Case No. 97863-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

S. MICHAEL KUNATH, et al.,

Respondents,

v.

CITY OF SEATTLE, et al.,

Petitioners.

ANSWER OF SCOTT SHOCK, SALLY OLJAR, STEVE DAVIES, AND JOHN PALMER IN OPPOSITION TO THE PETITIONS FOR REVIEW FILED BY THE CITY OF SEATTLE AND ECONOMIC OPPORTUNITY INSTITUTE

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IDENTITY OF RESPONDENTS AND RELIEF REQUESTED

Respondents Scott Shock, Sally Oljar, Steve Davies, and John Palmer are residents of Seattle and are subject to the City's Wealth Tax Ordinance, which purports to impose an income tax on Seattle's "high-income residents," but which in truth reaches well into the middle class. Ordinance 125339, § 1(11) (attached as pages 37-67 to Petitioner City of Seattle's Appendix (Pet. App.)). For the sake of judicial economy, Shock incorporates the facts and arguments set out by the Levine and Burke Respondents and, for the reasons set forth in their response and for the reasons set forth below, requests that this Court deny the petitions for review filed by the City of Seattle and Economic Opportunity Institute (EOI).

INTRODUCTION

Review is inadvisable in this case because the petitions fail to disclose key facts and settled caselaw that will determine the case, regardless of whether this Court addresses Petitioners' arguments. Indeed, both petitions mischaracterize the state of the law at the time this Court decided *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933). *Culliton* did not create the rule that income is property out of whole cloth. In truth, this Court established the rule that a person's money is property decades earlier

in *Wolfe v. Parmenter*, 50 Wash. 164, 176, 96 P. 1047 (1908).[1] Thus, by the time this Court was asked whether individual income is property subject to the Uniformity Clause of Article VII, Section I, of the Washington State Constitution, the law was indeed settled. *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930). Petitioners' insistence that *Culliton* "was incorrect and unfounded at the time" is based on a knowing omission and does not warrant review. Seattle Pet. at 8. This Court's repeated conclusion that income is property subject to the uniformity requirement is based on a settled rule of property law that can only be changed by constitutional amendment. *Culliton*, 174 Wash. at 374-75; *see also Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 55 P.2d 1056 (1936); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951); *Apartment Operators Ass'n of Seattle v. Schumacher*, 56 Wn.2d 46, 351 P.2d 124 (1960); *Harbour Village Apartments v. City of Mukilteo*, 139 Wn.2d 604, 989 P.2d 542 (1999); *Washington Public Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003).

The City and EOI also fail to disclose a dispositive concession made by Seattle during summary judgment. The City's "wealth tax" imposes a

[1] Petitioners' failure to disclose this Court's pre-*Culliton* caselaw is inexcusable where the parties have argued that *Paramenter* is the root of the "income is property" rule throughout the proceedings.

tax on an individual's "total income." SMC §§ 5.65.020, .030. Yet, the City conceded below that income derived from "an asset such as money in a bank account, investment in a stock or bond, or real estate is property." CP 963-64 (Seattle Reply Br. at 16-17). With that concession, the City abandoned its original argument that *all income* should lose its character as property, arguing instead that only *earned income (i.e., wages)* should be stripped of its protected status. *Id*. The City's concession is fatal to Petitioners' arguments because the Ordinance, as written, levies an income tax on *all individual income*, including income derived from investments. SMC §§ 5.65.020, .030. Seattle's "wealth tax," therefore, unquestionably violates the Uniformity Clause by including investment income in its targeted tax. Thus, the results below are correct.

Review is furthermore inadvisable because Seattle and EOI ask for relief that this Court cannot grant without violating the Fifth and Fourteenth Amendments to the U.S. Constitution. A court's power does not include the ability "to eliminate or change established property rights." *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 736, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (Kennedy, J., concurring); *see also id.* at 715 ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by

regulation.") (Scalia, J., lead opinion); *see also Eilers Music House v. Ritner*, 88 Wash. 218, 224, 154 P. 787 (1916) (Where the Court "announced a rule of property, and property rights have become fixed and determined thereunder, . . . the doctrine of stare decisis demands it be followed, except as otherwise determined [by an act of legislation]."). The law is settled: income is property.

