No. 23-171

In the Supreme Court of the United States

CHRIS QUINN; CRAIG LEUTHOLD; SUZIE BURKE; LEWIS RANDALL; RICK GLENN; NEIL MULLER; LARRY AND MARGARET KING, AS INDIVIDUALS AND THE MARITAL COMMUNITY COMPRISED THEREOF; AND KERRY COX,

PETITIONERS,

v.

STATE OF WASHINGTON; DEPARTMENT OF REVENUE; AND VIKKI SMITH, DIRECTOR OF THE DEPARTMENT OF REVENUE,

RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Washington is one of forty-two states that apply an excise tax on certain capital gains earned by their residents. Washington's tax applies to gains earned from sales of tangible property in Washington and sales of intangible property (e.g., stock) anywhere by Washington residents. Petitioners effectively concede that these applications of the tax are constitutional. To prevent tax evasion, the tax also applies to gains earned from selling certain tangible property removed from Washington during the tax year. Petitioners challenge this aspect of the tax even though (1) they have offered no evidence that they paid the tax at all, much less on out-of-state sales; (2) they have not cited a single case invalidating anything like Washington's tax; (3) the tax provides credits to ensure that Washingtonians do not face double taxation on the same gains; and (4) other states' capital gains taxes likewise apply to gains earned by their own residents from these types of transactions, so Washington's tax is substantively indistinguishable for Commerce Clause purposes. The questions presented are:

1. Do Petitioners have standing to challenge alleged out-of-state application of Washington's capital gains tax when they have not shown that they pay the tax at all, much less based on out-of-state activities?

2. If Petitioners have standing, should this Court declare that state capital gains taxes cannot apply to gains earned by their residents from out-of-state transactions even though that is a universal feature of such taxes and no court has ever so held?

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INTRODUCTION

The question Petitioners ask this Court to resolve is one they lack standing to raise and is not presented by this case. Moreover, the decision below creates no conflict with any decision of this Court or any lower court. There is no basis for certiorari.

In 2021, Washington became the forty-second state to adopt a capital gains tax. Most states that tax capital gains do so through their income tax systems, as a form of excise tax, and they tax their residents' gains regardless of where the transaction that generated the gain took place. In terms of its effect on interstate commerce, Washington's tax is nearly identical, but because Washington has no income tax, its capital gains tax is structured as a standalone excise tax. Washington's tax applies to *fewer* out-of-state gains than do the capital gains taxes of other states, and Washington offers a full credit if another state has taxed the same gain.

Petitioners are individuals who oppose the tax, but they have never alleged or showed that they actually pay it. They filed suit before the tax was even signed into law, and although they were allowed to proceed in state court under Washington's liberal standing rules, to invoke this Court's jurisdiction they must show Article III standing. They cannot.

Petitioners' claim here is that Washington's tax violates the dormant Commerce Clause when applied to gains earned from sales outside of Washington, but they have not shown that they owe the tax at all, much less based on out-of-state sales. They thus can show no injury from the aspect of the tax they claim is unconstitutional. They lack standing.

Even if Petitioners had standing to bring this case, they misrepresent the question that this Court would need to decide. The Petition describes the question presented as whether a state may tax "out-of-state transactions involving only out-of-state property." Pet. i. In fact, Washington's tax applies to gains earned from three types of transactions: (1) sales of tangible property in Washington; (2) sales of intangible property (like stocks) anywhere by Washington residents; and (3) to prevent tax evasion, sales of tangible property that was removed from Washington during the taxable year. Pet. App. 113-14 (Wash. Rev. Code § 82.87.100(1)). Petitioners explicitly concede that Washington may tax gains from the first category of transactions. Pet. 12 n.2. They effectively concede that Washington may tax gains from the second category, Pet. 19, a concession required by this Court's many cases holding that states may tax their residents' transfers of intangible property wherever they occur. Thus, if the Court were to grant review, the only question presented would be whether Washington's tax may be applied to gains from the third category of sales, a category Petitioners have not even alleged they made. Even if they had, Washington offers a full credit against its tax for any tax paid to another state based on the same gains, a practice this Court has long recognized as addressing any potential Commerce Clause issue.

Besides lacking standing and twisting the question presented, Petitioners have cited no case conflicting with the decision below. They claim that the Washington Supreme Court ignored a per se rule created by three of this Court's decisions that States may never tax gains from out-of-state transactions.

But they never cited those cases to the Washington Supreme Court, likely because they are inapposite and involved dramatically different state taxes. In reality, states routinely impose taxes on gains their residents earn from activities in other states, a practice this Court has upheld for decades. And the Court has upheld a range of measures States have used to prevent their residents from evading taxes by moving property out of state. Meanwhile, the only lower court case Petitioners cite, *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015), did not involve state taxes at all and explicitly emphasized that it was not applying this Court's dormant Commerce Clause tax cases. *Id.* at 1324.

Finally, although this Court has repeatedly emphasized that the constitutionality of state taxes depends on their real-world impact rather than nomenclature, Petitioners ask this Court to invalidate parts of Washington's tax based on features materially indistinguishable from the capital gains taxes of forty-one other states. Under every state's capital gains tax system of which Washington is aware, taxpayers residing in the state owe tax on gains from out-of-state sales of tangible property, such as artworks, gold, or real estate. Washington's tax is far more limited, because it applies only to gains from selling tangible property removed from Washington during the tax year and grants a full credit whenever another state taxes the same gain. Petitioners do not and cannot explain why Washington's narrower tax would be uniquely unconstitutional when its impact on interstate commerce (if any) is substantively indistinguishable from that of every other state's capital gains tax. The Court should deny certiorari.

STATEMENT OF THE CASE

A. Washington Joins the Overwhelming Majority of States to Have Enacted a Capital Gains Tax

Washington is one of forty-two states that imposes an excise tax on capital gains. Pet. App. 10 (citing Elizabeth McNichol, *State Taxes on Capital Gains*, Ctr. on Budget & Policy Priorities (June 15, 2021), https://www.cbpp.org/research/state-budget-and-tax/state-taxes-on-capital-gains).[1] Most of these states tax capital gains as part of their net income tax regimes, not (like Washington) as a stand-alone excise tax. But under decisional law from this Court and virtually every state, income taxes are a type of excise tax. *See, e.g.*, *Hale v. Iowa Bd. of Assessment & Revenue*, 302 U.S. 95, 104 n.7 (1937) (collecting cases); *Dooley v. City of Detroit*, 121 N.W.2d 724, 728 (Mich. 1963) (same).[2]

Washington enacted its capital gains excise tax in 2021. 2021 Wash. Sess. Laws 1229-39 (ch. 196). The law, codified in Washington Revised Code 82.87,

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[1] The states that do not currently tax capital gains are Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, and Wyoming. David Rae, *States with Low or No Capital Gains Taxes*, Forbes (Online) (July 10, 2023), https://www.forbes.com/sites/davidrae/2023/07/10/states-with-low-or-no-capital-gains-taxes/?sh=72e161b994c1.

[2] The federal income tax is also considered an excise tax. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 16-17 (1916) ("[T]axation on income [is] in its nature an excise entitled to be enforced as such[.]").

implements a narrowly tailored, seven percent tax on gains derived from the sale or exchange of certain long-term capital assets.[3]

The Washington legislature's stated objective for the tax is two-fold. *See generally* Pet. App. 11 (Washington Supreme Court's discussion of legislative objectives). First, the tax is designed to advance the "paramount duty of the state" to amply fund education by "invest[ing] in the ongoing support of K-12 education and early learning and child care[.]" Pet. App. 98 (Wash. Rev. Code § 82.87.010). The tax is projected to raise nearly $2.5 billion over its first six years to support these priorities. Pet. App. 13.

Second, the capital gains tax will "mak[e] material progress toward rebalancing the state's tax code[,]" which is the "most regressive in the nation[.]" Pet. App. 99 (Wash. Rev. Code § 82.87.010). Under Washington's historic tax system, "[t]he poorest individuals bear the greatest tax burden due in large part to [Washington's] heavy reliance on sales taxes and the lack of a graduated income tax[.]" Pet. App. 3. The capital gains excise tax is a step towards a fairer tax system that "works . . . to help all Washingtonians grow and thrive." Pet. App. 99 (Wash. Rev. Code § 82.87.010).

The tax is designed as an excise tax, not a property tax. Pet. App. 103 (Wash. Rev. Code § 82.87.040(1)). That is, it is not imposed on the value

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[3] A copy of the complete Washington capital gains tax code is at Pet. App. 98-121.

of assets as of a particular date, as would be the case with a property tax, but rather when certain long-term capital assets are sold or exchanged and the taxpayer receives a gain. A long-term capital asset is an asset such as stocks, bonds, or valuable artwork held for more than one year. Pet. App. 101 (Wash. Rev. Code § 82.87.020(6)).

The tax is measured by the taxpayer's "Washington capital gains." Pet. App. 101 (Wash. Rev. Code § 82.87.040(1)). That amount is computed by starting with an individual's federal net long-term capital gain and making specific additions and subtractions to arrive at the Washington taxable gain. Pet. App. 99-100, 102 (Wash. Rev. Code § 82.87.020(1), (13)).

Most relevant here, the state legislature excluded gains with no connection to Washington by establishing a detailed allocation process in Wash. Rev. Code § 82.87.100. *See* Pet. App. 113-15. In general, that provision allocates to Washington the long-term capital gains from the sale or exchange of tangible personal property located in Washington and intangible property (like stocks) owned by an individual domiciled in the state. Pet. App. 113-14 (Wash. Rev. Code § 82.87.100(1)(a), (b)). Tangible property that was formerly located in Washington during the taxable year, but removed by a Washington resident owner prior to sale, is included in the measure of the tax so long as the gain is not subject to an income or capital gains tax by another state. Pet. App. 114 (Wash. Rev. Code § 82.87.100(1)(a)(i)-(iii)). In this way, a Washington resident may not

avoid all state tax on gains from the sale or exchange of tangible property by removing the property temporarily to another state.

In addition to these detailed allocation provisions, the Washington legislature included a credit to prevent the tax from applying to "the amount of any legally imposed income or excise tax paid by the taxpayer to another taxing jurisdiction on capital gains derived from capital assets within the other taxing jurisdiction[.]" Pet. App. 114 (Wash. Rev. Code § 82.87.100(2)(a)). Together, the allocation and credit provisions ensure that capital gains are subject to the Washington tax only when there is a constitutional connection with Washington and no other state is lawfully taxing the same gains.

To achieve its goal of imposing the tax "without exacerbating existing tax inequities," Pet. App. 12, the Washington legislature provided generous deductions and exemptions. For example, an individual's first $250,000 in capital gains each year are exempt from the tax. Pet. App. 109 (Wash. Rev. Code § 82.87.060(1)). Gains derived from the sale of a qualified family-owned small business are also exempt. Pet. App. 109 (Wash. Rev. Code § 82.87.070(1)). In addition, the legislature exempted gains from the sale or exchange of most real estate. Pet. App. 105 (Wash. Rev. Code § 82.87.050(1)). Assets held in various retirement accounts are also exempt from the tax. Pet. App. 107 (Wash. Rev. Code § 82.87.050(3)).

B. The Washington Supreme Court Upholds the Tax

Almost a year before Washington's capital gains excise tax took effect, and even before it was signed into law, a group of nine Washington residents (the "Quinn" plaintiffs, now Petitioners) filed an action challenging the tax. A second, almost identical lawsuit was filed soon after by a different group of plaintiffs: the "Clayton" plaintiffs, who have not petitioned for certiorari. The trial court consolidated both actions. The State, along with a group of intervenors, defended the tax. Pet. App. 13-14.

The Quinn and Clayton plaintiffs raised mostly state constitutional claims, asserting that Washington's tax constituted a "property tax" that violated certain aspects of the Washington constitution, and that the tax violated the state's "privileges and immunities clause." Pet. App. 2, 13; *see also* Wash. Const. art. VII, §§ 1, 2 (imposing uniformity and levy restrictions on property taxes); Wash. Const. art. I, § 12 (Washington's privileges and immunities clause). Petitioners also alleged that the tax violated the dormant Commerce Clause. Pet. App. 2, 13.

The State challenged Plaintiffs' standing. The trial court found that Plaintiffs had standing under Washington law.

Because the opponents of the tax raised only facial constitutional challenges, the trial court determined the legality of the tax on cross motions for summary judgment. Pet. App. 14.

The court invalidated the tax on state law grounds, ruling that the tax had certain "hallmarks" of a broad-based net income tax, rendering it a property tax under state court precedent. Pet. App. 14, 31, 90. Having determined that the tax was a property tax, the court held that it violated Washington's constitution. Pet. App. 14, 93. The court did not address Plaintiffs' other claims.

The Washington Supreme Court reversed. Pet. App. 2, 49. It first rejected all of Plaintiffs' state constitutional claims, holding that the Washington tax was an excise tax, not a property tax, and that the tax did not implicate the state's constitutional limits on property taxes or violate any privileges or immunities recognized under Washington law. Pet. App. 17-40. The Court next thoroughly analyzed and rejected Plaintiffs' lone federal constitutional claim, under the dormant Commerce Clause. Pet. App. 40-49. Based on its application of this Court's modern dormant Commerce Clause precedent, the Washington Supreme Court held that the tax satisfied "all four elements of the *Complete Auto* test" and, consequently, the opponents of the tax "failed to demonstrate a dormant commerce clause violation[.]" Pet. App. 49 (referring to *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

Petitioners did not raise, and the Washington Supreme Court therefore did not address, any arguments under the Due Process Clause or other principles of federal constitutional law. *See generally* BIO App. 61a-65a (claims not raised below); Pet. App. 40-49 (unraised claims not addressed by the

Washington Supreme Court). Petitioners also did not cite the primary cases they now rely on. BIO App. 5a-9a. (failing to cite *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80 (1948), *American Oil Co. v. Neill*, 380 U.S. 451 (1965), and *Sam Francis Found.*, 784 F.3d 1320).

REASONS TO DENY REVIEW

Petitioners fail to establish an injury in fact related to their claims. None of them has demonstrated that they have ever paid or imminently will pay Washington's capital gains tax, much less that they will do so on allegedly out-of-state transactions. Petitioners thus have not shown that this Court has jurisdiction over this case.

Petitioners also fail to establish any basis for review. The decision below involved mostly state constitutional issues. On the federal side of the ledger, Petitioners acknowledge that they raised only a dormant Commerce Clause claim. Pet. 11; *see also* Pet. App. 2 (listing petitioners' state and federal constitutional claims); Pet. App. 13 (same). The Washington Supreme Court's decision correctly rejected that claim and presents no conflict with any decision of this Court or any lower court.

