No. 79447-7

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, *et al.*,

Respondents,

v.

CITY OF SEATTLE, *et al.*,

Appellants.

RESPONSE OF LEVINE AND BURKE RESPONDENTS TO BRIEF OF AMICUS CURIAE WASHINGTON STATE SENATORS AND WASHINGTON STATE REPRESENTATIVES

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I. INTRODUCTION[1]

Six state senators and eleven state representatives, repeating arguments made elsewhere in this case, ask this Court to intervene in the legislative arena.[2] The irony should not be lost that instead of following the constitutional mandate to pass a law expressly granting Washington cities the power to tax income, a small group of state legislators ask this Court to conclude, incorrectly, that the Legislature has already granted cities such power in the Optional Municipal Code even though no city has exercised and no court has recognized such a power in the 52 years since that Code's enactment. Instead of sponsoring legislation authorizing cities to tax income they seek refuge from political accountability by asking the courts to legislate for them.

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[1] Two groups of Respondents jointly file this brief answering the Washington State Senators' and Representatives' amicus brief. The "Levine Respondents" are Dena Levine, Christopher Rufo, Martin Tobias, Nicholas Kerr, Chris McKenzie, Alisa Artis, Lien Dang, Kerry Lebel, and Dorothy M. Sale. The "Burke Respondents" 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.

[2] The Amici Legislators are State Senators Sam Hunt, Karen Keiser, Patty Kuderer, Joe Nguyen, Rebecca Saldaña and Lisa Wellman and State Representatives Sherry Appleton, Eileen Cody, Lauren Davis, Beth Doglio, Laurie Dolan, Joe Fitzgibbon, Noel Frame, Mia Gregerson, Nicole Macri, Cynthia Ryu and Sharon Wylie. Amici Legislators' Br. at 1.

Amici ask this Court to rule, incorrectly, that taxing "total income"—as Seattle defines it—is not taxing "net income." And instead of convincing two-thirds of the members of each legislative chamber to approve referral of a constitutional amendment to the people and then a majority of voters to approve the amendment, the Amici Legislators "encourage the Supreme Court"[3] to ignore the State constitution's plain language (itself the result of a voter-approved constitutional amendment) and reverse nearly a century of constitutional precedent holding that income is property. In short, these legislators do not abide by fundamental constitutional norms, and more troubling, they evidently do not respect or trust democracy. This Court should decline their invitation to undermine the proper separation of legislative and judicial powers.[4]

The Amici Legislators' rehashed arguments fail for fundamental reasons that Burke and Levine Respondents have explained previously. The Legislature has not authorized cities to tax income; rather, the Legislature expressly prohibited cities from levying such taxes. And the

[3] Amici Legislators' Br. at 19.

[4] For this reason, the Burke and Levine Respondents have not set out to counter Amici Legislators by soliciting an opposing amicus brief from legislators opposed to granting cities the power to tax income. Such an intrusion into the judicial sphere for the improper purpose of asking the courts to assume legislative powers—as Amici Legislators do—is inappropriate and unseemly.

State constitution forbids a graduated income tax because income is property and must be taxed uniformly, if at all; this Court cannot rule otherwise. Indeed, the Amici Legislators' request for this Court to do what they themselves apparently have concluded they cannot secure the votes to do in the Legislature only highlights the fundamentally undemocratic underpinnings of the City's and EOI's arguments.[5]

This Court should decline the invitation of a handful of legislators to venture into the political arena and should affirm the trial court's summary judgment that Seattle's income tax is illegal and invalid.

II. ARGUMENT

A. The Legislature Did Not Authorize Seattle To Tax Income; In Fact, The Legislature Expressly Prohibited Such A Tax.

Amici Legislators ask this Court to do what the Washington Legislature has repeatedly refused to do: grant cities authority to impose an income tax. The constitution exclusively vests the Legislature with authority to delegate local taxing power. Wash. Const. art. VII, § 9; *id.*, art. XI, § 12. Without an ***express*** statutory grant of authority, cities have no constitutional or inherent power to impose taxes of any kind—much less an income tax. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151

[5] CP 712-718 (recounting EOI's failed effort to pass an income tax in the City of Olympia by initiative and describing follow-up coordination between the City of Seattle and EOI to pass the Ordinance).

Wn.2d 359, 366, 89 P.3d 217 (2004); *King County v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984).

