No. 100769-8

IN THE 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, an individual; LARRY and MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual,

Respondents,

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,

Appellants,

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, ADRIENNE STUART, 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, an individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an

individual; CATHERINE SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN McKENNA, an individual; WASHINGTON FARM BUREAU, WASHINGTON STATE TREE FRUIT ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION,

Respondents,

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,

Appellants,

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

Intervenors.

INTERVENORS' STATEMENT OF GROUNDS FOR DIRECT REVIEW

PACIFICA LAW GROUP LLP
Paul J. Lawrence, WSBA #13557
Sarah S. Washburn, WSBA #44418
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Paul.Lawrence@pacificalawgroup.com
Sarah.Washburn@pacificalawgroup.com

Attorneys for Intervenors

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I. INTRODUCTION

Washington State has the most regressive tax system in the United States. Low-income and middle-income Washingtonians pay a disproportionate share of their income in state taxes compared to residents with high incomes. In order to address the State's pressing need for additional investments in K-12 education and early learning and childcare without exacerbating these systemic tax problems, the Legislature enacted a seven percent tax on the sale or exchange of certain long-term capital assets like stocks and bonds, the revenues from which will provide significant funding for public education in Washington. Wrongly characterizing this tax as an income tax rather than an excise tax, the trial court struck it down as violative of constitutional requirements applicable to property taxes.

This Court should accept direct review because the trial court invalidated the capital gains tax on constitutional grounds. RAP 4.2(a)(2). Moreover, the case involves "fundamental and urgent issue[s] of broad public import which require[] prompt

and ultimate determination." RAP 4.2(a)(4). First, taxpayers and the State need a definitive answer that only this Court can provide on the tax's validity so they may conduct their planning and budgeting activities accordingly. Second, the trial court—having erroneously characterized the tax as an income tax rather than an excise tax—relied on erroneous, unsustainable, and outdated judicial interpretations of the constitutional limitations on an income tax. For decades, that erroneous case law has negatively impacted Washington, resulting in lower revenue and unfair tax burdens. If this Court rules the capital gains tax is an income tax, it should revisit that prior authority.

The Edmonds School District, Tamara Grubb (a teacher), Adrienne Stuart (a parent), Mary Curry (an early learning and childcare provider), and the Washington Education Association ("WEA") (collectively, "Education Parties"), Intervenors below, respectfully request that this Court accept direct review and reverse the trial court.

II. NATURE OF THE CASE AND DECISION

A. ESSB 5096 Funds Important Public Education Investments by Taxing the Voluntary Sale of Capital Assets.

In April 2021, the Legislature adopted Engrossed Substitute Senate Bill 5096 ("ESSB 5096"), imposing a seven percent tax on the sale or exchange of certain long-term capital assets beginning January 1, 2022. ESSB 5096, § 5(1).

The Legislature's stated purpose for the tax is twofold. First, the tax will advance the "paramount duty of the state" to amply fund educational opportunities for every child by "invest[ing] in the ongoing support of K-12 education and early learning and child care." *Id*., § 1. Revenue from the tax is dedicated to Washington's Education Legacy Trust Account ("ELTA") and the Common School Construction Account ("CSCA"). *Id.*, § 2. Each year, the first $500 million collected from the tax will be deposited into the ELTA. *Id*., § 2(1)(a). Funds from the ELTA "may be used only for support of the common schools [(i.e., K-12 public schools)], and for expanding

access to higher education through funding for new enrollments and financial aid, early learning and childcare programs, and other educational improvement efforts." *Id*., § 3; RCW 83.100.230. Any revenue above $500 million each year is dedicated to the CSCA. ESSB 5096 § 2(1)(b). This account assists school districts with capital projects, such as the building or renovation of school facilities. In the first six years, the Washington State Department of Revenue forecasts that the law will generate over $2.5 billion for these important public education investments.

Second, the tax is intended to "mak[e] material progress toward rebalancing the state's tax code," which the Legislature recognized is the "most regressive in the nation because it asks those making the least to pay the most as a percentage of their income." ESSB 5096, § 1. Under Washington's existing tax code, middle-income families pay two to four times more in state taxes as a percentage of household income than high-income earners, and low-income families pay at least six times more. *Id*.

As a step toward making the tax code fairer to working people, ESSB 5096 aims to impose a tax on those with a greater ability to pay. The tax applies only to sales or exchanges of long-term capital assets, defined as capital assets held for more than a year. *Id*., §§ 4(6), 5(1). The Legislature provided numerous exemptions, such as for real estate transfers and assets held in retirement accounts. It also provided generous deductions, including a standard deduction of $250,000 as well as a qualified family-owned small business deduction. *Id*., §§ 6–8.