A. Petitioners Lack Article III Standing Because They Fail to Establish Injury in Fact Related to their Claim

Petitioners lack Article III standing to seek review by this Court. They claim that Washington's tax is unconstitutional when applied to gains from transactions outside of Washington, but they have not alleged or showed that they owe Washington's capital

gains tax at all, much less that any of them paid tax on gains from out-of-state transactions. They thus can show no injury to themselves from the constitutional violation they allege, and it is a bedrock principle that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others[.]" *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

As the parties seeking to invoke federal jurisdiction, Petitioners bear the burden of establishing standing at each stage of the proceedings. *Doremus v. Bd. of Educ. of Borough of Hawthorne*, 342 U.S. 429, 434-35 (1952); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). This is no less true when this Court is reviewing a decision from a state court. *Doremus*, 342 U.S. at 434-35. While the trial court here found that plaintiffs had standing under Washington's far more liberal standing rules (and based on theoretical future injury), that is irrelevant because "[t]he constitutional and prudential considerations [of Article III standing] are peculiarly federal in nature." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). In other words, "the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override [the Court's] settled law to the contrary." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013); *accord Waller v. Georgia*, 467 U.S. 39, 43 n.3 (1984) ("The fact that the Georgia Supreme Court found standing does not permit us to avoid the responsibility of ensuring that our order will be other than advisory.").

The "irreducible constitutional minimum" for standing contains three requirements: (1) an "injury in fact" that is "concrete" and "actual or imminent, not conjectural or hypothetical"; (2) "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant"; and (3) "redressability—a likelihood that the requested relief will redress the alleged injury." *Steel Co.*, 523 U.S. at 102-03 (internal quotation marks omitted); *accord DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).

Here, Petitioners fail to meet the first "and foremost" requirement of showing an actual injury on multiple levels. *See Steel Co.*, 523 U.S. at 103. To begin with, they have presented no evidence that they have ever been subject to Washington's capital gains tax at all. They filed suit before the capital gains tax went into effect, and their Complaint includes no allegations that any of Petitioners had been assessed or would owe *any* tax. *See generally* BIO App. 55a-66a. Instead, Petitioners alleged that they own capital assets and "*would be* subject to the capital gains tax in ESSB 5096 *if* they realized capital gains and would incur a tax liability on capital gains in excess of $250,000." BIO App. 58a (emphases added). These allegations are plainly insufficient to establish Article III injury. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (theory of "future injury is too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending'").

Even if Plaintiffs could show that any of them has paid Washington's capital gains tax, their constitutional claim is premised on the idea that Washington is impermissibly taxing out-of-state transactions, but they have offered no evidence whatsoever that any tax they might owe is due to out-of-state transactions. They thus lack standing to challenge the tax's constitutionality on this basis. *Broadrick*, 413 U.S. at 610; *New York v. Ferber*, 458 U.S. 747, 767 (1982) (same).

The Court should deny the petition because it lacks jurisdiction to hear the case.

B. There Is No Conflict With This Court's Decisions

1. The Washington Supreme Court's Decision Does Not Conflict with any of This Court's Decisions Newly Cited by Petitioners

Petitioners claim that the Washington Supreme Court created a conflict with this Court's decisions by ignoring three cases—cases Petitioners never cited below—that supposedly create a per se rule prohibiting taxes like Washington's. *See* Pet. 15 (citing *McLeod*, 322 U.S. 327; *Memphis Nat. Gas Co.*, 335 U.S. 80; *American Oil Co.*, 380 U.S. 451). But none of those cases involved taxes remotely like Washington's. And contrary to Petitioners' argument, this Court has repeatedly upheld excise taxes based on the taxpayer's domicile regardless of where the underlying transaction occurs. Accepting Petitioners' view would upend longstanding state tax policies and elevate form over substance, directly contrary to this Court's direction.

Washington's tax applies to gains generated by three types of transfers, as detailed in the part of the statute allocating gains to Washington: (1) tangible personal property sold in Washington; (2) intangible personal property sold by a Washington-domiciled resident; and (3) tangible personal property temporarily removed from Washington State before sale by a Washington-domiciled resident. Wash. Rev. Code § 82.87.100(1)(a). None of the cases cited by Petitioners involved any of these circumstances.

With respect to the first category, Petitioners concede that Washington can tax tangible personal property sold in Washington State. Pet. 12 n.2. This "has long been settled" law. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995). None of the cases cited by Petitioners suggest otherwise.

As to the second category, Petitioners concede that "States can . . . tax residents' sale of *intangible* property, which has no location, even if the parties designate the locus of the transaction to be elsewhere[.]" Pet. 19. (citing *Curry v. McCanless*, 307 U.S. 357, 367-69 (1939)). Petitioners then misrepresent a quote from *Curry* to suggest that this rule applies only where "the owner of [the] intangibles confines his activity to the place of his domicile." Pet. 19-20 (alteration in original) (quoting *Curry*, 307 U.S. at 369). In reality, *Curry* imposed no such limitation, holding: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for

imposing on him a tax on the use and enjoyment of rights in intangibles[.]" *Curry*, 307 U.S. at 366. When the Court later discussed the taxpayer "confin[ing] his activity to the place of his domicile[,]" Pet. 19-20 (quoting *Curry*, 307 U.S. at 369), it was addressing the ability of *another state* besides the taxpayer's domicile to tax the same intangibles. The Court said that "when the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state," then that other state could *also* impose a tax. *Curry*, 307 U.S. at 367. But "it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax[.]" *Id.* at 368. Thus, it is black letter law that when a person transfers intangible property, the state of their domicile may tax that transfer, even if the transfer occurred elsewhere. *See, e.g.*, *Curry*, 307 U.S. at 366-67; *Graves v. Elliott*, 307 U.S. 383, 386 (1939) ("[T]he power of disposition of property is the equivalent of ownership. It is a potential source of wealth and its exercise in the case of intangibles is the appropriate subject of taxation at the place of the domicile of the owner of the power."); *Pearson v. McGraw*, 308 U.S. 313, 318 (1939) (same); *Central Hanover Bank & Trust Co. v. Kelly*, 319 U.S. 94 (1943) ("It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state,

keeps the paper evidences of the intangibles outside its boundaries.”).[4]

None of the cases relied on by Petitioners for their alleged extraterritoriality claim alters this black letter law or even involves the sale of intangible property. Each case instead dealt exclusively with the sale of *tangible* property.

As to the third category of gains included in the measure of the Washington tax, Petitioners’ cited cases similarly do not apply to the sale of tangible personal property temporarily removed from the state. At the outset, Petitioners have not shown they have even sold tangible personal property outside the state or paid any Washington capital gains taxes in such circumstances, and as explained above, Petitioners thus cannot establish any injury necessary to establish Article III standing to challenge this aspect of the law.

Equally as important, Petitioners cannot demonstrate a reviewable conflict because none of their cases address the unique circumstances in which the Washington capital gains tax applies. In *McLeod*, for example, all aspects of the sale occurred in

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[4] This power extends not only to the right of the domiciliary state to tax the sale itself, but to tax income derived from the sale of intangibles. *Lawrence v. Tax Comm’n of Mississippi*, 286 U.S. 276, 279 (1932); *People of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937). This established jurisdictional principle is over a century old. *See Bullen v. Wisconsin*, 240 U.S. 625, 631 (1916). And the rule applies even if another state has jurisdiction to tax intangible property for some other reason. *Curry*, 307 U.S. at 368, 373; *Tax Comm’n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942).

Tennessee, including the seller's domicile and the consummation of the sale. On these facts, this Court held that Arkansas lacked authority to tax the "interstate transaction" under the then-prevailing interpretation of the Commerce Clause. *McLeod*, 322 U.S. at 330. But Washington's tax is not remotely comparable. It applies only in the rare circumstance where a Washington resident temporarily takes a highly valuable capital asset, such as jewelry or fine art, out of state to sell in a year in which they make over $250,000 in qualifying capital gains. *McLeod* does not address such circumstances.

Petitioners' reliance on *Memphis Natural Gas Co.* is even more tenuous. There, the Court *upheld* Mississippi's franchise tax on an out-of-state pipeline company measured by the value of the taxpayer's in-state property. *Memphis Nat. Gas Co.*, 335 U.S. at 80-81. Petitioners misquote *Memphis Natural Gas Co.* as adopting a broad rule against a state taxing an "event" occurring outside a state's boundaries. What *Memphis Natural Gas Co.* actually held is that a state does not have the authority to tax a "taxable event [that] is outside its boundaries *or [] a privilege the state cannot grant*." *Memphis Nat. Gas Co.*, 335 U.S. at 95 (emphasis added) (citation omitted). But in identifying the taxable incident, *Memphis Natural Gas Co.* also held that this Court is ordinarily "bound by the construction of the state statute by the state court[.]" *Id.* at 84-85. Thus, to the extent *Memphis Natural Gas Co.* applies here at all, it supports the State. Petitioners acknowledge that the Washington Supreme Court determined that the taxable incident for Washington's capital gains tax is the "taxpayer's

exercise of their power to dispose of capital assets," a power exercised within the state of domicile. Pet. 21. Petitioners also concede that they and this Court are "bound" by this interpretation of state law. Pet. 21. Far from demonstrating a reviewable conflict, *Memphis Natural Gas Co.* supports the decision below by emphasizing that the Washington Supreme Court's interpretation of the incidence of its state tax as the privilege to dispose of capital assets is controlling.

Petitioners similarly fail to show a conflict with *American Oil Co.* In that case, Idaho imposed a motor fuels tax on a licensed motor fuels distributor that made a bulk purchase of gasoline in Utah. But there, as in *McLeod*, "[e]ach and every phase of the transaction had its locus outside of Idaho[,]" including the domicile of the seller, the invitations for and submissions of bids, the delivery of the motor fuels, and the passage of title to the fuel. *American Oil Co.*, 380 U.S. at 458. Even more importantly, the state courts had determined that the taxable incident there was "a privilege tax upon the [out-of-state] dealer." *Id.* at 456-57. Petitioners thus mischaracterize *American Oil Co.* as holding that the location of the tangible property was dispositive of the dormant Commerce Clause question. It was not. And nothing in *American Oil Co.* says that a state automatically loses the ability to tax tangible property temporarily removed out of state even when such property has no taxable situs in any other state. To the extent *American Oil Co.* applies here at all, it again supports accepting the Washington Supreme Court's interpretation of the taxable incident as on the privileges exercised by its own residents.

Petitioners also conspicuously ignore more relevant decisions of this Court that recognize state power to mitigate tax-avoidance efforts by their residents. For example, this Court has long recognized a domiciliary state's power to enact "a use tax, or some equivalent on the consumption of services," even while acknowledging such taxes are designed to "compensate the taxing State for its incapacity to reach the corresponding sale[.]" *Oklahoma Tax Comm'n*, 514 U.S. at 193-94; *see also Gen. Trading Co. v. Tax Comm'n of Iowa*, 322 U.S. 335 (1944) (upholding "a non-discriminatory excise laid on all personal property" regardless of where the sale was made).

The tax-avoidance aspect of Washington's capital gains law is a logical extension of this Court's recognition in *People of New York ex rel. New York Central & Hudson River Railroad Co. v. Miller*, 202 U.S. 584 (1906), that tangible personal property does not lose its tax situs through temporary removal from the state. In *Hudson River Railroad Co.*, this Court held that a domiciliary state retains jurisdiction to tax "its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into another state for a day, a week, or six months, and then brought back." *Id.* at 597. In that circumstance, "the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *Id.* (citing *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409 (1906)); *see also City Bank Farmers' Trust Co. v. Schnader*, 293 U.S. 112, 120 (1934) (domiciliary state lacks jurisdiction to tax tangible property relocated to another state when the

relocation "was not merely transient, transitory, or temporary, but [the property] was fixed in an established abiding place in which [it] remained for a long time" thereby becoming "subject to the taxing power" of that state). Nothing in *McLeod* undercuts a domiciliary state's power to mitigate tax-avoidance strategies by its residents by taxing privileges related to property recently removed from the state.

In any event, *if* a taxpayer ever pays Washington capital gains tax on tangible personal property temporarily removed from the state (that is not entirely offset by a credit), they can always raise an as-applied challenge against the law at that time. The Washington Supreme Court recognized as much, concluding that Petitioners' purely hypothetical arguments about the reach of Washington's laws are "not sufficient to facially invalidate the tax, and an as-applied challenge is the best remedy for a taxpayer if any of those hypothetical circumstances materialize and in fact result in multiple taxation." Pet. App. 47 (citing *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989) (remote possibility of multiple taxation insufficient to facially invalidate tax)).

Petitioners also elevate form over substance in suggesting that the application of Washington's capital gains excise tax is somehow different from application of other states' capital gains taxes, in direct contradiction to this Court's longstanding method of "focusing on the practical effect of a challenged tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981) (internal quotation marks omitted). An example helps illustrate the point. Imagine a taxpayer whose only capital gains in a year

come from selling an artwork at auction in New York City. Whether the taxpayer lives in Washington or in a state that characterizes its capital gains tax as an income tax, the taxpayer would still owe their state's capital gains tax (in Washington they would only owe it if the painting had been in Washington earlier that taxable year). In either case, the taxpayer owes their state an excise tax based entirely on an out-of-state sale of tangible personal property. But Petitioners claim that Washington's tax is somehow uniquely unconstitutional, whereas the identical effect of the capital gains taxes in forty-one other states is not. That makes no sense.

Petitioners may respond that in other states, the privilege being taxed is receiving income, whereas in Washington it is the "power to dispose of capital assets," Pet. 21, but the outcome and practical effect of the taxes are identical, and this Court has said repeatedly that what matters are effects, not nomenclature. *See, e.g.*, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940) ("[T]he descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. . . . [I]n passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it." (Internal quotation marks omitted.)); *see also South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018) ("The Court's Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." (Quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994).));

Complete Auto Transit, Inc., 430 U.S. at 279 (in assessing constitutionality of a tax under the dormant Commerce Clause, courts consider "not the formal language of the tax statute but rather its practical effect").

In short, the Washington Supreme Court's decision creates no conflict with decisions of this Court. Rather, it is Petitioners who argue for a rule contrary to this Court's longstanding precedent.

2. Petitioners Show No Conflict with *Complete Auto*

Petitioners eventually get around to addressing the claim actually presented to, and rejected by, the Washington Supreme Court. Pet. 22. But they fail to demonstrate a conflict with *Complete Auto* and its progeny. Under *Complete Auto*, this Court has consistently upheld application of a state tax if it (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not impermissibly discriminate against interstate commerce, and (4) is fairly related to services provided by the state. *Complete Auto Transit, Inc.*, 430 U.S. at 279. Petitioners fail to show a conflict with any of these requirements.

