, that very few uniformity provisions fall squarely into one type or another. Wade J. Newhouse, 2 *Constitutional Uniformity & Equality in State Taxation* § 4.04, at 1764-1767 (2d ed. 1984). Newhouse classifies he Washington Constitution's uniformity provision as a "very limited form of a modified" uniformity. *Id.* at 1766.

> and text-writers have endeavored to argue the world into the belief that the income tax is a property tax. … Other courts are just as emphatic in the claim that it is an excise tax …

O'Connell v. State Bd. of Equalization, 25 P.2d 114, 118-19 (Mont. 1933) (internal citation omitted). At the end of the day, whether income is property is purely a matter of state law. *Id.* at 119 ("the state of Montana intended to enact an income tax and did not intend that it should be considered as a property tax law").

Appellants argue that the United States Supreme Court "consistently" rejects the definition of income as property, but in *Hale v. Iowa State Board of Assessment & Review*, 302 U.S. 95, 105 (1937), the court recognized that defining property under state constitutions was a matter of state law on which courts disagree.[29] As for Washington, "[t]he Constitution of this state, so far as it bears upon the characterization of property, is *sui generis*." *Stiner*, 174 Wash. at 416-17. That other courts reach different conclusions under their respective state laws cannot establish that *Culliton* was clearly incorrect in its interpretation of Washington law. "None of the decisions from other states have any bearing upon the law before us, because of our peculiarly forceful constitutional

[29] *People of The State of New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937) merely applied New York state law. Six months later, *Hale* acknowledged *Culliton* and *Jensen*. 302 U.S. at 105 n.8.

definition and the difference in their constitutional authorization or restriction." *Culliton*, 174 Wash. at 374.

When interpreting a constitutional provision, this Court presumes that "language carries its ordinary and popular meaning, unless shown otherwise" and that the language's context should also be considered. *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994).

Referring to the definition of "property" in Amendment 14, Appellants concede that income is encompassed within "everything" and is "intangible," but they ask the Court to rule that Washington citizens do not own their "income," because "income is not transferable." City Br. at 27-28. [30] Garnishment of earnings proves that income is subject to ownership, and transferable. *See* RCW Chapter 6.27.

Finally, the City contends that the purpose of Amendment 14 was to expand the subjects of tax, City Br. at 28, but the City is only half right. Amendment 14 broadened the categories of "property" subject to tax to include "intangibles," but it did so *subject to the uniformity provision*, which was an integral part of that amendment. The City cannot single out and target a small segment of the income-earning population any more than

[30] The City quotes *Sim v. Ahrens*, 271 S.W. 720, 732 (Ark. 1925), but that case discussed income "'during [the] period and process of its making,'" City Br. at 26, in other words, *before it is due and owing.* Thus, a hotel manager may be working to *earn* income, but she only *realizes* income as salary at the conclusion of a pay period.

it can target a particular class of landowners with differentiated or graduated real property taxes. *Culliton*'s definition of income as property under Amendment 14 is entirely consistent with the purpose of the amendment, read as a whole.

7. The City did not establish "harm."

In *Deggs,* this Court decided that prior rulings on certain statutes of limitations "may have been incorrect," but the Court honored *stare decisis* because the *Deggs* plaintiff "ha[d] not shown that they are harmful" even though the rulings had the effect of barring some wrongful death claims. 186 Wn.2d, at 728. The City has not shown harm under either of the two related tests to overturn *stare decisis.*

The City presented no admissible evidence of harm below. Instead, the City relied on self-serving statements in the Ordinance that state and city tax systems were regressive. *See* CP 372-375. This is inadmissible hearsay. Legislative findings made "as an incident to the process of making law" are given deference, but legislative findings on elements of subsequent judicial determination are not. *City of Tacoma v. O'Brien,* 85 Wn.2d 266, 270-71, 534 P.2d 114 (1975) (collecting cases rejecting legislative determinations of facts that constitute an "element of adjudication"). Thus, for purposes of *stare decisis,* it is for the courts to determine whether tax systems are

"regressive" and cause "harm." The City offered no admissible evidence of harm and the trial court made no such finding.

On appeal, the City offers just two examples of harm, neither based on admissible evidence. *First*, the City cites language from the 1932 statewide income tax initiative (invalidated by *Culliton*) that taxation should be based on ability to pay, of which earnings "are a fair measure." City Br. at 29. The City pronounces "[t]he same is true today," but this is a policy preference, not harm. Ten times since 1932 the citizens of Washington rejected the City's contention by voting against graduated income taxes.

Second, the City argues that Washington and Seattle have regressive tax structures that "harm[] low- and moderate-income earners." *Id.* The City submitted no admissible evidence in the form of expert opinion testimony to support its contention that Seattle's tax structure is regressive, that regressivity harms certain residents, or that the Ordinance significantly reduces regressivity, since the Ordinance is not lowering the tax burden on *any* of its low- and moderate-income residents.

On the other hand, Plaintiffs demonstrated with undisputed evidence, that a favorable tax climate has produced enormous benefits to diverse Washington and Seattle citizens at all levels of income. The Ordinance itself acknowledges that "Seattle is a growing and prosperous city that can offer great schools, good jobs, and healthy communities for

all." CP 23. The Ordinance recognizes that "robust economic growth has created significant opportunity and wealth," CP 23, funding state and local government through numerous existing fees and taxes. The Washington State Department of Commerce touts the fact that Washington has no income taxes as a significant competitive advantage in its promotional materials to attract businesses and citizens to locate in Washington.[31]

Seattle is the fastest growing city in the United States. CP 23. Seattle has been creating job opportunities at twice the national average.[32] Workers in a range of fields make more per hour than their national counterparts, from computer programmers to cashiers and fast food cooks.[33] Seattle's total wages and benefits have been increasing at approximately 3.5% annually, compared to 3% nationally.[34]

Seattle's vibrant economy has buoyed strong growth in per capita household income, too. Seattle's median household income increased by nearly $10,000 from 2014 to 2015, when it reached more than $80,000 per year. *See* CP 1260, 1263. Seattle's economic formula, with no state and

[31] https://perma.cc/K73X-T52H ("Washington State does not have a personal or corporate income tax."; https://perma.cc/LY65-WWJK ("Washington State offers business many tax advantages, including no personal or corporate income tax . . . ."); https://perma.cc/KS97-5WQ4 ("We offer businesses some competitive advantages found in few other states. This includes no personal or corporate income tax.").