Amici Legislators point to the Optional Municipal Code and claim "[n]o other authority is needed." Leg. Br. at 2-5. But the Code, and specifically RCW 35A.11.020, provides the City with no such authority. As Levine and Burke have explained, the Code was intended to give code cities the same tax authority as any other class of city, but it provides code cities (or, by virtue of RCW 35.22.570, first-class cities) with no independent taxing authority. *See Response Brief of Levine and Burke Respondents*, pp. 23-26; *Response of Levine and Burke to Amici Washington Cities*, pp. 1-6. Amici Legislators offer no new textual analysis, legislative history, or case law to support their erroneous interpretation. Amici also have no first-hand insight regarding legislative intent to contribute because the Code was enacted more than 50 years ago.

Amici Legislators argue that the Legislature has not preempted cities from enacting taxes on "total income," Leg. Br. at 5, but there is no need to resort to preemption analysis because the Legislature never authorized Seattle to impose such a tax in the first instance. Amici's reliance on *Watson v. City of Seattle*, 189 Wn.2d 149, 401 P.3d 1 (2017),

plainly fails for this reason.[6] In *Watson*, the Court determined that a tax on the purchase of guns and ammunition was a valid excise, authorized by RCW 35.22.280(32). *Id.* at 167-68. Having made that threshold determination, the Court then had to decide whether the tax was preempted by some other statute. Not so here. The lack of statutory authority for the City to tax income is the beginning and end of the analysis.

And, unlike *Watson* where there the court found no state statute preempting Seattle's excise tax on the purchase of guns and ammunition, in the present case a state statute expressly prohibits cities from imposing income taxes. On this issue, Amici Legislators bring nothing new to the table, either. Just like Seattle and EOI, Amici argue that because the City characterized its Ordinance as a tax on "total income," it somehow can avoid RCW 36.65.030's prohibition of taxes on "net income." Leg. Br. at 7. Here, too, Amici Legislators ignore the well-settled law cited by Levine and Burke showing that the City cannot define-away an applicable statutory prohibition. *Response Brief of Levine and Burke Respondents*,

[6] Amici's citation to *Lawson v. City of Pasco*, 168 Wn.2d 675, 230 P.3d 1038 (2010), is even more inapposite. *Lawson* has nothing to do with local taxing authority, but rather traditional police powers—a subject over which cities enjoy home-rule without statutory authority. Wash. Const. art. XI § 11. The Court applied straightforward preemption analysis and found no conflict between a local ordinance and state statutes.

pp. 29-31. The Ordinance either taxes "net income" or it doesn't; the City's characterizations, definitions and labels are meaningless.

For all the reasons set forth by Levine and Burke (and others), the Ordinance's tax on "total income" ***is*** a tax on "net income." *Id.* at 26-29; *see also Brief of Amici Curiae Greater Seattle Business Association and Ethnic Business Coalition*. On this equally dispositive issue, Amici Legislators are conspicuously silent. They don't dispute that "net income" as used in RCW 36.65.030 means gross income minus deductions. They don't dispute that "total income" as used in the Ordinance (derived from IRS Form 1040, line 22) records an individual's gross income less deductions for expenses and costs related to that income. Because total income is not gross income, and reflects deductions to gross income, it is—under all possible definitions of the term—"net income."

B. This Court Cannot Overturn Supreme Court Precedent Or Rule That Its Grounds Are No Longer Valid; The Power To Usher In An Income Tax Lies With the Legislature And The People.

The short-shrift Amici Legislators give to the statutory arguments betrays their true aim: urging the Supreme Court to overturn its binding precedents *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), and progeny. The Supreme Court has never wavered in holding that income is within the

extremely broad definition of "property" in our constitution—and, thus, a graduated income tax violates the constitution's uniformity clause. *See* Wash. Const. art. VII, § 1 (defining "property"). Because this case can and should be decided solely on statutory grounds, Washington law forbids the courts from reaching out to decide an issue of constitutional interpretation. *Tunstall v. Bergeson,* 141 Wn.2d 201, 210, 5 P.3d 691 (2000).