Petitioners admit that the fourth prong of *Complete Auto* is met here: Washington's capital gains tax is "fairly related to services provided by the state." Pet. 23-24. Petitioners, however, attempt to graft onto the first three prongs a per se rule against extraterritorial application of state laws that appears nowhere in *Complete Auto* or in any case applying it. Pet. 23. And as detailed below, this Court recently rejected an argument that the dormant Commerce

Clause incorporates a per se rule against extraterritorial application of state laws. *Nat'l Pork Producers Council v. Ross*, 596 U.S. 358 (2023). Petitioners present no basis to relitigate that conclusion in applying the *Complete Auto* test.

Apart from advocating a per se rule this Court has already rejected, Petitioners are left arguing that the Washington Supreme Court erred in its *application* of the *Complete Auto* test, hardly an issue warranting review by this Court. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."). Petitioners are also wrong as a matter of law as to each point.

As to the first prong of *Complete Auto*, Petitioners are wrong that Washington lacks a sufficient nexus to tax either intangible property sold by its residents or tangible property temporarily removed from Washington as a tax avoidance strategy. Pet. 23. As detailed above, this Court has consistently held that a state has nexus to tax the sale or transfer of intangible property such as stocks and bonds owned by persons domiciled in the state. *Curry*, 307 U.S. at 366; *Graves*, 307 U.S. at 386. Washington also has the requisite nexus to tax sales of tangible property with a recognized situs in the state that has been temporarily removed. This taxable nexus is not lost until the tangible property obtains an actual situs outside the state and is subject to that other state's taxing jurisdiction. *Frick v. Pennsylvania*, 268 U.S. 473, 489 (1925). And Washington offers a full credit

where another state taxes the same transaction. In short, in any case where a taxpayer would actually owe Washington's tax, there is "'nexus' aplenty." *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 33 (1988).

As to the second prong, Petitioners are similarly wrong that Washington's capital gains tax is not "fairly apportioned." Pet. 24. The "central purpose" of the fair apportionment requirement "is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61. Consistent with that purpose, the dormant Commerce Clause "imposes no single [apportionment] formula on the States[.]" *Id.* at 261 (first alteration in original) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983)). Fair apportionment can be, and often is, satisfied through the use of a credit for taxes paid to another state, and this Court has "repeatedly held that a tax credit is an acceptable method of avoiding dormant commerce clause infirmity." Pet. App. 46 (citing *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 567-68 (2015), *Goldberg*, 488 U.S. at 264, and *D.H. Holmes Co. Ltd.*, 486 U.S. at 31)).[5]

For decades, this Court has upheld a state tax as fairly apportioned when it is "internally and externally consistent." *Goldberg*, 488 U.S. at 261. Internal consistency requires a tax to be structured so that if every state imposed it, no multiple taxation

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[5] Petitioners mostly ignore Washington's credit against taxes paid to other states. They mention the credit only with respect to their "discrimination" argument. *See* Pet. 24. They completely ignore the credit when addressing "fair apportionment." Pet. 23-24.

would result. *Goldberg*, 488 U.S. at 261. External consistency evaluates the "economic justification for the State's claim upon the value taxed[.]" *Oklahoma Tax Comm'n*, 514 U.S. at 185. Petitioners here do not even attempt to argue that the Washington capital gains tax is internally or externally inconsistent. But even if they did, the Washington tax easily satisfies these requirements, as the Washington Supreme Court correctly explained. Pet. App. 45-47.

Petitioners' claims of discrimination also fail. Pet. 24. "Discrimination" in the dormant Commerce Clause context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (internal quotation marks omitted). But under its plain text, the Washington tax does not grant unfavorable treatment to out-of-state persons, so the law is not facially discriminatory. And Petitioners present no evidence of actual discrimination, offering instead their *ipse dixit* contention that the state's credit mechanism is unsatisfactory and "subject[s] interstate commerce to the burden of multiple taxation." Pet. 24 (internal quotation marks omitted). Unproven assertions cannot be a sufficient basis to invalidate Washington's tax, or the capital gains taxes imposed by every other state would be struck down as "discriminatory" based on pure conjecture by persons opposing the tax. Petitioners' discrimination claim contains no substance and does not merit Supreme Court review.

Petitioners fail to show that the decision below conflicts with this Court's dormant Commerce Clause precedent. Review should be denied.

C. Petitioners Demonstrate No Conflict with Any Court of Appeals Decision

Petitioners also fail to identify a single Court of Appeals decision striking down a tax like Washington's as violating the dormant Commerce Clause. Lacking a genuine conflict on this core legal issue, Petitioners attempt to manufacture a conflict with a Ninth Circuit case, *Sam Francis Foundation*. But that case presents no genuine conflict for at least two reasons. First, *Sam Francis Foundation* is not a tax case, and specifically declined to apply this Court's dormant Commerce Clause precedent governing state tax laws. And second, the Ninth Circuit applied a "per se" rule against extraterritorial application of state laws that this Court just rejected last term in *Ross*. *Sam Francis Foundation* is thus neither relevant nor good law and provides no basis for this Court's review.

To start, Petitioners cannot show a reviewable conflict here because *Sam Francis Foundation* had nothing to do with taxes. *Sam Francis Found.*, 784 F.3d at 1324. The court specifically recognized that the law at issue there, requiring the payment of royalties to artists for the sale of fine art, bore no resemblance to a tax because it regulated conduct solely "among private parties" and required payment to a private party, not the government. *Id.* The law also required sellers' agents to attempt to locate and pay the artist, where "[n]othing of the sort is required by ordinary tax law[.]" *Id.* Because the law was not a

tax, the Court explicitly declined to apply this Court's precedent governing state tax laws, including the *Complete Auto* factors. *Sam Francis Found.*, 784 F.3d at 1324.

By contrast, when addressing an actual tax, the Ninth Circuit acknowledges that *Complete Auto* governs. *See, e.g.*, *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 602 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985). Thus, contrary to Petitioners' argument, *Sam Francis Foundation* would have no application to a dormant Commerce Clause challenge to Washington's capital gains tax in federal court, and cannot establish even a superficial conflict. Given its obvious inapplicability, it is hardly surprising that Petitioners failed to even cite *Sam Francis Foundation* below.

Second, *Sam Francis Foundation* is no longer good law because the Ninth Circuit applied a "per se" rule against extraterritorial application of state laws that this Court repudiated in *Ross*. Specifically, the Ninth Circuit adopted an interpretation of *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989), as "preclud[ing] the application of a state statute to commerce that takes place wholly outside of the State's borders[.]" *Sam Francis Found.*, 784 F.3d at 1323. It held that such laws are invalid per se regardless of whether the state intended to inhibit interstate commerce. *Id.* at 1323-24 (citing *Valley Bank of Nevada v. Plus Sys., Inc.,* 914 F.2d 1186, 1190 (9th Cir. 1990)). Applying this per se rule, the Ninth Circuit struck down the California royalty law without any determination that the state law discriminated against out-of-state commerce or consideration of any other factor. *Id.* at 1323-24.

This Court, however, has unequivocally rejected this interpretation of *Healy*, holding that a "close look" at the case reveals "nothing like" a per se rule against extraterritorial application of state laws, but instead "typifies the familiar concern with preventing purposeful discrimination against out-of-state economic interests." *Ross*, 598 U.S. at 371. Specifically, this Court found that concerns about economic protectionism took "center stage" in *Healy*, which identified the "essential vice" in the law at issue as the "hoard[ing]" of commerce "for the 'benefit of' in-state merchants" and "discourag[ing] consumers from crossing state lines to make their purchases from nearby out-of-state vendors." *Id.* at 372-73 (internal quotation marks omitted) (quoting *Healy*, 491 U.S. at 340-41). *Ross* also recognized the extraordinary disruption a per se extraterritoriality rule would have on the "interconnected national marketplace" where "many (maybe most) state laws have the 'practical effect of controlling' extraterritorial behavior[,]" including *state tax laws*. *Id.* at 374.

Ross thus not only abrogates *Sam Francis Foundation*, it unequivocally rejects the per se rule Petitioners seek to resurrect in this case. Petitioners cannot show a reviewable conflict based on *Sam Francis Foundation*.

D. Numerous Factors Make This Case Unsuited for this Court's Review

There are at least three reasons, independent of the lack of standing and conflict addressed above, why the Court should not grant the petition: (1) the hypothetical nature of the injuries would require the Court to decide the issues in a factual vacuum;

(2) even if Petitioners are correct about the almost exclusive focus of the petition—taxation of allegedly out-of-state transactions involving tangible personal property—the remedy would be to strike a relatively minor portion of the capital gains tax, making this case not sufficiently important for this Court's review; and (3) Petitioners' lead argument was not presented in state court, and as a matter of comity the Court should not grant review and consider overturning a state's highest court based on arguments never presented there.

1. This Case Involving Hypothetical Facts Is a Poor Vehicle

Even if the Court determined that Petitioners' hypothetical injuries are sufficient to establish Article III standing, the lack of factual context for Petitioners' arguments makes this case a poor vehicle for addressing taxation of allegedly out-of-state transactions. With respect to the sale of intangible property, even Petitioners admit (as they must) that the sale "has no location" and that states may tax residents on such sales regardless of the "designat[ed] locus" of the transaction. Pet. 19-20. Petitioners attempt to impose an additional requirement that the owner of the intangibles restrict his activity to the place of his domicile, but as detailed above, that simply misrepresents the case law. *See supra* 14-15 (discussing *Curry*, 307 U.S. at 366-67; *Graves*, 307 U.S. at 386; *Pearson,* 308 U.S. at 318; *Central Hanover Bank*, 319 U.S. 94). Even if this Court were to adopt such a requirement, it would be impossible for the Court to determine here whether any Petitioner sufficiently "restricted his activity" when there are no

facts in the record about what gains from what transactions are actually being taxed.

A factual record is even more important to address Washington's law as applied to out-of-state sales of tangible personal property that had been present in Washington within the prior year. A determination that a state has a "substantial nexus" to tax a resident or transaction will inevitably be impacted by the facts and circumstances of a particular case. Petitioners' argument encompasses situations where, for example, a Washington resident purchases a stockpile of gold and holds it in Washington for thirty years, negotiates a sale to another Washington resident, but on the day of sale, drives ten miles from Vancouver, Washington, to Portland, Oregon, to finalize the transaction for the express purpose of avoiding Washington's excise tax. The bars of gold will not have changed taxable situs in just one day and there is no question that Washington would have a "substantial nexus" to the transaction sufficient to justify taxing the transaction. If, on the other hand, the seller kept the gold bars in Oregon for a year before the transaction was finalized, Washington's capital gains tax would not even apply. Wash. Rev. Code § 82.87.100(1)(a)(i)-(iii). The facts of each case will determine whether the tax applies in the first instance, any credits that will offset a tax, the State's nexus to the transaction, and any injury in fact to the taxpayer, highlighting the unsuitability of this case for this Court's consideration.

2. Even If Plaintiffs Prevail on Their Primary Theory, the Broad Relief They Seek Would be Unavailable

Although Petitioners seek invalidation of Washington's capital gains tax, the near-exclusive focus of their arguments is on a minor tax-avoidance provision of the tax that applies to gains from sales of tangible personal property recently removed from the state. They concede the tax is constitutional as to in-state sales. Pet. 19. And they all but concede that the tax can constitutionally be applied to gains from the sale of intangibles, Pet. 20, which in any event is established from precedent as discussed above. That leaves only how the tax applies to gains from the sale of property recently removed from the state. Wash. Rev. Code § 82.87.100(1)(a)(i)-(iii).

Even if they prevailed with respect to this narrow tax-avoidance provision, the correct remedy would be to invalidate just that portion of the tax. Generally, this Court will not invalidate an entire tax scheme when it can instead invalidate only the offending portion. *E.g.*, *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (invalidating a specific tax exemption in Washington's gross receipts tax code while leaving the rest of the tax code intact). This is consistent with the Court's practice in other areas, because "'when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-29 (2006)). This approach is entirely logical because

“‘[t]he unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions[.]’” *Free Enter. Fund*, 561 U.S. at 508 (first alteration in original) (quoting *Champlin Refining Co. v. Corp. Comm’n of Oklahoma*, 286 U.S. 210, 234 (1932)). Consistent with law and logic, “the ‘normal rule’ is ‘that partial, rather than facial, invalidation is the required course[.]’” *Id.* (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). And this would also be consistent with the intent of Washington’s legislature, which included a severability provision when enacting the tax: “If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” 2021 Wash. Sess. Laws 1239 (ch. 196, § 21).

In short, the gravamen of the Petition involves a relatively minor aspect of Washington’s capital gains tax that does not merit this Court’s review, and which can be the subject of as-applied challenges if any Petitioners are ever subject to it.

3. Petitioners Never Presented their Lead Argument in the State Courts

As a prudential matter, the Court should reject the petition because it presents issues that Petitioners did not argue below and that the Washington Supreme Court thus had no opportunity to consider. Petitioners’ lead argument here is that the Washington Supreme Court ignored a per se rule against taxing out-of-state gains allegedly created by three of this Court’s decisions: *McLeod*, 322 U.S. 327,

Memphis Natural Gas Co., 335 U.S. 80, and *American Oil Co.*, 380 U.S. 451. But Petitioners never even cited these cases in their briefing to the Washington Supreme Court. It would be inequitable and contrary to basic principles of comity to consider overturning a decision of a state's highest court based on an argument never presented to it.

To be sure, Petitioners did argue that the tax impermissibly allocated capital gains to Washington based on activities occurring outside its borders. BIO App. 40a-51a. But they made this argument solely in the context of claiming the tax failed to meet the "substantial nexus" or "fair apportionment" prongs of the *Complete Auto* test, a very different argument than their lead claim here.

The State recognizes that the argument below still fell under the rubric of the dormant Commerce Clause, so the State does not argue that this is an entirely new issue such that failure to raise these arguments deprives this Court of jurisdiction. That said, many of the same longstanding rationales from this Court's jurisdictional analysis militate against accepting the petition, including: (1) federal questions not raised below are likely to have an inadequate record; (2) "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality[,]" *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969); and (3) "due regard for the appropriate relationship of this

Court to state courts" in deciding questions "affecting the validity of state statutes not urged or considered there." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

This Court should decline to consider a petition that primarily raises arguments not raised to the state court below.