For that reason, the last time the government asked this Court to reverse its tax uniformity precedents, this Court admonished that, if the government believed that changed circumstances warrant a tax not currently allowed, then the proper course of action is to follow the legislative procedure to amend the Constitution. *Apartment Operators Ass'n*, 56 Wn.2d at 47-48. Only that procedure ensures that the people of Washington may take part in any debate whether to amend the Constitution and whether to change longstanding, statewide tax policy. *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 2605, 192 L. Ed. 2d 609 (2015) ("The Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights."). And only that procedure can craft a tax policy that is based on the express authorization, limitation, and oversight by the State Legislature. This Court should deny the petitions and direct the City and EOI, once again, to bring their tax policy arguments to the Legislature. *See Apartment Operators Ass'n*, 56

Wn.2d at 47-48 ("The argument is again pressed upon us that these cases were wrongly decided. The court is unwilling, however, to recede from the position announced in its repeated decisions.").

STATEMENT OF THE CASE

On July 10, 2017, the Seattle City Council voted to adopt Council Bill 119002 as part of a strategy to set up a "test case" in which the City could challenge the constitutional requirement that income taxes be uniform.[2] Four days later, former Seattle Mayor Ed Murray signed into law Ordinance 125339, titled in part, "AN ORDINANCE imposing an income tax on high-income residents."

The Ordinance imposes an annual "tax on the total income of every resident taxpayer." SMC §§ 5.65.020, .030. The ordinance does not impose the tax at a uniform rate as required by the Uniformity Clause. Instead, the Ordinance states that individuals who earn over $250,000 in total income per year, or married couples earning over $500,000 in total income per year, must pay a 2.25% income tax. SMC § 5.65.030(B). Persons with incomes below those amounts are subject to the tax Ordinance but, for the time being, are taxed at a rate of 0%. SMC § 5.65.030(B).

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

Despite stating that the tax is intended to target only "high-earners," the Ordinance does not limit the definition of "total income" to a high salary. Instead, an individual's "total income" can include moneys received from an investment, the sale of a home or business, an inheritance, and other occurrences. Thus, the Ordinance reaches far into the middle class, taxing small business owners (and others) who work their entire careers with the goal of funding their retirement through a sale of a business or other property. Such one-time occurrences in a middle-class family does not make them "high earners"—they are still middle class.

Shortly after the City enacted the tax, several Seattle residents challenged the Ordinance in four separately filed complaints in King County Superior Court, alleging that the City lacked authority to levy the income tax and contesting the constitutionality of the tax. Pet. App. at 49-52. The trial court consolidated the cases, ruled in favor of the consolidated plaintiffs on cross-motions for summary judgment and concluded, on statutory grounds, that the tax was unlawful and unenforceable. *Id*. at 55-62. The Court of Appeals affirmed the decision, but on the constitutional ground that the tax violated the Uniformity Clause. These petitions followed.

ARGUMENT AND AUTHORITIES

I

BINDING CASELAW FROM THIS COURT AND THE SUPREME COURT OF THE UNITED STATES PRECLUDES THE RELIEF SOUGHT BY SEATTLE

The petitions filed by Seattle and EOI should be denied because they ask this Court to grant relief that is not available. Specifically, Petitioners ask the Court to overrule settled caselaw establishing that earned income is personal property. The aim of this argument is to take earned income outside the purview of the Uniformity Clause. This Court, however, has long held that a decision establishing a rule of property law must be followed unless and until the Legislature acts to amend the law. *Eilers Music House*, 88 Wash. at 224 (Where the Court "announced a rule of property, and property rights have become fixed and determined thereunder, . . . the doctrine of stare decisis demands it be followed, except as otherwise determined [by an act of legislation]."). This limitation on the judicial branch is consistent with the Constitution's understanding that the judiciary exists to ensure constitutional protection of guaranteed rights and liberties, not to second-guess them. *See* Wash. Const. art. IV, § 28; *see also City of Seattle v. Evans*, 182 Wn. App. 188, 196 n.25, 327 P.3d 1303 (2014), *aff'd on other grounds*, 184 Wn.2d 856, 366 P.3d 906 (2015) (If a settled constitutional guarantee was subject to change based solely on the shifting needs of local

government, it would be no constitutional guarantee at all.). Petitioners' claims are before the wrong branch of government and should be denied. *Apartment Operators Ass'n*, 56 Wn.2d at 47-48 (directing government to bring its challenge to the uniformity requirement to the Legislature).