In light of the generous exemptions and deductions in ESSB 5096, the capital gains tax will be paid almost exclusively by the wealthiest Washington residents, and then only on the voluntary sale of non-exempt capital assets. The Department of Revenue estimates that approximately 7,000 individuals, or less

than one in every thousand Washingtonians, will owe the tax in the first year.[1]

B. The Trial Court Rules the Capital Gains Tax Unconstitutional.

Plaintiffs filed two separate lawsuits (later consolidated) challenging ESSB 5096's constitutionality. Specifically, they alleged ESSB 5096 violates article VII, sections 1 and 2 (uniformity and levy limit requirements for property taxes), article I, section 12 (privileges and immunities), and article I, section 7 (privacy rights) of the Washington Constitution, as well as the dormant Commerce Clause of the United States Constitution. CP 16–24, 607–25.[2] Education Parties were permitted to intervene in the case as defendants in support of ESSB 5096's constitutionality. CP 112–13, 136–40.

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[1] *See* Fiscal Note, ESSB 5096, *available at* https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363 (last visited April 11, 2022).

[2] The Clerk's Papers cited herein pertain to Douglas County Superior Court Cause No. 21-2-00075-09.

On cross-motions for summary judgment,[3] the trial court ruled that ESSB 5096 is an unconstitutional property tax. In doing so, the trial court did not apply this Court's longstanding precedent distinguishing excise taxes from property taxes. *See, e.g., Morrow v. Henneford,* 182 Wash. 625, 630–31, 47 P.2d 1016 (1935); *Mahler v. Tremper*, 40 Wn.2d 405, 407–10, 243 P.2d 627 (1952); *see also* CP 308–16, 671–79, 813–19 (citing and discussing cases). Rather, the trial court erroneously characterized the tax as an income tax and then relied on this Court's cases holding that "income is property" for constitutional purposes. *See* CP 866–69 (citing *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), *Jensen v. Henneford*, 185 Wash. 209, 53

[3] Plaintiffs abandoned their article I, section 7 claim on summary judgment. Education Parties joined in the State's merits briefing on Plaintiffs' remaining constitutional challenges and submitted supplemental briefing arguing that if the trial court deemed ESSB 5096 an income tax rather than an excise tax, this Court's cases deeming income "property" are incorrect, unfounded, and should not be followed. *See* CP 399–408, 790–95, 801–05.

P.2d 607 (1936), and *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951)).

The trial court listed several "'incidents' of ESSB 5096" that, in its view, bore "hallmarks of an income tax rather than an excise tax." *See* CP 869–71. Specifically, the court stated that ESSB 5096 relies on federal income tax returns and "is thus derived from a taxpayer's annual federal income tax reporting"; levies a tax on the same long-term capital gains characterized as "income" under federal law; is levied annually on transactions rather than at the time of each transaction; is levied on net capital gain rather than gross value of property sold in a transaction; and includes a deduction for charitable donations, among other things. *Id*. The trial court thus concluded:

> ESSB 5096 is properly characterized as an income tax pursuant to *Culliton*, *Jensen*, *Power* and other applicable Washington caselaw, rather than as an excise tax as argued by the State. As a tax on the receipt of income, ESSB 5096 is also properly characterized as a tax on property pursuant to that same caselaw.

CP 872. The trial court erred. It mischaracterized the capital gains tax and misapplied this Court's precedent distinguishing property taxes from excise taxes.

Finally, the trial court wrongly ruled ESSB 5096 violates the uniformity and limitation requirements in article VII, sections 1 and 2 of the Washington Constitution, in that it imposes a seven percent tax on capital gains over $250,000 but no tax on gains below that threshold, and exceeds the maximum annual property tax rate of one percent. *See* CP 872, 873–78. The court thus granted Plaintiffs' motion for summary judgment and denied the State's motion. CP 872, 876.

Having ruled the tax "invalid" on article VII grounds, the trial court did not address Plaintiffs' remaining constitutional challenges. CP 872.

The State and Education Parties timely appealed.

III. ISSUES PRESENTED FOR REVIEW

1. The capital gains tax applies to the voluntary sale or exchange of capital assets, making it an excise tax under

established Washington Supreme Court precedent. Did the trial court err in holding the tax is an income tax, and thus a tax on property, prohibited under article VII, sections 1 and 2 of the Washington Constitution?

2. Does Plaintiffs' Privileges and Immunities challenge to ESSB 5096 fail, where Plaintiffs identified no privilege or immunity protected under article I, section 12 of the Washington Constitution and, regardless, reasonable grounds exist for the distinctions drawn by the Legislature in granting exemptions and deductions to the tax?

3. Does Plaintiffs' dormant Commerce Clause challenge to ESSB 5096 fail, where Plaintiffs admitted the capital gains tax can be applied consistent with the Commerce Clause in some circumstances and, regardless, the activity taxed has a substantial nexus with Washington, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State?