E. Petitioners' Claims Regarding the Impact of the Decision Are Inaccurate and Overblown

Contrary to Petitioners' arguments that the opinion below conflicts with precedent, it is Petitioners' argument, if accepted by this Court, that would unsettle principles previously understood as black-letter law and call into question taxes that states have relied on for decades. In addition, Petitioners' mischaracterization of Washington's tax leads them to wildly exaggerate the potential impact of the decision below. In reality, the practical impact of the decision is that Washington, like forty-one other states and the federal government, can impose an excise tax on capital gains that is carefully crafted to avoid double taxation.

First, Petitioners consistently conflate sales of tangible personal property with sales of intangible property, despite the plethora of cases discussed above that enshrine the common-sense notion that the two types of transactions are fundamentally different. Intangible property, as even Petitioners recognize, has no singular location. Pet. 19-20. In Petitioners' view, parties would be free to designate the location of

a sale or transfer anywhere in the world, thus providing a ready means of evading *any* taxation of such transactions.

Second, Petitioners' nightmare scenarios of states taxing their residents' transactions of all kinds no matter where they occur bears no resemblance to Washington's capital gains tax. Petitioners routinely ignore several important features of the tax that demonstrate its purpose as preventing tax avoidance rather than seeking to impose extraterritorial taxes; namely, that the property must have been located in Washington within the prior year, and Washington's inclusion of robust credits for any tax (including an income tax) imposed in the state where the sale occurs. *See* Pet. App. 114 (Wash. Rev. Code § 82.87.100(1)(a)(i)-(iii), (2)(a)). Petitioners' parade of horribles is predicated on hypothetical taxes with no such features. *E.g.*, Pet. 27-28.

In reality, the practical effect of Washington's tax mirrors the excise tax on capital gains imposed by nearly every other state, albeit with a slightly different mechanism. This Court and state courts have universally recognized that an income tax is "in its nature an excise entitled to be enforced as such[.]" *Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 17 (1916); *see also Hale*, 302 U.S. at 104-05 & n.7 (observing that most state courts have held that "a net income tax is to be classified as an excise"); *Thorpe v. Mahin*, 250 N.E.2d 633, 365-36 (Ill. 1969) (discussing *Hale* and other authorities). And as detailed above, Washington's capital gains tax actually applies to fewer gains from out-of-state transactions than do the capital gains taxes of other states. The

opinion below does not represent the harbinger of doom theorized by Petitioners, but rather the unobjectionable continuance of the status quo.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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APPENDIX

Appendix

The Quinn Respondents' Response To
State Of Washington's Opening Brief,
Quinn v. State of Washington, No. 100769-8
(Wash. S. Ct. Sept. 8, 2022) 1a

First Amended Complaint For Declaratory
and Injunctive Relief,
Quinn v. State of Washington, No. 21-2-00075-09
(Douglas County Superior Ct. May 17, 2021) 55a

No. 100769-8

SUPREME COURT OF
THE STATE OF WASHINGTON

CHRIS QUINN, an individual; CRAIG LEUTHOLD, an individual; SUZIE BURKE, an individual; LEWIS and MARTHA RANDALL, as individuals and the marital community comprised thereof; RICK GLENN, an individual; NEIL MULLER, and individual; LARRY and MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual,

Respondents,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE an agency of the State of Washington, and VIKKI SMITH, in her official capacity as Director of the Department of Revenue,

Appellants.

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors

APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, and individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERIN SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN MCKENNA, an individual; WASHINGTON FARM BUREAU; WASHINGTON STATE TREE FRUIT

ASSOCIATION; WASHINGTON STATE DAIRY FEDERATION,

Respondents,

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE an agency of the State of Washington, and VIKKI SMITH, in her official capacity as Director of the Department of Revenue,

Appellants.

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors

THE QUINN RESPONDENTS' RESPONSE TO STATE OF WASHINGTON'S OPENING BRIEF

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I. INTRODUCTION

The State opens its brief to this Court not with a defense of the capital gains tax, but an appeal of its policy. The State also attempts to deflect by recasting the actual nature of the capital gains tax and mischaracterizing the decision of the court below. However, scrutiny of the statute adopted by the Legislature and the governing authority confirms that the superior court was correct when it found the capital gains tax unconstitutional. The capital gains tax is a tax on income that violates both the state and federal constitutions.

First, the capital gains tax violates Article VII of the Washington Constitution because it is a tax on property that does not satisfy the constitutional requirements of uniformity and rate limitations.[1] The capital gains tax does not meet the definition of an excise tax, despite the State's arguments otherwise. The capital gains tax is imposed by reason of an individual's legal or beneficial ownership of property; applies when long-term capital gains attributed to "Washington" are recognized by the owner for federal income tax purposes; and is not imposed on individual transactions or any privilege conferred by Washington but is imposed on an aggregate amount measured by the total "Washington" capital gains recognized by the individual over a given calendar year after netting deductions and exclusions. In other words, the capital gains tax is an "absolute and unavoidable" demand on an individual's property—income—a quintessential

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[1] The Quinn Plaintiffs join the arguments made by the Clayton Plaintiffs in response to the brief filed by Intervenors.

property tax.

Second, the capital gains tax violates the Privileges and Immunities Clause of the Washington Constitution because the Legislature impermissibly taxed certain persons while exempting others within the same class with no stated, reasonable ground for granting an immunity from the tax.

Finally, the capital gains tax structured by the Legislature violates the dormant Commerce Clause of the United States Constitution regardless of whether it is deemed a property tax, excise tax, or something other. The State impermissibly taxes activity occurring outside the state as to which it lacks any nexus, imposes a tax that is not fairly apportioned to activities occurring within the state, and discriminates against interstate commerce by exposing gains derived across state lines to the risk of multiple state taxation. The State tries to save the capital gains tax by relying on an inapt principle applied to facial challenges in other contexts which requires proof that no set of circumstances exists in which the law could be constitutionally applied. But a state tax that violates the Commerce Clause must be stricken in toto— even if there are some circumstances in which imposition of the tax may be permissible.

In sum, the capital gains tax cannot survive constitutional scrutiny. This Court should affirm the superior court's order declaring the tax unconstitutional and invalid, and therefore void and inoperable as a matter of law.

II. ISSUES ON APPEAL

1. Does the capital gains tax violate Article VII of the Washington Constitution when it imposes a tax on individuals based on their ownership of property, lacks uniformity, and exceeds the permissible tax rate?

2. Does the capital gains tax violate the Privileges and Immunities Clause of the Washington Constitution when the Legislature granted a privilege of exemption from the tax to certain persons while subjecting other persons to the tax that fall within the same class and the Legislature did not provide any reasonable ground for granting that privilege?

3. Does the capital gains tax violate the Commerce Clause of the United States Constitution when it (1) impermissibly taxes gains derived from out-of-state activity, (2) imposes a tax that is not fairly apportioned to activities occurring within the state, and (3) discriminates against interstate commerce by exposing gains derived from out-of-state transactions to multiple state taxation?

III. STATEMENT OF THE CASE

A. The Legislature Imposed a Capital Gains Tax on Individuals.

In 2021, the Legislature levied for the first time a tax on the annual long-term capital gains of individuals. Laws of 2021, 67th Leg., Ch. 196 (Engrossed Substitute Senate Bill ("ESSB") 5096) § 5.[2]

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[2] ESSB 5096 is codified at Chapter 82.87 RCW. This brief cites to the session law as adopted by the Legislature. A copy of ESSB 5096 is attached as Appendix A.

Beginning January 1, 2022, the tax is imposed on an individual's annual "Washington capital gains." *Id.* § 5 (imposing the tax on individuals); § 4(13) (defining "Washington capital gains" as "adjusted capital gain") and (4(1) defining "adjusted capital gain" as "federal net long-term capital gain").

Capital gains incurred by pass-through entities (e.g., partnerships, limited liability companies, S corporations, or grantor trusts) are taxed against the entity's "legal or beneficial owner" to the extent of the individual's ownership interest in the entity "as reported for federal income tax purposes." *Id.* § 5(1), (4). In other words, an individual need not voluntarily act to sell or exchange any long-term capital asset to be subject to the capital gains tax—mere legal or beneficial ownership of the capital asset and recognition of the gains is sufficient

The starting point for determining an individual's tax liability begins with identifying the taxpayer's "Washington capital gains," which are derived directly from the individual's "federal net long-term capital gain" reported for "federal income tax purposes" on the taxpayer's IRS tax return with some exceptions for losses carried forward or back. §§ 4(1), (3), 5(3). Next, long-term capital gains that are excluded from Washington's capital gains tax are subtracted from that amount. *Id.* § 4(a). Then, amounts of long-term capital gains that are not allocated to Washington under the statute are subtracted. *Id.* § 4(1)(a). Long-term capital gains derived from tangible personal property (e.g., physical capital assets) are allocated to Washington if *either* (1) the property was located in this state at the time of sale or exchange; *or* (2) the property was located in

Washington at some time during the taxable year, the taxpayer was a resident of Washington at the time of the sale or exchange, and the taxpayer is not otherwise subject to the payment of an income or excise tax on the long-term capital gains by another state. *Id.* § 11(1)(a). Long-term capital gains derived from intangible personal property (e.g., stocks, bonds, goodwill) will be taxed by Washington if the taxpayer was domiciled in Washington at the time the sale or exchange occurred, regardless of whether the assets can be allocated to a state other than Washington or the transaction that creates the gain occurs in a jurisdiction other than Washington. *Id.* § 11(1)(b). A credit is allowed against the tax equal to the amount of any income or excise tax paid to another taxing jurisdiction but only if the gains are derived from assets "within" the other jurisdiction. *Id.* § 11(2)(a).

After the initial "Washington capital gains" are calculated, the taxpayer may deduct from the amount (1) a standard deduction of $250,000, or a total of $250,000 for spouses and domestic partners; (2) an adjusted deduction for gains derived from the sale or transfer of certain family-owned small business; and (3) a $100,000 deduction for charitable donations over $250,000 made to certain Washington-based nonprofit organizations. *Id.* §§ 7-9. The sum total of the final "Washington capital gains" is then multiplied by seven percent to determine the ultimate tax liability. *Id.* § 5.

The tax, as structured by the Legislature, will require all individuals both inside and outside the State who incur Washington capital gains to go through this calculation each year to determine if they are liable for the tax. *Id.* §§ 5, 12. Individuals owing the

capital gains tax to Washington must report and pay the amount due on or before the date that their federal income tax return must be filed. *Id.* § 12(1). In addition to filing a Washington return, taxpayers must file a copy of their federal income tax return along with all schedules and supporting documentation for the federal return. *Id.* § 12(2). Failure to comply subjects the taxpayer to civil and criminal penalties. *Id.* § 15.

B. The Superior Court Found ESSB 5096 Unconstitutional.

Individual and associational plaintiffs filed separate lawsuits in Douglas County Superior Court to obtain declaratory judgment that ESSB 5096 is constitutionally invalid under both the federal and state constitutions. CP Vol. I 1-9 (Quinn Compl.); CP Vol. II 1-17 (Clayton Compl.). Each asserted that ESSB 5096 (1) violates Article VII, Sections 1 and 2, of the Washington Constitution because it imposes a non-uniform tax on income and exceeds the one percent limit on taxes upon personal property; (2) violates Article I, Section 12, of the Washington Constitution by imposing a tax on certain persons while exempting others; and (3) violates the Commerce Clause of the United States Constitution because it allocates taxable gain to Washington based on the taxpayer's location instead of the location of the activity, discriminates against interstate commerce, and is not fairly apportioned. *See id.*[3] The cases were consolidated. CP Vol. I 107-111. Both sets of Plaintiffs

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[3] The Quinn Plaintiffs did not move for a ruling on their privacy claim under Article I, Section 7, of the Washington Constitution so that claim is not at issue on appeal.

later amended to add more parties challenging the constitutionality of the tax. *See* CP Vol. I 16-24; CP Vol. I 607-25.

A school district and individuals involved in education were allowed to intervene as party defendants in the case after the State entered its appearance in the case. CP Vol. I 136-40. The State unsuccessfully sought to dismiss the lawsuits and to transfer venue. *See* CP Vol. I 189-97. Thereafter, the parties cross-moved for summary judgment. CP Vol. I 227-31.

After considering the "wealth of material" filed by both sides, CP Vol. I 866, the Superior Court granted summary judgment for the Plaintiffs. CP Vol. I 872, 876. The court first noted that it had disregarded the policy considerations put forth by the State and Intervenors as being inapplicable to determining the legality of the tax. CP Vol. I 866 (citing *State ex rel Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 7, 435 P.3d 975 (1968)). The court next summarized "nearly a century of case law" setting forth how tax statutes should be analyzed to determine their proper nature and incidents. CP Vol. I 867-69. It then described multiple aspects of ESSB 5096 which establish that the capital gains tax is not an excise tax, but an "absolute and unavoidable" tax meeting the definition of a property tax under the case law. *See* CP Vol. I 871-72. The Superior Court concluded that ESSB 5096 violates Article VII, Sections 1 and 2, of the Washington Constitution because the tax lacks uniformity and exceeds the one percent rate limit for property taxes. CP Vol. I 872. The Superior Court did not reach the Plaintiffs' other constitutional arguments for the invalidity of ESSB

5096, having found the law invalid under Article VII. *Id*.

The State and Intervenors appealed directly to this Court.

IV. ARGUMENT

The capital gains tax enacted by the Washington Legislature does not withstand constitutional scrutiny. The State attempts to save the capital gains tax by recasting the nature and structure of the tax and appealing to policy interests. However, as long ago recognized by this Court, "[i]t is not the function of this court in cases like this to consider the propriety of the tax, or to seek for the motives or to criticize the public policy which may have prompted adoption of the legislation." *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 7, 435 P.2d 975 (1968) (citing *State Board of Tax Comm'rs of Indiana v. Jackson*, 283 U.S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931)). The Court determines whether the law adheres to constitutional strictures placed on the State's authority to impose a specific tax in dispute. *See id.*

Here, regardless of the policy reasons advocated by the State for the capital gains tax, the tax enacted by the Legislature cannot survive constitutional scrutiny. The plain text of ESSB 5096 belies the State's arguments about its true incident and measure and confirms the law's invalidity. The superior court correctly found ESSB 5096 to be unconstitutional. This Court in its *de novo* review should conclude the same. *See Lee v. State*, 185 Wn.2d 608, 614, 374 P.3d 157 (2016).