The relief sought by Petitioners is furthermore barred by the U.S. Supreme Court, which holds that a court's power does not include the ability "to eliminate or change established property rights." *Stop the Beach Renourishment*, 560 U.S. at 736 (Kennedy, J., concurring); *see also id.* at 715 ("If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.") (Scalia, J., lead opinion). A decision that extinguishes a settled rule of state property law violates the Fifth and Fourteenth Amendments of the U.S. Constitution. *Id*. To avoid this conflict with the federal Constitution, this Court should deny the petitions.

II

THE CITY'S TAX ORDINANCE IS A POOR VEHICLE FOR OVERRULING CASES ESTABLISHING BASIC CONSTITUTIONAL RIGHTS

Seattle's decision to levy an unequal tax on "all income" will remain unconstitutional regardless of whether this Court reconsiders past precedents holding that an individual's wages are personal property.

Review on the questions presented therefore cannot alter the result reached by the court below.

Seattle's attempt to set up a "test case" contained a fatal flaw: the City overreached when it levied a targeted tax on "all income" of so-called high earners. Faced with an overwhelming body of caselaw, the City conceded in its summary judgment pleadings that many types of income are properly classified as property:

> Income transformed into an asset such as money in a bank account, investment in a stock or bond, or real estate is property. That is different from income, which is money in motion but not yet realized by being turned into a tangible or intangible asset.

CP 963-64 (Seattle Reply Br. at 16-17); *see also*, *e.g.*, *Dean v. Lehman*, 143 Wn.2d 12, 35, 18 P.3d 523 (2001) (noting that "interest income 'is sufficiently fundamental that States may not appropriate it without implicating the Takings Clause'") (quoting *Schneider v. California Department of Corrections*, 151 F.3d 1194, 1201 (9th Cir. 1998)); *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172, 118 S. Ct. 1925, 141 L. Ed. 2d 174 (1998) ("[W]e hold that the interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161-64, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (finding a property right in

earned interest from a bank account; the government cannot, by *ipse dixit*, declare one's money "public" without compensation).

Seattle's concession is determinative of this case. The City's tax, by its plain terms, levies a tax on "the total income of every resident taxpayer" (SMC §§ 5.65.020, .030), which includes the very type of investment income that the City agrees is correctly characterized as property. CP 963-64. This uncontested fact establishes a plain violation of the Uniformity Clause. Therefore, there is no need for this Court to address the City's revised argument that *earned income* should not share the same constitutionally protected status as unearned income.[3] *Walker v. Munro*,

[3] Even so, Petitioners' argument regarding earned income conflicts with decisions of the U.S. Supreme Court. *See*, *e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S. Ct. 2863, 81 L. Ed. 2d 815 (1984) (finding a common law property right in the fruits of one's labor when considering whether trade secrets constitute property) (citing 2 W. Blackstone, *Commentaries*; J. Locke, *Second Treatise of Civil Government*, ch. 5 (J. Gough ed. 1947)); *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337, 340-41, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (wages constitute constitutionally protected property that may not be taken absent procedures mandated by the Due Process Clause); *Blair v. Comm'r of Internal Revenue*, 300 U.S. 5, 12, 57 S. Ct. 330, 81 L. Ed. 465 (1937) (recognizing that income is a present and transferable property interest); *Hoeper v. Tax Comm'n of Wis.*, 284 U.S. 206, 215, 52 S. Ct. 120, 76 L. Ed. 248 (1931) (a tax on income must comply with due process). The argument also conflicts with numerous decisions from other jurisdictions. *United States v. Skowron*, 839 F. Supp. 2d 740, 750 (S.D.N.Y. 2012), *aff'd*, 529 F. App'x 71 (2d Cir. 2013) ("Money paid in salary is property."); *United States v. Thompson*, 647 F.3d 180, 186-87 (5th Cir. 2011) (a person's labor is property); *United States v. Bahel*, 662 F.3d 610, 648-49 (2d Cir. 2011) (A salary is "plainly 'property.'"); *Eguia v. Tompkins*, 756 F.2d 1130, 1138 (5th Cir. 1985) ("There can be no doubt that the plaintiff's interest in his salary . . . is a property interest protected by the Constitution."); *Orloff v. Cleland*, 708 F.2d 372, 378 (9th Cir. 1983) ("It is obvious that Orloff had a property interest in his salary."); *Opinion of the Justices*, 95 N.H. 537, 539, 64 A.2d 320 (1949) (income is property for purposes of uniform statute requirement); *Dunbar v. Johnston*, 170 S.C. 160, 169 S.E. 846, 847 (1933) (an individual's interest in her wages or salary is a property right); *Eliasberg Bros. Mercantile Co. v. Grimes*, 204 Ala. 492, 494, 86 So. 56 (1920) ("[W]hile 'income' is a complex conception of elements and units which may be, and usually are, acquired,