[32] *See* United States Bureau of Labor Statistics, Seattle Area Economic Summary (updated June 27, 2018), https://perma.cc/H2EP-QE34.

[33] *See id.*

[34] *See id.*

local income taxes, is producing real benefits in the form of strong growth in personal income and wages for all citizens.

With no evidentiary support, the City asserts that allegedly regressive taxes strain "low- and middle-income households." CP 24. 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. *See* CP 1274-75. The Ordinance claims that regressive taxes "disproportionately harm communities of color," but the 2016 census showed median income rose for Asians, blacks and multiracial residents. *See* CP 1277-1283. Seattle's unique economy is distributing financial benefits across its diverse population.

Seattle does *not* argue or offer evidence that it suffers "harm" from an inadequate tax base, and for good reason. As 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.[35] The City's General Fund revenues have nearly matched this

[35] *Compare* City of Seattle, *2013 Adopted and 2014 Endorsed Budget* (2013) ("2013 Seattle Budget Book"), at 44 *available at* https://perma.cc/QL86-BFWS *with* City of Seattle, *2018 Proposed Budget* ("2018 Seattle Proposed Budget Book") at 100 *available at* https://perma.cc/9SK4-Q2WE.

substantial growth, growing from $926 million in 2011 to $1.19 billion in 2017 adopted budget, a nearly 29% increase in General Fund revenues.[36]

Even if *Culliton* were overturned, the City's Ordinance does not purport to address the harms it argues. The Ordinance claims that income tax revenues will "lower[] the property tax burden and the impact of other regressive taxes, including the [B&O] tax rate," CP 23, but the Ordinance does not include provisions to do any of these things. Indeed, for many small pass-through businesses, it piles an income tax on top of the existing B&O tax. Another purported use is to "[provide] affordable housing," CP 26, but as drafted, the impact on housing is to add a tax on house sales to existing excise and property taxes, increasing the price of housing and reducing funds sellers could use to purchase their next home.

8. Overruling s*tare decisis* would harm settled expectations of Seattle and Washington citizens and voters.

Stare decisis jealously protects Plaintiffs' intimate personal reliance interests. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, (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). The evidence below showed that many residents of

[36] *Compare* 2013 Seattle Budget Book, at 57 *available at* https://perma.cc/QL86-BFWS *with* 2018 Seattle Proposed Budget Book at 110 *available at* https://perma.cc/9SK4-Q2WE.

Seattle and Washington felt that having no income tax was significant to their decisions to move here for work, to start businesses here, and to buy homes and settle permanently. CP 650, 693, 699, 644, 747. Numerous Seattle residents have made life-defining decisions, integrating their families into educational, religious and community organizations and personal relationships, in reliance on a constitutional rule against graduated income taxes. Few interests are as personal and consequential as the decisions affecting the choice of one's community. *Casey*, 505 U.S. at 856.

With Seattle's Ordinance, many residents now face, or will face when they are ready to sell their homes or small businesses, the necessity of leaving Seattle, severing some of the most important ties in their lives to avoid an income tax that had long been constitutionally prohibited. Residents who planned to fund retirements from selling family businesses must consider moving out of the City to avoid the tax on capital gains. CP 696. The City's assurance that only the wealthiest will be taxed is demonstrably false. In any given year, thousands of residents of modest means will face sudden income tax liabilities on gains from one-time sales of homes and small businesses - unless they relinquish the "privilege" of living in Seattle before sale and move. [37]

[37] 98-year old Dorothy Sale, a retiree of limited means who lived in the same house for 50 years, faces tax on the sale of her home. She plans to use the sale proceeds to pay for assisted or skilled care, if needed. CP 646-45.

"'*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision.'" *Deggs*, 186 Wn.2d at 729 n.9 (quoting *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991)). 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 (1997) (concerns of *stare decisis* are "at their acme" in cases involving contract and property rights); *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 45, 275 P. 74 (1929) (same).

> There 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.'"

Key Design Inc. v. Moser, 138 Wn.2d 875, 881, 983 P.2d 653 (1999) (refusing to overrule 50-year old rule for real property conveyances that was "harsh and outdated and produce[d] inconsistency and uncertainty").

The Court must also consider the expectations of Washington voters. In a democratic society organized under a constitutional government of limited powers, *stare decisis* must be afforded its highest respect when a challenged constitutional rule has been repeatedly sustained by voters. The Court would risk its legitimacy if it were to turn its back on the unequivocal

will of the people on this record and rule by judicial fiat, especially on a political issue of tax policy. If sentiment has changed, the voters must express a will to change their Constitution through an initiative.

V. CONCLUSION

This Court should affirm the trial court's ruling that Seattle's Ordinance levies a tax on income that has not been expressly authorized by the Legislature, and it violates state law prohibiting net income taxes. The Court should decline to decide issues of Constitutional interpretation.

RESPECTFULLY SUBMITTED this 27th day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Response Brief of Levine and Burke Respondents to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated July 27. 2018.

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