A. ESSB 5096 Violates Article VII Of The Washington Constitution.

ESSB 5096 violates the Washington Constitution because it is a tax on property that fails to comply with the constitutional restrictions of uniformity and rate limitations set forth in Article VII. The State tries to recast the capital gains tax into an excise tax to avoid this conclusion. *See* State's Br. at 31-47. However, "[t]he character of a tax is determined by its incidents, not by its name." *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999) (quoting *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936)). Analyzing ESSB 5096's true subject matter and its incidents, "i.e., the manner in which it is assessed and the measure of the tax," *id.* at 607 n.1 (citation omitted), confirms that that the capital gains tax is a property tax *on* income. *See, e.g., Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 650 & n. 12, 62 P.3d 462 (2003) (collecting cases recognizing that income is property and taxes *on* the receipt of income are property taxes).[4]

1. The Capital Gains Tax Is Assessed Based on Individual Ownership of Long-Term Capital Assets, Not Voluntary Activity.

The State spends over ten pages of its brief

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[4] In a different context, this Court recently held that a security deposit—which is money held in deposit under contractual lease terms—is the " personal property" of the tenant and subject to the three-year statute of limitations for recovery of personal property. *See Silver v. Rudeen Mgmt. Co., Inc.*, 197 Wn.2d 535, 538, 484 P.3d 1251 (2021).

walking through a history of cases describing excise taxes and property taxes. *See* State's Br. at 19-29. Yet the principles this Court applies to assess whether the subject matter of a particular tax is one of property or one of excise are not in dispute. This Court has held a tax on property is one that is "an absolute and unavoidable demand," *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965), that "falls upon the owner merely because he is owner [of property]." *Morrow v. Henneford*, 182 Wash. 625, 631, 47 P.2d 1016 (1935) (quoting *Bromley v. McCaughn*, 280 U.S. 124, 137, 50 S. Ct. 46, 74 L. Ed. 226 (1929). In contrast, an excise tax is "imposed upon a voluntary act *of the taxpayer*, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event" and which is "based upon the extent to which the taxpayer enjoys the taxable privilege." *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005) (emphasis added); *see also Black*, 67 Wn.2d at 99 ("the obligation to pay an excise is based upon the voluntary action *of the person taxed* in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking") (emphasis added).

The State contends that ESSB 5096 imposes an excise tax on the privilege of selling or exchanging long-term capital assets. State's Br. at 31. Examination of the text of ESSB 5096 demonstrates that the State mischaracterizes the true object of the tax. The express language of the statute provides that only individuals are subject to payment of the tax:

> (4)(a) The tax imposed in this section applies to the sale or exchange of long-term capital assets owned by the taxpayer, whether the taxpayer was the legal or beneficial owner of such assets at the time of the sale or exchange. *The tax applies when the Washington capital gains are recognized by the taxpayer* in accordance with this chapter.
>
> (b) For purposes of this chapter:
>
> (i) *An individual is considered to be a beneficial owner of long-term capital assets held by an entity that is a pass-through or disregarded entity for federal tax purposes*, such as a partnership, limited liability company, S corporation, or grantor trust, *to the extent of the individual's ownership interest in the entity* as reported for federal income tax purposes.
>
> (ii) . . . *A grantor of [incomplete gift non-grantor trusts] is considered the beneficial owner of the capital assets* of the trust for purposes of the tax imposed in this section and *must include any long- term capital gain or loss from the sale or exchange of a capital asset by the trust* in the calculation [of their Washington capital gains.]

ESSB 5096 § 5(4) (emphasis added). The capital gains tax is thus imposed when three conditions are met: (1) an individual owns or possesses a legal or beneficial interest in capital assets for a period of at least 12 months; (2) the assets are sold or exchanged for gain without regard to whether the individual had any involvement in the sale or exchange; and (3) the individual recognizes the capital gains on their federal income tax returns. *Id.*; *see also* § 4(1), (3), (13)

(defining "adjusted capital gains," "federal net long-term capital gain," and "Washington capital gains"). The tax is not imposed *on* the activity of selling or exchanging long-term capital assets, as the State contends. It is imposed *on* the recognition of capital gains, i.e. income, for which the State confers no right or privilege.

Further, the fact that the capital gains tax does not apply to every sale or transfer of capital assets belies the State's arguments that ESSB 5096 imposes a valid excise tax on activities. Unlike excise taxes on specific activity (e.g., the real estate excise tax on sales of Washington real estate, or the sales tax on retail sales in Washington), the capital gains tax does not apply to every capital asset transaction occurring in the state. And unlike both the real estate excise tax and the sales tax, the capital gains tax is not imposed on the *legal* owner that is the party to the taxed sale or exchange.

Indeed, an individual need not engage in any voluntary act to be subject to the capital gains tax. *See Sheenhan*, 155 Wn.2d at 800. For example, an individual residing in Washington who is the beneficiary of a grantor trust domiciled elsewhere will be subject to the capital gains tax when the trustee sells or exchanges long-term capital assets held by the trust because the income is passed through to the beneficiary under both federal income tax law and ESSB 5096. Likewise, a Washington resident who owns shares in an S corporation domiciled outside Washington will be subject to the capital gains tax when the Board of Directors or manager of the entity sells or exchanges long-term capital assets held by the entity because the income is passed through to

shareholders to the extent of their interest in the entity. *See, e.g.,* CP Vol. I 697-99. So too with a Washington citizen who happens to own stock in a foreign corporation that is acquired in a merger or acquisition or which engages in a stock redemption, neither requiring a nexus to Washington or any action from the individual. *See, e.g.,* CP Vol. I 693-95. Any of these individuals will be subject to the capital gains tax even if they do not deliberately, intentionally, or voluntarily take any action to cause the sale or exchange of long-term capital assets held by the related entities. So long as the individual reports non-exempt long-term capital gains on their federal income tax returns, they will be subject to the state capital gains tax. The State is simply wrong when it asserts that the capital gains tax applies "only to those that sell or transfer" capital assets. State's Br. at 31. The tax is triggered by the ownership of income in the form of capital gains, not by an individual's voluntary action to transfer long-term capital assets.

The State also wrongly asserts that the capital gains tax is an excise tax because it is imposed based on "the exercise of one of the rights to use property, i.e. to sell or transfer ownership." State's Br. at 32. As the examples above demonstrate, the assertion is wrong. And the State cites no authority for the proposition that an excise tax can be imposed on an individual based on a third-party's voluntary exercise of rights to sell or exchange the property. *Cf. Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004) (holding "a valid excise tax" is one where "the obligation to pay" is "based upon the voluntary action *of the person taxed*") (emphasis added). Moreover, to the extent the State is

suggesting that the taxpayer's "exercise of one of the right's to use property" is the voluntary receipt of gains, this Court has already rejected the notion that such a tax is an excise in *Jensen v. Henneford*, 185 Wash. 209, 219, 53 P.2d 607 (1936).

In *Jensen*, this Court rejected the State's argument that a 1935 tax was a valid excise on the "privilege of receiving income," instead of a direct tax on the income itself. 185 Wash. at 218. Having previously concluded that a tax on income was subject to the constitutional requirements for property tax in *Cullitan v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), the Court in *Jensen* further concluded that:

> The right to receive, the reception, and the right to hold are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and therefore the property (income) itself. Despite its change of designation, we are convinced that the 1935 act imposes a tax on net income, and is therefore a property tax.

185 Wash. at 219. The Court expressly rejected the notion advocated again here by the State that the beneficial receipt of income from property's use can be subject to an excise tax because "to tax by reason of ownership of property is to tax the property itself." *Id.*

Here, like the net income tax in *Jensen*, the subject matter of the capital gains tax is not the privilege of using or transferring a class of property within the state. Rather, the subject of the tax is the income that individuals receive simply because of

their direct or beneficial ownership of property, regardless of whether the transactions from which the gains are derived are undertaken voluntarily or entirely passively. These characteristics make the capital gains tax an "absolute and unavoidable" demand on property, i.e. income, which cannot be an excise tax under this Court's precedents.

2. The Measure of the Capital Gains Tax Is the Amount of Gains Reported on Federal Income Tax Returns, Not the Amount of the Transaction Purportedly Being Taxed.

In every excise case highlighted by the State, the measure of the excise is based on the total value of the privilege being taxed. *See Sheehan*, 155 Wn.2d at 800 ("[E]xcise taxes are directly imposed based upon the extent to which the taxpayer enjoys the taxable privilege."). For example, the business and occupation ("B&O") tax upheld in *Morrow v. Henneford*, was imposed on the privilege of engaging in business activity in the state and measured by the total gross income earned from business activity in Washington. 182 Wash. at 631. The real estate excise tax upheld in *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), was imposed on the selling price of the property located in the state and transferred under state law. In *Black v. State*, the measure of the sales tax was the total cost of the in-state lease. 67 Wn.2d at 98. So too with the leasehold excise tax in *Washington Public Ports*, which was measured by the total taxable rent for in-state facilities. 148 Wn.2d at 642–43. In *High Tide Seafoods v. State*, the measure of the tax on enhanced fish food was the total value of

the fish at transfer. 106 Wn.2d 695, 700, 725 P.2d 411 (1986) (citing RCW 82.27.020). In *Sheehan*, 155 Wn.2d at 800, the measure of the motor vehicle excise tax was the value of the vehicle at registration. And the estate tax upheld in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), was measured by the total value of the property at the time of the decedent's death and is apportioned to the extent any of the property was located outside of Washington. *See* RCW 83.100.040.

Unlike in each of those cases, the measure of the capital gains tax at issue here is not measured by the extent to which the taxpayer engages in any privilege conferred by or an activity regulated by Washington. This makes it markedly unlike the B&O tax highlighted by the State, *see* State's Br. at 34, which is measured by the value of the taxable privilege—business— engaged in by the taxpayer. The State in fact never identifies the "taxable privilege" that only individuals allegedly engage in to be subject to the capital gains tax—other than to suggest that capital gains are income for the wealthy. *See id.* But, as the United States Supreme Court has said in another context, "[a] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 374, 111 S. Ct. 818, 829, 112 L. Ed. 2d 884 (1991).

Here, the capital gains tax is measured by an individual's total, annual long-term Washington capital gains for the federal taxable year. ESSB 5096 §§ 4(1), (13), 5. ESSB 5096 defines Washington capital gains as the aggregate sum of the individual's federal net long-term capital gains adjusted by the amounts

of long-term capital losses and gains that are either exempt or not allocated to Washington, less the amounts of standard and itemized deductions set forth in the statute. *See* ESSB 5096 §§4(1), (4)(13), 7, 8, 9. In other words, the capital gains tax is imposed on the value of the individual's annual net income. The capital gains tax is a property tax on annual income. *See High Tide Seafoods*, 106 Wn.2d at 699 (a property tax is imposed on the value of property); *Black*, 67 Wn.2d at 99 (same).

3. The Superior Court Correctly Analyzed ESSB 5096 to Determine its Proper Nature and Measure.

The State also misses its mark when it complains about the superior court's letter ruling and the "hallmarks" of the capital gains tax described there. *See* State's Br. at 33-47. The "hallmarks" identified by the superior court do not delineate a new test for what constitutes a property tax versus an excise tax under this Court's precedents, as the State contends. *See* State's Br. at 33-47. The superior court correctly reviewed these factors to determine "who is being taxed [under ESSB 5096], what is being taxed, and how the tax is measured." *See* CP Vol. I 869 (quoting *Kunath v. City of Seattle*, 10 Wn. App. 2d 205 (2019)). The superior court's conclusion was correct. Analysis of ESSB 5096's relevant attributes make clear that the capital gains tax is a tax on property (income), not an excise tax. *See* CP Vol. I 869.

The superior first court noted that ESSB 5096 is expressly connected to federal *income* taxes. CP Vol. I 869. ESSB 5096 tethers its definition of capital assets to Subtitle A of the Internal Revenue Code,

which governs federal income taxes. *See* ESSB 5096 § 4(2) ("'Capital asset' has the same meaning as provided by Title 26 U.S.C. Sec. 1221"); *see also* § 4(3) ("'Federal net long-term capital gain' means the net long-term capital gain reportable for federal income tax purposes"). ESSB 5096 further relies on the amount of total gains reported on an individual's federal income tax returns as the starting bases for determining the amount of capital gains tax owed to Washington. While these federal attributes are not in and of themselves determinative of ESSB 5096's incident, they highlight that the object of the capital gains tax is to tax individual income.

The superior court also observed that the capital gains tax is directly imposed on the net total gain recognized by an individual on their federal income tax returns after adjustments are made based on Washington's designated allocations and exemptions. The superior court noted that these features make ESSB 5096 unlike each of the excise taxes described by the State in its briefing that are imposed on a transactional basis measured by the gross value of the transaction engaged in. *See* CP Vol. I. 869, n. 2 (listing cases cited by State). Nothing is remarkable about the superior court's observation or comparison in that regard.

The superior court also correctly ascertained that the capital gains tax is levied on all "Washington capital gains" regardless of whether the gains were derived from transactions within Washington. Setting aside that Washington lacks authority to impose such taxes without apportionment, as discussed later in this brief, the capital gains tax is not tethered to Washington-based activity, privileges, or rights. The

superior court correctly concluded that the State imposed the capital gains tax "without concern whether the State conferred any right or privilege to facilitate the underlying transfer," and thus entitling the State to charge an excise. CP Vol. I 870 (citing *Jensen*, 185 Wash. at 218). The State was concerned only with reaching acquired income. *Contrast* ESSB 5096 *with State ex rel Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933) ("This act does not concern itself with income which has been acquired, but only with the privilege of acquiring").

The superior court finally observed, that unlike the excise taxes cited by the State, the capital gains tax is not imposed on every transfer of title or ownership of capital assets, or even necessarily assessed on the person engaging in the transfer. CP Vol. I 871. This too supports the superior court's conclusion that while the State has characterized the tax as a levy on the "sale or exchange" of capital assets, its extra-territorial reach shows it is in fact not. The capital gains tax set forth in ESSB 5096 is a tax on income.

4. The Capital Gains Tax Is a Non-Uniform Property Tax That Exceeds Constitutional Rate Limitations.

Because capital gains fall within the definition of "property" and the capital gains tax falls under the definition of "property tax" recognized by this Court, ESSB 5096 must comply with the Washington Constitution, Article VII, Sections 1 & 2. It does not.

The Uniformity Clause set forth in Article VII, Section 1 requires that "[a]ll taxes shall be uniform upon the same class of property within the territorial

limits of the authority levying the tax . . . .The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." "'[N]et income.' . . . under the Fourteenth Amendment, constitutes one class of property." *Jensen*, 185 Wn. at 222–23. If net income is a single class of property, it follows that net income in the form of gains derived from the sale of long- term capital assets is one class of property, and any tax on such gains must satisfy the constitutional principles of uniformity.