124 Wn.2d 402, 415, 879 P.2d 920 (1994) (The Court will not issue advisory opinions regarding constitutional rights.).

III

REVIEW IS INADVISABLE BECAUSE THE PETITIONS MISSTATE THE LAW

Petitioners' argument to overturn this Court's "income is property" decisions relies on an incomplete statement of Washington's tax history and relevant caselaw. The City and EOI claim that this Court did not actually rule that income is property in *Aberdeen Savings & Loan*. Seattle Pet. at 8. As a result, they argue that *Culliton* was mistaken when it cited *Aberdeen Savings & Loan* for the proposition that income is property. *Id*. That argument, however, omits several on-point decisions that preceded those opinions.

The "income is property" rule finds it roots in *Parmenter* where this Court ruled that money becomes property immediately upon its receipt (*i.e.*, income) and, therefore, an individual's money cannot be held exempt from the State's property tax.[4] 50 Wash. at 176-77; *State ex rel. Atwood v.*

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and used or disposed of at different times, its elements and units are in the most literal sense wealth and property—none the less so because their possession is transient and their identity easily and quickly lost.").

[4] *Parmenter*, however, concluded that intangible property was distinctly different and did not qualify as property (and therefore not subject to taxation). *Parmenter*, 50 Wash. at 176-77. That conclusion sparked the tax revolt that resulted in the 1930 amendment to the Uniformity Clause that expanded the definition of property to "include[e] everything, whether tangible or intangible, subject to ownership." Wash. Const. art. VII, § 1. Thus, Petitioners' argument that the modern definition was adopted only to capture intangible

Wooster, 163 Wash. 659, 662, 2 P.2d 653 (1931) (money is property); *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 44, 275 P. 74 (1929) (money is property). Thus, by the time this Court considered the equal protection challenge in *Aberdeen Savings & Loan*, the threshold question of whether income constituted constitutionally recognized property interest was in fact established.[5] 157 Wash. at 361. Petitioners' insistence that *Aberdeen Savings & Loan* failed to address the question whether an income tax is a tax on property is directly refuted by the Court's opinion on rehearing the case:

> In order to clarify the situation, the court now states that the opinions above cited were rendered with a view to determining the questions presented by the cases at bar, and those questions only; that the majority of the court was of the opinion that the legislation therein attacked must be held, under the decisions of the Supreme Court of the United States, to attempt to establish a property and not an excise or corporation franchise tax . . .

Washington Mut. Sav. Bank v. Chase, 157 Wash. 351, 392, 290 P. 697 (1930). There can be no question, therefore, that *Culliton* correctly cited

property and not income is technically correct, but misleading because the Court had held income subject to property taxation decades earlier. 50 Wash. at 176-77.

[5] The City's discussion of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928), Seattle Op. Br. at 18-22, has no bearing on the issues presented here. Although *Aberdeen Savings & Loan* followed that decision, *Culliton* did not rely on any of the conclusions relating to the federal Equal Protection Clause when determining that income is subject to the Uniformity Clause. At most, *Culliton* relied on the threshold determination that a tax on income implicates a federally protected right subject to the protections guaranteed by the Fourteenth Amendment, but that aspect of *Quaker* is not challenged and remains valid to date.

Aberdeen Savings & Loan for the settled rule that income constitutes property as defined by the Constitution.

Contemporaneous precedent—also overlooked by the Petitioners—offer even more support for *Culliton*'s conclusion that an income tax is a property tax. On the same day that it issued *Culliton*, this Court also issued its decision in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933). There, the Court reviewed a statute imposing an excise tax on business. *Id*. at 407. At the outset, the Court distinguished an excise tax from an income tax, confirming that, "[w]hen acquired, income immediately becomes property in the hands of the acquirer, and it is, of course, taxable with other property of the same class." *Id*. (concluding that a tax on the privilege of engaging in business is not an income tax). Petitioners' claim that *Culliton* was "incorrect and unfounded" is baseless.