Amici Legislators insist, without citing any authority, that the Court of Appeals "can rule that the grounds which support[] precedent are no longer valid." *Id.* at 1, 17, 19. The power to reconsider Supreme Court precedent lies exclusively with that court. Under the principles of vertical *stare decisis* that apply here, a Washington Court of Appeals lacks the authority even to entertain a request to overturn binding Supreme Court precedent. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). The courts have reaffirmed this principle repeatedly and recently. *See* Burke and Levine Resp. to WSLC Amicus Br. at 3-5 (describing recent decisions that observe the binding effect of Supreme Court precedent on this Court). Like the WSLC Amici,[7] Amici Legislators are forced to admit as much: "The constitutionality of the tax

[7] *See* WSLC Amici Br. at 4-17 (Dec. 7, 2018) (Wa. Sup. Ct. No. 95295-7)

must ultimately be decided by the Washington Supreme Court." Amici Legislators' Br. at 1.[8]

If Amici Legislators wish to grant cities the power to impose taxes on income, recourse lies with Washington citizens and their elected representatives in the Legislature, through well-established democratic processes, not by *fiat* in the courts. The path is straightforward: enact legislation specifically authorizing local income taxes and repeal RCW 36.65.030. If Amici Legislators want an unequal, graduated income tax, convince two-thirds of the members of each house to approve referral of a constitutional amendment to the people and persuade a majority of Washington voters to amend the constitution.

[8] Also, like the WSLC Amici, the Amici Legislators seek to improperly expand the record of "harm." Amici Legislators' Br. at 7-15. They too, for example, cite heavily the *Who Pays?* advocacy piece that WSLC Amici sought to rely on heavily in their brief but was not in the record below. *Compare* Amici Legislators' Br. at 8-10 *with* WSLC Amici Br. 6, 8-11, 18. Amici Legislators seek to add even more evidence of "harm" that could have been introduced in the trial court below but was not. *See* Amici Legislators' Br. at 10-15 (citing Department of Revenue report on tax structure, various news articles, and the State's *own property tax hike* to show that the "regressive character of Washington's tax structure" causes "harm" for purposes of stare decisis). As Burke and Levine Respondents have shown, such efforts to expand the record are improper, Burke and Levine Resp. (Jan. 28, 2019) at 6-8, and the evidence proffered is not relevant or admissible in any event. *Id.* at 8-9. This Court should ignore it and, instead, examine the record evidence that shows the currently favorable tax environment has promoted opportunity and well-being for all in Seattle. *See id.* at 9-12.

As history shows, Washington voters have rejected this path time and again. Since 1934, Washington voters have voted down six attempts to amend the constitution to pave the way to graduated taxes on income.[9] Over roughly the same period, Washington voters also have rejected four statewide ballot proposals to codify an income tax by statute.[10] The most recent proposal was I-1098 in 2010, an initiative to levy a "progressive" graduated state tax on income which Intervenor-Appellant EOI strongly supported. CP 866, 910.[11] As they did when presented with the previous nine state income tax ballot measures, voters rejected I-1098 by a decisive margin—64% opposed it. Again and again, Washington voters have expressed their democratic intention that the constitutional prohibition on graduated income tax remain in its current, popularly-adopted form, and that the statutory prohibitions on income taxes not be changed. Under principles of stare decisis and constitutional avoidance, this Court should not and cannot substitute its will or the will of a handful of legislators for the will of the people.

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[9] 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).

[10] 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).

[11] I-1098 did not propose a constitutional amendment.

At the same time, this Court should ignore Amici Legislators' arguments that they should be saved the trouble of doing the hard work of passing legislation that would grant cities the express power to tax income, which they clearly lack at present, and of repealing current law which expressly prohibits cities from taxing income. It is the Legislature's job to make our State's laws, and if Amici Legislators believe their constituents support granting income tax authority to cities, they can easily pass such laws themselves. This Court should neither overturn the oft-expressed will of the people, nor offer a small group of legislators refuge from the political accountability attendant to following proper legislative processes.

III. CONCLUSION

For the reasons stated, *Burke* and *Levine* Respondents respectfully request that the Court reject Amici Legislators' statutory arguments that are duplicative of the City's and Intervenor-EOI's erroneous arguments and disregard their irrelevant policy arguments urging the Court to ignore *stare decisis*. This Court should respect the constitutional delegation of powers to the Legislature to make the laws and honor the will of Washington voters on the question of whether to redefine "property" in our State constitution or to tax income at all. The Amici Legislators' brief is an affront to constitutionally mandated democratic processes by which laws are to be made, amended and repealed.

RESPECTFULLY SUBMITTED this 25th day of February 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing document to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated February 25, 2019.

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February 25, 2019 - 2:56 PM

Transmittal Information

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Appellate Court Case Number:	79447-7
Appellate Court Case Title:	City of Seattle, Appellant/Cr-Respondent v. S. Michael Kunath, Respondent/Cr-Appellant
Superior Court Case Number:	17-2-18848-4

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