The capital gains tax is non-uniform in at least two ways. First, the State imposes the capital gains of individuals but not other residents, such as corporations, that sell or exchange capital assets. This is non-uniform taxation. *Power, Inc. v. Huntley,* 39 Wn.2d 191, 195, 235 P.2d 173 (1951) ("If the four per cent tax on corporate net incomes is a tax on property, it violates the principle of uniformity in that it levies no tax on the incomes of individuals and copartnerships which may be in competition with corporations required to pay the tax.") (citing authorities).

Second, taxpayers will pay a seven percent tax on their "Washington capital gains" ESSB 5096 §5. But after a standard deduction, the first $250,000 of Washington capital gains are subject to zero tax. ESSB 5096 § 7. Additional deductions for qualifying sales of small businesses and charitable deductions are also allowed. *Id.* As a result, ESSB 5096 imposes a graduated, non-uniform tax on a single class of capital gains. *See Culliton*, 174 Wn. at 382 ("The constitutional amendment speaks of the same class of property. One who pays a tax on a $2,000 taxable

income pays a tax on precisely the same class of property as one who pays a tax on a $1,000 taxable income, and to tax the one at a progressively higher rate than the other positively violates the other clause of the amendment, that all taxes shall be uniform upon the same class of property.”).

ESSB 5096 must also comply with Article VII, Section 2, which places a ceiling on the aggregate taxes that can be imposed on property. Section 2 restricts the aggregate of all tax levies on property to a rate of one percent annually without a supermajority vote of the people. Seven percent is obviously more than one percent, so ESSB 5096 also violates the Washington Constitution by levying a tax that exceeds the maximum rate permitted under Section 2. The superior court was correct to invalidate the capital gains tax imposed under ESSB 5096 on these state constitutional grounds.

B. ESSB 5096 Violates the Privileges and Immunities Clause of the Washington Constitution.

Article I, Section 12 of the Washington Constitution provides that “No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Const. art. I, § 12. This provision, which is more protective than the federal equal protection clause, “protects . . . against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 806–07, 83 P.3d 419

(2004). Courts subject legislation implicating Article I, Section 12 to a two-part test. *Schroeder v. Weighall*, 179 Wn.2d 566, 572–73, 316 P.3d 482 (2014). First, the Court must ask whether the law grants a "privilege" or "immunity" within the meaning of the constitution. *Id.* If the answer is yes, then the Court must ask whether there is a "reasonable ground" for granting that privilege or immunity. *Id.*

In the case of ESSB 5096, the answer to the first question of whether the statute implicates a "fundamental right[] of state citizenship" is yes. *See Schroeder*, 179 Wn.2d at 573. This Court has recognized that the term "privileges and immunities" "as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution." *Grant Cnty. Fire Prot. Dist. No. 5*, 150 Wn.2d at 812-13. The federal constitution's "privileges and immunities" clause includes the fundamental right "to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from." *Id.* Thus, "[b]y analogy," the Washington Constitution's "privileges and immunities" clause also includes the fundamental right to be exempt from taxes which other citizens or corporations are also exempt from. *See id.*

The State argues that there is no fundamental right to be exempt from a state tax that the state has granted to other persons. State's Br. at 50. The cases relied on by the State for this proposition, however, concerned citizens seeking *similar* exemptions as that granted to others engaged in *different* activity. For example in *Supply Laundry Co. v. Jenner*, the petitioners challenged on equal protection grounds

exemptions under the B&O tax for various businesses and professions. 178 Wash. 72, 78, 34 P.2d 363 (1934). The Court rejected the notion that the Legislature could not "draw fine distinctions *between* classifications." *Id.*; *accord Morrow*, 182 Wash. at 634; *Black*, 67 Wn.2d at 100. The Court in these cases did not endorse the notion advocated by the State here that the Legislature can draw distinctions within the *same* class.

ESSB 5096 imposes a capital gains tax on any sale or exchange of long-term capital assets. § 5(1). The tax thus generally applies to any person[5] who owns long-term capital assets and engages in the sale or exchange of those assets. The same provision also specifies however that "[o]nly individuals are subject to payment of the tax," meaning that any non-natural person that also derives capital gains is not subject to payment of the tax. *Id.* ESSB 5096 on its face subjects only certain persons owning and selling capital assets to the tax, while exempting any other person with the *exact same circumstances* from the tax.

The second question when applied to state

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[5] The tax code generally applies to any "person" meaning interchangeably "any individual, receiver, administrator, executor, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, company, joint stock company, business trust, municipal corporation, political subdivision of the state of Washington, corporation, limited liability company, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise and the United States or any instrumentality thereof." RCW 82.04.020 (excise tax purposes); see also RCW 83.100.020(9) (estate and transfer tax; same); RCW 84.04.075 (property taxes; same).

taxes asks whether there is a "reasonable ground" for the legislature to have taxed one class and exempted other classes from the same tax. *Schroeder*, 179 Wn.2d at 573; *cf. Texas Co. v. Cohn*, 8 Wn.2d 360, 376, 112 P.2d 522 (1941) (applying federal equal protection analysis to tax law).[6] "Under the reasonable ground test a court will not hypothesize facts to justify a legislative distinction . . . . Rather, the court will scrutinize the legislative distinction to determine whether it in fact serves the legislature's stated goal." Id. at 574 (internal citations omitted). The Legislature's stated purpose for imposing the tax in ESSB 5096 purportedly is to "rebalance" the state's tax code so that its "wealthiest residents" pay more taxes on their share of income than those residents at the bottom of the income spectrum. ESSB 5096 § 1. This stated purpose, however, speaks only to the difference in levying the tax on individuals whose "profit is in excess of $250,000," *id.*, it says nothing of a legislative basis for imposing the tax only on individuals as opposed to imposing the tax on any person owning the capital assets and selling those assets for gain.[7] And there is no discernable basis in the legislative text for the State to treat individuals incurring capital gains discriminatively from other "persons" incurring capital gains, when the purported

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[6] This Court has since held that Article I, Section 12 provides greater constitutional protections than equal protection. *Grant Cty. Fire Protection Dist. No. 5*, 150 Wn.2d at 806–07. The test applied in *Texas Co*, which looked to "any conceivable basis" to uphold the classification, therefore no longer applies.

[7] Such a distinction, of course, also violates Article VII, Section 1's uniformity provision for property taxes.

reason is to raise revenue, except for the Legislature to reach individual income. *Cf. Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 554, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015) (disparate treatment of corporate and personal income cannot be justified based on the state services enjoyed by two groups of taxpayers). This arbitrary distinction does not in fact support the Legislature's stated purpose, and thus unconstitutionally burdens the tax against only a select set within the relevant class of taxpayers in violation of Article I, Section 12. ESSB 5096 should be invalidated on these state constitutional grounds as well.

C. ESSB 5096 Violates The Commerce Clause Of The United States Constitution.

The Supreme Court has long held that Article I, Section 8, clause 3 ("the Commerce Clause") of the United States Constitution contains a dormant prohibition against certain state taxation involving interstate commerce. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) (analyzing history of the dormant Commerce Clause). To survive Commerce Clause scrutiny, a state tax must meet a four-part test that focuses on the practical effect of the challenged tax. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The tax must (1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce, and (4) be fairly related to the services that the state provides. *Id.* at 279. ESSB 5096 violates this inquiry because the statute (1) impermissibly imposes the tax based on the location of the taxpayer and not

the location of the activity from which the income is derived; (2) imposes the tax without fairly apportioning it to activities occurring only within Washington; and (3) discriminates against interstate commerce by subjecting income derived outside the state to risk of multiple state taxation. The State's attempt to validate the capital gains tax in the face of these deficiencies must fail.

1. The Commerce Clause Analysis Requires The Court To Determine Whether Application Of The Tax Is Unconstitutional.

The State first asks this Court to apply a test for facial challenges that the United States Supreme Court has never applied when analyzing a state tax law under the Commerce Clause. Specifically, the State asserts—citing only non-tax, non- Commerce Clause cases—that Plaintiffs must establish that there are "no set of circumstances" in which the capital gains tax can constitutionally be imposed to invalidate the tax. *See* State's Br. at 15-17, 54-55, 58. Not so. As discussed below, the Supreme Court has not hesitated to find a state tax scheme invalid under the Commerce Clause even if there may be scenarios in which some imposition of the tax could be constitutionally permissible.

The State's facial argument derives from a principle applicable in other contexts that a challenge to a legislative act generally requires the challenger to "establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095 (1987) (analyzing substantive due process challenge to

federal bail legislation); *Washington State Republican Party*, 141 Wn.2d 245, 282, n. 14, 4 P.3d 808 (2000) (analyzing First Amendment challenge to state campaign finance law). Yet the State does not cite any case in which this "no set of circumstances" principle has been applied in a Commerce Clause challenge to a state tax law, nor are Plaintiffs aware of any such case.[8]

The State misleadingly references *Tyler Pipe Industries, Inc. v. Department of Revenue*, 483 U.S. 232, 248, 107 S. Ct. 2810, 97 L. Ed. 199 (1987), as purportedly supporting its position because the Supreme Court invalidated a specific business and occupation (B&O) tax exemption while leaving the B&O tax code intact. *See* State's Br. at 16. But, contrary to the State's suggestion, the petitioners in *Tyler Pipe* did not challenge the entirety of the B&O tax code or bring an as-applied challenge; instead they brought a facial challenge against a provision in the

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[8] Application of *Salerno* has been called into question by the Supreme Court and other courts, including in tax challenges. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 55 n. 22, 119 S. Ct. 1849, 144 L.Ed.2d 67 (1999) (questioning *Salerno*'s application); *Gordon v. Holder*, 721 F.3d 638, 654 (D.C. Cir. 2013) (rejecting *Salerno*'s application when a tax statute "erases the boundaries that define a sovereign's jurisdiction"); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023–24 & n.4 (9th Cir. 2007) (collecting cases in which Supreme Court has not applied *Salerno*, including *Kraft Gen. Foods Inc v. Iowa Dep't of Rev. & Finance*, 505 U.S. 71, 112 S. Ct 2365, 120 L. Ed. 2d 59 (1992), a state tax Commerce Clause challenge); *accord Robinson v. City of Seattle*, 102 Wn. App. 795, 806-08, 10 P.3d 452 (2000) (discussing *Salerno's* application and declining to apply the "no set of circumstances" test in a constitutional challenge to a city tax ordinance under the Washington Constitution).

State's tax code that assessed the B&O tax "only on those goods manufactured in Washington that are sold outside the State." *Id.* at 240. The Supreme Court agreed with the challengers that the provision had "facially discriminatory consequences" because it treated transactions differently depending on whether they were in-state or out of it. *Id.* at 241. The Court thus found the challenged statute invalid under the Commerce Clause because it "unfairly burden[ed] commerce by exacting more than a just share from the interstate activity." *Id.* at 247 (quoting *Washington Dept. of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 748, 98 S. Ct. 1388, 1393, 55 L.Ed.2d 682 (1978)).

The Supreme Court's analysis in *Tyler Pipe* is consistent with its Commerce Clause analysis in other tax cases in which the Court has applied a "practical" analysis that looks at whether application of the tax would violate the Commerce Clause. *See, e.g.*, *Wynne*, 575 U.S. at 552 (Commerce Clause requires a "practical approach" that looks to the economic impact of the tax); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 616, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) (applying a "consistent and rational method of inquiry focusing on the practical effect of a challenged tax"); *Gwin, White & Prince v. Henneford*, 305 U.S. 434, 439–40, 59 S. Ct. 325, 83 L. Ed. 272 (1939) (looking at tax statute in its "practical operation" to find it discriminated against interstate commerce). Contrary to the State's argument, the Supreme Court has not saved state tax statutes by asking whether it could find any instance that the tax would not violate the Commerce Clause. The Supreme Court has instead consistently invalidated state tax laws when the

"practical operation" of the tax scheme exceeds a state's taxing authority or discriminates against interstate commerce.

For example, in *Gwin*, the fact that Washington's B&O tax applied equally to income earned from activities entirely in Washington and those earned both within and outside Washington did not save the tax from being struck down as facially invalid. Notwithstanding that the tax could constitutionally apply to the exclusively in-state activity, the Supreme Court held the entire tax scheme discriminated against interstate commerce because it involved "risk of a multiple burden to which local commerce is not exposed." *See Gwin*, 305 U.S. at 439.

Similarly in *Wynne*, the Supreme Court agreed that Maryland's personal income tax structure violated the Commerce Clause because the system allowed a credit for income tax paid to another jurisdiction for one portion of the state's income tax but not another. *Wynne*, 575 U.S. at 545. The Court noted that the tax could be separated into three categories depending on who and where the income was earned. *See id.* at 566-67. Yet the fact that the tax could constitutionally apply to income earned solely in-state did not save the law because the scheme as a whole discriminated against interstate commerce. *Id.* at 567; *see also id.* at 565 n. 8 ("In applying the dormant Commerce Clause, [the categories] must be considered as one.") As explained in detail in the next sections, ESSB 5096 suffers from similar structural defects under the Commerce Clause as the state taxes invalidated in *Gwin* and *Wynne*. Even the State tacitly acknowledges that there could be

circumstances where application of the capital gains tax would violate the dormant Commerce Clause. *See* State's Br. at 57-58; *see also* CP Vol. I 663 (admitting "circumstances where the tax might not constitutionally apply). Those unconstitutional "circumstances" doom the capital gains tax when the well-established Commerce Clause analysis is applied.[9]

2. ESSB 5096 Impermissibly Allocates Capital Gains to Washington Based on Activities Occurring Outside its Borders.

The Commerce Clause limits Washington's power to tax to only those activities within its jurisdictional reach. See *Gwin*, 305 U.S. at 438-39. "State taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." *Id.* (citations omitted). This extraterritoriality principle applies whether the tax imposed by the State is a tax on sales, a gross receipts tax on the privilege of engaging in activity, or a tax on income. *See Wynne*, 575 U.S. at 551–52 (Commerce Clause does not "distinguish[]" between taxes on gross

[9] The State also notes that the legislature included a severability clause in ESSB 5096 and suggests that this aspect could save the statute in an as-applied challenge. State's Br. at 17 n. 2. However, as discussed next, ESSB 5096's constitutional defects concern not only what is included in the text, but also what the text is missing. Attempting to sever only select provisions of the statute would not save its unconstitutionality under the Commerce Clause.

receipts or net income); *Jefferson Lines, Inc.*, 514 U.S. at 184 (states may only tax sales or services occurring within its borders). The *Complete Auto* test thus requires that the tax only apply to activities connected to the State and that there be a fair relation between the tax and the activities of the taxpayer in the State. *See Jefferson Lines, Inc.*, 514 U.S. at 184, 199.