Even so, Petitioners' strategy of attacking the legal character of individual income (rather than seeking reform of the uniformity requirement) presents serious legal and policy concerns that militate strongly against review. Indeed, the argument that wages should not receive the same protection that is due to other types of income threatens to undermine the fundamental understanding that each person has a property interest in his or her labor. *Patton v. City of Bellingham*, 179 Wash. 566, 574, 38 P.2d 364 (1934) ("The right to labor . . . is a right of property.");

see also S. Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emp. of Am., 205 Miss. 354, 379, 38 So. 2d 765, 771 (1949) ("Labor is property."); *Bayonne Textile Corp. v. Am. Fed'n of Silk Workers*, 114 N.J. Eq. 307, 316, 168 A. 799, 804 (1933) ("Labor is property; capital is property; both must be equally safeguarded."); *Branson v. Indus. Workers of the World*, 30 Nev. 270, 95 P. 354, 361 (1908) ("The right to labor is property. It is one of the most valuable and fundamental of rights.").

A decision that treats wages differently than unearned income would strike at the heart of personal sovereignty. Recall Frederick Douglass's account of walking toward the wharves shortly after he arrived in New Bedford. Mr. Douglass saw a pile of coal in front of the Reverend Peabody's home and asked Mrs. Peabody if he might put the coal away. She agreed and paid Mr. Douglass two silver half dollars for his work. Mr. Douglass recounted the immense pride he felt from his earnings:

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

Frederick Douglass, *Life and Times of Frederick Douglass Written by Himself* 259 (Boston: De Wolfe & Fiske Co., 1892).

Seattle and EOI would tell Mr. Douglass that those coins were not his property after all. Worse yet, Petitioners ask this Court to characterize income in a manner that would deepen the divide between the poor and wealthy by providing constitutional protection for those who can readily invest income into assets, while depriving people who live paycheck-to-paycheck of the same constitutional protections. The Petitioners' characterization of earned income is an argument of expedience—not justice—and does not warrant review.

CONCLUSION

Petitioners ask this Court to use an axe to do a scalpel's job. Questions of statewide tax policy are properly decided by the Legislature, which operates subject to the will of the people. Only that process guarantees that all voices are heard and all contingencies are vetted before making such an abrupt change to statewide tax and constitutional policy. *Belas v. Kiga*, 135 Wn.2d 913, 937-38, 959 P.2d 1037 (1998) (Protecting individuals against arbitrary and discriminatory taxation through the uniformity requirement remains the "highest and most important of all requirements applicable to taxation under our system."). Moreover, Petitioners' arguments against the State's current tax policy are not presented by the facts of this case. Seattle's "high earner" tax is not a

progressive tax—it is a targeted tax.[6] The income tax, moreover, did not roll-back any of the taxes that Petitioners identify as contrary to its preferred policy; instead, the City contemporaneously adopted several new taxes that place an undue burden on the poor. *See* Daniel Gilbert & Daniel Beekman, *Behind Seattle's government spending spree: a deluge of taxes, six-figure pay and officials eager to do more*, Seattle Times, Dec. 21, 2017.[7] This Court should decline to engage in Petitioners' theoretical tax policy arguments. *Walker*, 124 Wn.2d at 415 (The court will not render judgment on a hypothetical or speculative controversy.). The petitions should be denied.

DATED: January 30, 2020.

Respectfully submitted,

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[6] The Ordinance's co-sponsor, Seattle City Councilmember Kshama Sawant, stated that her proposal to impose a "tax on Seattle's rich" is part of a larger "battle" against wealthy citizens and was motivated by her belief that the "capitalist class" actively works to "undercut" the policies that she supports. *Seattle Answers Trump's War on Workers by Taxing the Rich*, the Real News Network (July 12, 2017) http://therealnews.com/stories/ksawant0711tax; *see also "Tax the Rich! Town Hall with Kshama Sawant & Trump-Proof Seattle*" (May 19, 2017) https://www.youtube.com/watch?v=DAqBWiIU-J8.

[7] https://www.seattletimes.com/seattle-news/times-watchdog/seattle-went-on-a-government-spending-spree-with-a-deluge-of-taxes-six-figure-pay-and-officials-eager-to-do-more/

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