To determine whether a state tax impermissibly extends beyond the state's territorial limits, the court must ask "whether the tax applies to an activity with a substantial nexus with the taxing State." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099, 201 L. Ed. 2d 403 (2018) (emphasis added). "Such a nexus is established when the taxpayer . . . 'avails itself of the substantial privilege of carrying on business' [i.e., the taxed activity] in that jurisdiction," *id.* (internal citation omitted), or there is "nexus between [the] tax and transactions within [the] state for which the tax is an exaction." *Mobil Oil Corp. v. Comm'r of Taxes of Vermont*, 445 U.S. 425, 437, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980). Likewise, the measure of the tax, i.e., what is included in the calculation of the tax, must be reasonably related to the taxpayer's presence or activities in the state. *Jefferson Lines, Inc.*, 514 U.S. at 199. "When the measure of a tax bears no relationship to the taxpayers' presence or activities in a State . . . the State is imposing an undue burden on interstate commerce." *Commonwealth Edison Co.*, 453 U.S. at 629. Both inquiries ensure "the taxing power . . . bears fiscal relation to protection, opportunities and benefits given by the state—that is whether the state has given anything for which it can ask return." *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of*

Rev., 553 U.S. 16, 24–25, 128 S. Ct. 1498, 170 L. Ed. 2d 404 (2008) (citation omitted); *accord Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 777, 112 S. Ct. 2251, 119 L. Ed. 2d 533 (1992) ("The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'") (citation omitted).

ESSB 5096 overreaches the bounds of the Commerce Clause because it allocates gains to Washington that are not derived from activity with nexus to the State. Specifically, Washington allocates to itself *all* gains:

> (1) derived from sales or exchanges of tangible property located in the state at the time of the sale or exchange (§ 11(1)(a));
>
> (2) derived from sales or exchanges of tangible property previously located in the state if the taxpayer was a resident at the time of the sale/exchange and the taxpayer is not otherwise subject to the payment of another tax by another jurisdiction (§ 11(1)(a)(i)-(iii)); and
>
> (3)derived from sales or exchanges of intangible personal property if the taxpayer was domiciled in the state at the time of the sale or exchange. (§ 11(1)(b)).

See ESSB 5096 § 11(1) (a)-(b). For two of these allocations, the State impermissibly sources the tax not based on the location of activity purportedly being taxed—i.e., the sale or exchange of the property—but

rather on the taxpayer's residency or domicile in the State.

With respect to the first sentence in section 11(1)(a), it is true that the State has nexus to tax sales of tangible personal property located in the state when the sale is consummated there. *See* State's Br. at 56 (citing *Jefferson Lines*, 514 U.S. at 184). The State however ignores entirely the second sentence of the same provision, which allocates to Washington gains on the sale of tangible property "even though the [tangible personal] property was not located in the state at the time of the sale or exchange." *See* ESSB 5096 § 11(1)(a)(i)–(iii). This provision indisputably imposes the tax based on the *residency* of the taxpayer, disregarding the constitutionally determinative fact that the *activity* on which the excise tax is purportedly based (i.e., the sale or exchange) occurred outside the jurisdictional reach of the State. *See Allied-Signal, Inc.*, 504 U.S. at 777 ("[W]e have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax.").

With respect to the provision in section 11(1)(b) allocating gains derived from intangibles solely based on the taxpayer's domicile, the State overstates the rule. *See* State's Br. at 56. States have authority to impose taxes on the sale or transfer of intangible property in cases "where the owner of the intangibles *confines* his *activity* to the place of his domicile." *Curry v. McCanless*, 307 U.S. 357, 367, 59 S. Ct. 900, 83

L. Ed. 1339 (1939) (emphasis added).[10] The Supreme Court also explained that the maxim of *mobilia sequuntur personam*[11] applied in this context is one of convenience that must yield to factual reality when the activity involves more than one state:

> [W]hen the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there, the reason for a single place of taxation no longer obtains, and the rule is not even a workable substitute for the reasons which may exist in any particular case to support the constitutional power of each state concerned to tax.

Id. at 367 (emphasis added); *accord Mobile Oil Corp. v.*

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[10] The State contends *Curry* held that transactions in intangible property are deemed to occur only in the state of the owner's domicile. State's Br. at 56. The Supreme Court created no such black-letter rule in *Curry*. Addressing a Fourteenth Amendment challenge, *Curry* refused to impose a one-size-fits-all rule, explaining "[w]e find it impossible to say that taxation of intangibles can be reduced in every case to the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons." *Id.* at 908–09. The Court declined to hold "that the Fourteenth Amendment may be invoked to compel the taxation of intangibles by only a single state by attributing to them a situs within that state." *Id.* at 909 (citation omitted).

[11] The maxim means "that it is the identity or association of intangibles with the person of their owner *at his domicile* which gives jurisdiction to tax." *Curry*, 307 U.S. at 367 (emphasis added).

Comm'r of Taxes of Vermont, 445 U.S. 425, 444–45, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980) (permitting sourcing based on a state's connection to the activity generating the income from intangibles). The State disregards that ESSB 5096 allocates all income derived from the sale or exchange of intangible capital assets entirely to Washington based only on the taxpayer's domicile, without regard to whether the capital gains resulted from activity outside the state. *See* ESSB 5096 § 11(1)(b).

The State also disregards the fact that a taxpayer may have no control over sale or exchange of the intangibles at issue because the capital gains tax applies based solely on "whether the taxpayer was the legal or beneficial owner" of the assets at the time of sale or exchange. ESSB 5096 § 5(4)(a). In other words, the taxpayer may not engage in any activity or even have power to do so to be subject to the tax, such as in the case of a beneficiary of a trust or the minority shareholder of a corporation. *See, e.g.*, CP Vol. I 639-95, 697-99. Yet the capital gains tax here is imposed "to the extent of the individual's ownership interest" or to the extent the individual recognizes the gains on their personal federal income tax forms. *See id.* at § 5(4)(a), (b)(i)-(ii). The Supreme Court, however, has explicitly rejected the notion that "intangibles—stocks, bonds—in the hands of the holder of the legal title with definite taxable situs at its residence" may be taxed based on the *equitable* owner's domicile. *Safe Deposit & Trust Co. of Baltimore, Md. v. Commonwealth of Virginia*, 280 U.S. 83, 92–93, 50 S. Ct. 59, 74 L. Ed. 180 (1929). Just as in *Curry*, the Supreme Court found in *Safe Deposit & Trust Co.* that "the fiction of *mobilia sequuntur personam*" must yield

to the "established fact of *legal* ownership, actual presence and control elsewhere." *Id.* (emphasis added). Here, the State has tried to reinstate the "fiction" that the power to tax transactions involving intangible personal property should be based exclusively on domicile, instead of where the activity related to the intangible occurs. *See id.* at 93.

In sum, the State unconstitutionally overreached its jurisdiction with the capital gains tax.

3. ESSB 5096 Lacks Fair Apportionment.

The fact that ESSB 5096 taxes transactions that occur entirely outside Washington's borders also dooms the Act under *Complete Auto*'s fair apportionment requirement. Income earned from interstate commerce must be "fairly apportioned" to the activities carried on within that state. See *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 255, 58 S. Ct. 546, 82 L. Ed. 823 (1938). This principle of "fairness" derives from the Commerce Clause's prohibition against "multiple taxation, which is threatened *whenever* one State's act of overreaching combines with *the possibility* that another State will claim its fair share of the value taxed." *Jefferson Lines, Inc.*, 514 U.S. at 184– 85 (emphasis added). Despite the State's claim, ESSB 5096 contains no method for apportioning gains derived from the sale or exchange of long-term capital assets outside of the state.

To assess ESSB 5096's "threat of malapportionment" the court must ask "whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well." *Jefferson Lines, Inc.*, 514 U.S. at 185 (citation omitted). "Internal

consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* This test requires "hypothetically assuming that every State has the same tax structure" to determine whether the state "tax scheme[]" "inherently discriminates against interstate commerce without regard to the tax policies of other States." *Wynne*, 575 U.S. at 562. External consistency, in contrast, looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines, Inc.*, 514 U.S. at 185. There must be "a rational relationship between the income attributed to the State and intrastate values of the [business being taxed]." *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 165-66, 103 S. Ct. 2933, 77 L. Ed. 2d 545 (1983). If the income apportioned to the State is "out of all appropriate proportion to business transacted in that State," the tax lacks "fair apportionment." *See id.* at 180–81. ESSB 5096 fails these requirements.

The State contends that ESSB 5096 is internally consistent because it allocates gains based on where the property is located for tangible personal property and based on domicile of the owner for purposes of intangible personal property. State's Br. at 59. The State again ignores the second sentence of ESSB 5096 § 11(1)(a), which allocates gains based on the taxpayer's Washington residency when the state where the transaction actually occurs chooses not to tax. The very fact that another state *could* tax means

that ESSB 5096 fails the test for internal consistency. *See Armco, Inc. v. Hardesty*, 467 U.S. 638, 644–45 and n.8, 104 S. Ct. 2620, 82 L. Ed. 2d 540 (1984) (validity of one state's tax does not turn on how another state has chosen to exercise its taxing authority); *Mobile Oil Corp.*, 445 U.S. at 444 (constitutionality of state's law does not depend on proof of actual multiple taxation; fact that another state could tax governs the analysis).

Further, the State grossly mischaracterizes the tax credit provision in ESSB 5096 § 11(2)(a), when it asserts the provision "eliminates any chance of multiple taxation." State's Br. at 60 (referencing RCW 82.87.100(2)). The credit is extended only to capital gains paid by the taxpayer to another state "from capital assets *within* the other taxing jurisdiction to the extent such capital gains are included in the taxpayer's Washington capital gains," ESSB 5096 § 11(2)(a) (emphasis added). In short, a credit is allowed but only if the gains were derived from capital assets within the other state—for example, the value of goodwill in an out of state business. No credit is allowed against another state's taxes on the same capital gains sourced to that state by other means, such as if the taxpayer has multiple residencies. For example, consider a situation in which Washington allocates for itself capital gains derived from the sale or exchange of tangible personal property solely because the taxpayer was a resident of Washington at the time of the event. If the taxpayer is also a resident of California, the taxpayer runs the risk of being taxed on the entirety of the income from the sale or exchange twice— once by Washington and once by California,

without any apportionment between the two under ESSB 5096.[12]

Contrary to the State's assertion, the lack of full credit by Washington for other states' taxes does create a "genuine risk" that gains derived from the transfer of long-term capital assets will be taxed by multiple states. *See* State's Br. at 59. ESSB 5096 lacks internal consistency and thus impermissibly burdens interstate commerce. *See Wynne*, 575 U.S. at 545 (striking down part of state income tax that did not offer residents a full credit against income taxes paid to other states); *Tyler Pipe Indus.*, 483 U.S. at 247–48 (version of Washington's B&O tax unconstitutionally discriminated against interstate commerce because it was internally inconsistent).

The State next repeats its same arguments regarding allocation for tangible and intangible personal property in defense of ESSB 5096's external inconsistency. *See* State's Br. at 60. However, Washington's alleged economic justification for allocating the gains to itself (i.e., the residency or domicile of the taxpayer) cannot overcome the fact

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[12] ESSB 5096 § 4(10)(a) defines "resident" as someone who is "domiciled in this state" or who "maintained a place of abode here and was physically present in this state for more than 183 calendar days." For purposes of its income tax (of which capital gains are included), California defines resident as any individual who is (1) in California for other than a temporary or transitory purpose; or (2) domiciled in California, but who is outside California for a temporary or transitory purpose. Cal. Rev. & Tax Code § 17014. Thus, a person can be both a resident of Washington at the time of sale and also a resident of California for purposes of the tax.

that the State is reaching "beyond that portion of value that is fairly attributable to economic *activity*" within the state. *Jefferson Lines, Inc.*, 514 U.S. at 185 (emphasis added). As previously stated, external consistency requires that gross receipts taxes or taxes on income "be apportioned to reflect the location of the various interstate activities by which [the amount] was earned." *Jefferson Lines, Inc.*, 514 U.S. at 190. Allocating capital gains derived from a sale or exchange of tangible personal property that occurs outside Washington entirely to Washington solely because the beneficial owner happened to be a Washington resident is externally inconsistent because the state in which the sale occurred has power to tax the income.

The Legislature here failed to incorporate *any* principles of apportionment in ESSB 5096 so that the capital gains tax is constitutionally imposed only on that portion of income reasonably attributed to the taxpayer's in-state activities in connection with the sale. This is the same defect that doomed Washington's early B&O tax. *See Gwin*, 305 U.S. at 438–39 (striking down Washington privilege tax derived from gross receipts incurred from sales in interstate commerce and without apportionment).

The State's arguments also suggest it believes that apportionment is not required for income earned from intangible personal property at all by application of its legally unsupported "fiction" that all intangible personal property is sourced to its owner's domicile. *See* State's Br. at 60. But, as previously discussed, the State is wrong. *See also Mobil Oil Corp.*, 445 U.S. at 445 ("The Court also has recognized that the reason for a single place of taxation no longer obtains when

the taxpayer's activities with respect to the intangible property involve relations with more than one jurisdiction *Moreover, cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations where the apportionment principle prevails*.") (emphasis added; citations omitted); *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 212, 56 S. Ct. 773, 80 L. Ed. 1143 (1936) (recognizing that tax on net profits from intangible property demands a method of apportionment among different jurisdictions with respect to the processes by which the profits are earned).

ESSB 5096 tries to allocate taxable gains derived from the sale of certain capital assets to Washington solely because the taxpayer resides or is domiciled within the State. But the act of simply living in the State does not bear a rational relationship to the amounts earned from the long-term ownership and eventual sale or transfer of those assets. And, even if some link were identified, there would still be no basis for Washington to allocate to itself —as it does in ESSB 5096—*all* of the gains earned without any apportionment for the value earned in other jurisdictions. By doing so, the gains allocated to Washington are "out of all appropriate proportion" to the activities conducted here. *Container Corp. of America*, 463 U.S. at 180–81. The State here has unconstitutionally extended its taxing authority to activities conducted wholly or predominantly outside its borders with no rational relationship between the income on which the state's tax is measured and the activity purportedly being taxed.

4. ESSB 5096 Discriminates Against Interstate Commerce.

Last, the State's arguments against ESSB 5096's discriminatory nature focus on the wrong test. *See* State's Br. at 60-61. The State focuses only on the portion of the Commerce Clause inquiry that seeks to identify discriminatory tax treatment of in-state and out-of-state interests. *See id.* (quoting *Washington Banker's Ass'n v. State*, 198 Wn.2d 418, 430, 495 P.3d 808 (2021) and *Filo Foods, LLC v. State*, 183 Wn.2d 770, 809, 357 P.3d 1040 (2015)).[13] But that aspect of the test for discrimination under the Commerce Clause has never been asserted here and is not the only way a state can discriminate against interstate commerce. As the Supreme Court has explained:

> among other things, [] a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. *Nor may a State impose a tax which discriminates against interstate commerce* either by providing a direct commercial advantage to local business, or *by subjecting interstate commerce to the burden of multiple taxation.*

Wynne, 575 U.S. at 549-50 (citations omitted; emphasis added); *see also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644–45 and n.8, 104 S. Ct. 2620, 82 L. Ed.

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[13] In both cases, the petitioners had asserted that the statute at issue discriminated against interstate commerce by unfairly taxing out-of-state businesses. *See Wash. Bankers Ass'n*, 198 Wn.2d at 426; *Filo Foods, LLC*, 183 Wn.2d at 809.

2d 540 (1984) ((“A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce.”). ESSB 5096 discriminates against interstate commerce because it subjects income earned across state lines to risk of multiple taxation. *See Wynne*, 575 U.S. at 549-50. While gains earned from sales of tangible personal property located in Washington are subject to tax only once by Washington, gains earned from out-of-state tangible personal property or gains earned from intangible personal property can be taxed not just by Washington but other states as well—simply because Washington has chosen to allocate the gains based on the taxpayer’s residency or domicile and without apportionment. This tax treatment burdens interstate commerce, which the State cannot constitutionally do. *Armco*, 467 U.S. at 644; *see also Gwin*, 305 U.S. at 438–39.

* * *

In sum, ESSB 5096 violates the dormant Commerce Clause because the capital gains tax imposed impermissibly allocates the tax to Washington based on the taxpayer’s location instead of where the activity of sale or transfer of the asset occurs, imposes a tax that is not fairly apportioned to activities occurring within the state, and discriminates against interstate commerce. The legislation cannot stand.

V. CONCLUSION

For these reasons, the Court should hold that the capital gains tax in ESSB 5096 is unconstitutional and void in its entirety.

This document contains 11,750 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted September 8, 2022,

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SUPERIOR COURT OF WASHINGTON
FOR DOUGLAS COUNTY

<table>
<tr>
<td>CHRIS QUINN, an individual; CRAIG LEUTHOLD, an individual; SUZIE BURKE, an individual; LEWIS and MARTHA RANDALL, as individuals and the marital community comprised thereof; RICK GLENN, an individual; NEIL MULLER, an individual; LARRY AND MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual.

Plaintiffs,

v.

STATE OF WASHINGTON; DEPARTMENT OF REVENUE, an agency of the State of Washington; VIKKI SMITH, in her official capacity as Director of the Department of Revenue.

Defendants.</td>
<td>Case No. 21-2-00075-09

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF</td>
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Plaintiffs, by and through their attorneys, allege the following First Amended Complaint for Declaratory and Injunctive Relief against Defendants State of Washington, Department of Revenue of the State of Washington, and Vikki Smith, as Director of

the Department of Revenue of the State of Washington:

I. NATURE OF THE CASE

1. The Washington State Legislature enacted ESSB 5096 to impose a seven percent (7%) tax on long-term capital gains. While described as an excise tax on the sale or exchange of long-term capital assets, the tax on capital gains is a tax on income.

2. Beginning January 1, 2022, individuals arc subject to capital gains tax on their adjusted capital gains during the federal taxable year. Adjusted capital gains are defined by the individual's federal net long-term capital gain, which is based on the amount of long-term capital gain reported on the individual's federal income tax return.

3. A standard deduction of $250,000 from the measure of the tax is allowed, along with an additional deduction for qualifying charitable donations over $250,000.

4. Individuals owing the tax must report and pay the capital gains tax to Washington on or before the date that their federal annual income tax return must be filed. Failure to pay the capital gains tax or otherwise comply with ESSB 5096 will result in penalties for the individual and possible criminal punishment as either a felony or gross misdemeanor.

5. Plaintiffs seek a declaratory judgment that ESSB 5096 is void because imposition of the capital gains tax as set forth in ESSB 5096 violates the Washington State Constitution and the United States Constitution.

6. ESSB 5096 is unlawful and invalid under the Washington State Constitution because (1) imposition of a non-uniform capital gains tax violates Article VII, Section 1 of the Washington Constitution; (2) imposition of a seven percent (7%) tax rate violates Article VII, Section 2 of the Washington Constitution; (3) imposing a capital gains tax on certain individuals while not taxing other individuals and not taxing entities violates the privileges and immunities clause of Article I, Section 12 of the Washington Constitution; (4) requiring Washington residents and nonresidents to disclose their federal income tax returns and all schedules and supporting documentation violates their privacy rights under Article I, Section 7 of the Washington Constitution.

7. ESSB 5096 is unlawful and invalid under the United States Constitution because (1) it allocates taxable gain to Washington based on the taxpayer's residency instead of where the sale generating the gain occurs in violation of Article I, Section 8, clause 3 (the "Commerce Clause") of the United States Constitution and (2) the method for allocating Washington capital gain in the statute violates the Commerce Clause requirements that state taxes be non-discriminatory and fairly apportioned.

8. Plaintiffs seek to enjoin the Defendants from assessing and collecting the capital gains tax from Washington residents and otherwise enforcing ESSB 5096.

II. PARTIES

A. Plaintiffs

9. Plaintiffs are Chris Quinn, Craig Leuthold, Suzie Burke, Lewis and Martha Randall, Rick Glenn, Neil Muller, Larry and Margaret King, and Kerry Cox.

10. Each of the named Plaintiffs own capital assets and would be subject to the capital gains tax in ESSB 5096 if they realized capital gains and would incur a tax liability on capital gains in excess of $250,000.

11. Plaintiffs have standing under the Uniform Declaratory Judgment Act because their interests in avoiding unlawful taxation are arguably within the zone of interests to be protected by the constitutional provisions in question and each would be injured if the unlawful capital gains tax set forth in ESSB 5096 were imposed on them.

12. Plaintiffs' Complaint also raises issues of significant public interest, which affect nearly 60,000 estimated taxpayers in the State of Washington.

B. Defendants

13. Defendant is the State of Washington.

14. Defendant Department of Revenue is an agency of the State of Washington.

15. Defendant Vikki Smith is the Director of the Department of Revenue and legislatively charged with assessing, collecting, and administering all programs related to taxes through the Department of Revenue. Director Smith is sued in her official capacity only.

III. JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction under Wash. Const. Article IV, Section 6, RCW 2.08.010, RCW 7.24.010, and RCW 7.40.010.

17. Venue is proper in this Court under RCW 4.92.010 because Douglas County is the county of residence or principal place of business of one or more of the plaintiffs.

IV. FACTUAL ALLEGATIONS

18. The Washington State Legislature adopted ESSB 5096 to impose a tax on the federal income taxable long-term capital gains of individuals.

19. The tax is imposed on individuals who have long term capital gains or losses for federal income tax purposes.

20. Individuals subject to the capital gains tax must pay a seven percent (7%) tax on the amount of adjusted capital gains less $250,000 and possibly other deductions. The threshold amount of taxable adjusted capital gains may increase—but never decrease—based on the consumer price index for all urban consumers for the Seattle area for each subsequent 12-month period.

21. Adjusted capital gains mean the "federal net long-term capital gain" reportable by individuals for their federal income tax purposes, excluding exempt gains or losses and excluding gains or losses that are not allocated to Washington. Losses carried back for federal income tax purposes are not included in the calculation of the individual's adjusted capital gain.

22. Long-term capital gains or losses derived from tangible personal property is allocated to Washington if either (1) the property was located in this state at the time of sale or exchange or (2) the property was located in Washington at some time during the taxable year, the taxpayer was a resident of Washington at the time of the sale or exchange, and the taxpayer is not otherwise subject to the payment of an income or excise tax on the long-term capital gains or losses by another state.

23. Long-term capital gams or losses derived from intangible personal property is allocated to Washington if the taxpayer was domiciled in Washington at the time the sale or exchange occurred.

24. A tax credit is allowed against the capital gains tax owed to Washington that is equal to the amount of any legal imposed income or excise tax paid by the individual to another taxing jurisdiction on capital gains derived from capital assets within the other taxable jurisdiction but included in the taxpayer's Washington capital gains.

25. A deduction of $250,000 is allowed per individual from the measure of adjusted capital gains, but in the case of spouses or domestic partner the total deduction is limited to $250,000.

26. A deduction is allowed for amounts of adjusted capital gains for the sale or transfer of an individual's interest in a "qualified family-owned small business," as defined in ESSB 5096.

27. A deduction of up to $100,000 is also allowed for amounts donated by the taxpayer to one

or more qualified charitable organizations in excess of $250,000 during the same taxable year.

28. Capital gains exempt from taxation include capital gains derived from certain real estate, certain retirement plans, livestock used in farming or ranching, timber, depreciable property used in a trade or business, commercial fishing privileges, and certain sales of auto dealerships.

29. Individuals owing capital gains tax must report and pay the tax to the Department of Revenue on or before the date that the individual taxpayer's federal annual income tax return must be filed, including extensions. In addition to the Washington tax return form, the taxpayer must also file a copy of their federal income tax return along with all schedules and supporting documentation.

30. Failure to pay the capital gains tax or otherwise comply with ESSB 5096 will result in penalties for the taxpayer(s) and possible criminal punishment as either a felony or gross misdemeanor.

V. CAUSES OF ACTION

A. DECLARATORY JUDGMENT BASED ON STATE CONSTITUTIONAL CLAIMS FIRST CAUSE OF ACTION

31. Plaintiffs repeat and reallege Paragraphs 1 through 30 as if fully set forth here.

32. There is an actual, present and justiciable controversy between Plaintiffs and Defendants concerning whether ESSB 5096 violates Article VII, Section I of the Washington State Constitution because it imposes a non-uniform tax on income of certain Washington residents.

33. A judicial determination concerning the statute's constitutional validity will conclusively terminate the dispute.

34. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is invalid because it violates Article VII, Section 1 of the Washington State Constitution.

35. Plaintiffs reserve the right to raise all legal bases under Washington law to challenge the constitutionality, legality, validity or enforceability of ESSB 5096.

SECOND CAUSE OF ACTION

36. Plaintiffs repeat and reallege Paragraphs 1 through 35 as if fully set forth here.

37. There is an actual, present and justiciable controversy between Plaintiffs and Defendants concerning whether ESSB 5096 violates Article VII, Section 2 of the Washington State Constitution because it exceeds the one percent limit on taxes upon personal property by the State without a valid vote of the people of the State.

38. A judicial determination concerning the statute's constitutional validity will conclusively terminate the dispute.

39. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is invalid because it violates Article VII, Section 2 of the Washington State Constitution.

40. Plaintiffs reserve the right to raise all legal bases under Washington law to challenge the

constitutionality, legality, validity or enforceability of ESSB 5096.

THIRD CAUSE OF ACTION

41. Plaintiffs repeat and reallege Paragraphs 1 through 40 as if fully set forth here.

42. There is an actual, present and justiciable controversy between Plaintiffs and Defendants concerning whether ESSB 5096 violates Article I, Section 12 of the Washington State Constitution by imposing a capital gains tax on certain Washington citizens while exempting other Washington citizens and all Washington corporations.

43. A judicial determination concerning the statute's constitutional validity will conclusively terminate the dispute.

44. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is invalid because it violates Article I, Section 12 of the Washington State Constitution.

45. Plaintiffs reserve the right to raise all legal bases under Washington law to challenge the constitutionality, legality, validity or enforceability of ESSB 5096.

FOURTH CAUSE OF ACTION

46. Plaintiffs repeat and reallege Paragraphs 1 through 45 as if fully set forth here.

47. There is an actual, present and justiciable controversy between Plaintiffs and Defendants concerning whether ESSB 5096 violates Article I, Section 7 of the Washington State Constitution because it invades the privacy rights of

Washington residents and nonresidents in relation to requiring disclosure of their federal income tax returns, schedules, and all supplying documentation, without careful tailoring and absent a legitimate governmental need for the entirety of that confidential information.

48. A judicial determination concerning the statute's constitutional validity will conclusively terminate the dispute.

49. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is invalid because it violates Article I, Section 7 of the Washington State Constitution.

50. Plaintiffs reserve the right to raise all legal bases under Washington law to challenge the constitutionality, legality, validity or enforceability of ESSB 5096.

B. DECLARATORY JUDGMENT BASED ON FEDERAL CONSTITUTIONAL CLAIMS FIFTH CAUSE OF ACTION

51. Plaintiffs repeat and reallege Paragraphs 1 through 50 as if fully set forth here.

52. There is an actual, present and justiciable controversy between Plaintiffs and Defendants concerning whether ESSB 5096 violates the Commerce Clause of the United States Constitution because it (1) allocates taxable gain to Washington based on residency instead of the location of the sale; (2) discriminates against interstate commerce; and (3) is not fairly apportioned.

53. A judicial determination concerning the statute's constitutional validity will conclusively terminate the dispute.

54. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is invalid because it violates the Commerce Clause of the United States Constitution.

55. Plaintiffs reserve the right to raise all legal bases under the federal law to challenge the constitutionality, legality, validity or enforceability of ESSB 5096.

C. INJUNCTIVE RELIEF

SIXTH CAUSE OF ACTION

56. Plaintiffs repeat and reallege Paragraphs 1 through 55 as if fully set forth here.

57. Plaintiffs' right to be free from the imposition of an invalid tax is in jeopardy of immediate invasion and will cause actual and substantial injury without any adequate remedy at law.

58. Plaintiffs are entitled under RCW 7.40.020 and Civil Rule 65 to an order enjoining Defendants from assessing and collecting the capital gains tax and otherwise enforcing ESSB 5096.

VI. REQUEST FOR RELIEF

Plaintiffs request that judgment be entered as follows:

1. Declaring ESSB 5096 to be unconstitutional and, therefore, void and inoperable as a matter of law.

2. Enjoining Defendants from assessing and collecting the capital gains tax and other enforcing ESSB 5096.

3. Awarding Plaintiffs fees, costs, and expenses as permitted by law or equity.

4. Awarding any additional or further relief that the Court finds appropriate, equitable, or just.

DATED this 17th day of May, 2021.

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