4. Prior case law holding that income is "property" is

erroneous and harmful. The legal underpinnings of those decisions have disappeared, as recognized by the vast majority of other states and by the U.S. Supreme Court. If this Court affirms the trial court's ruling that ESSB 5096 imposes an income tax rather than an excise tax, should the Court overturn its prior holdings and conclude that income is not "property" for tax uniformity and limitation purposes under article VII, sections 1 and 2 of the Washington Constitution?

IV. GROUNDS FOR DIRECT REVIEW

Direct review is warranted because the trial court ruled ESSB 5096 unconstitutional, RAP 4.2(a)(2), and because this case presents "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination" under RAP 4.2(a)(4).

A. Direct Review Is Warranted Because the Trial Court Invalidated the Capital Gains Tax on Constitutional Grounds.

Under RAP 4.2(a)(2), direct review of a trial court decision is appropriate when "the trial court has held invalid a

. . . tax . . . upon the ground that it is repugnant to . . . the Washington Constitution." Here, contrary to longstanding precedent holding a tax on the sale, transfer, or use of property is an excise and not a property tax, the trial court ruled ESSB 5096's tax on the sale or exchange of long term capital assets is a property tax and invalidated it under article VII, sections 1 and 2 of the Washington Constitution. *See* CP 869–72, 876. Because ESSB 5096 was ruled unconstitutional, this Court should retain the case and grant direct review under RAP 4.2(a)(2).

B. This Case Presents Fundamental and Urgent Issues of Broad Public Import Appropriate for Direct Review.

Direct review is also warranted here because the trial court's decision raises "fundamental and urgent issue[s] of broad public import which require[] prompt and ultimate determination" by this Court. RAP 4.2(a)(4).

1. ESSB 5096's Constitutionality Broadly Impacts Those Subject to the Tax and Those Standing to Benefit from Increased Education Funding.

The constitutionality of ESSB 5096 impacts nearly every Washington resident. The outcome of this case not only determines the taxes paid by Washington's wealthiest residents when realizing capital gains, it also impacts over $2.5 billion in projected revenues over the first six years of the tax that are earmarked for critical public education investments. Only this Court can provide the timely and definitive resolution of the issues surrounding ESSB 5096 necessary both to provide clear guidance for individual taxpayers subject to the capital gains tax and to facilitate the state planning and budgeting process. An interim trip to the Court of Appeals cannot provide a definitive decision on these questions. Moreover, the delay caused by a decision to transfer this case to the lower appellate court would result in prolonged uncertainty regarding the constitutional status of ESSB 5096.

For these reasons, this Court has a longstanding history of granting direct review in cases involving challenges to tax legislation. *See, e.g., Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 426–27, 495 P.3d 808 (2021) (direct review of challenge to additional 1.2 percent business and occupation tax on financial institutions with a consolidated net income of at least $1 billion); *Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 385–86, 473 P.3d 1205 (2020) (direct review of challenge to initiative limiting and/or repealing various motor vehicle taxes and fees); *League of Educ. Voters v. State*, 176 Wn.2d 808, 812–15, 295 P.3d 743 (2013) (direct review of challenge to initiative requiring supermajority for tax increases and referendum for certain spending increases); *Wash. Citizens Action of Wash. v. State*, 162 Wn.2d 142, 151, 171 P.3d 486 (2007) (direct review of challenge to initiative limiting state and local property tax levy increases); *Pierce Cnty. v. State*, 150 Wn.2d 422, 427–28, 78 P.3d 640

(2003) (direct review of challenge to initiative limiting license tab fees to $30 and repealing certain excise taxes and fees).[4]

Because the ultimate resolution of ESSB 5096's validity by this Court is in the interests of all Washingtonians, the Court should grant direct review and retain this case for decision.

2. In the Event This Court Rules ESSB 5096 Is a Tax on Income, Correcting Erroneous Supreme Court Decisions That Have Influenced Public Policy for Decades Presents Issues of Broad Public Import Appropriate for Direct Review.

If this Court affirms the trial court's ruling that ESSB 5096 imposes a tax on income, a question of fundamental and broad public import arises: What is the nature of a tax on income? Whether an income tax need comply with constitutional restrictions on property taxes depends on the validity of this Court's line of cases characterizing income as "property." As

[4] Further, direct review has "often been granted when the state or a municipality is a defendant." *RAP 4.2. Direct Review of Superior Court Decision by Supreme Court*, 2A Wash. Prac., Rules Practice RAP 4.2, cmt. 3 (8th ed. 2021).

discussed below, those cases are incorrect, unfounded, and should be overturned.

In the 1930s, in a series of divided decisions, this Court held that income is a form of property for purposes of article VII, section 1 of the Washington Constitution, and therefore an income tax is a property tax. *See Culliton*, 174 Wash. at 373–79; *Jensen*, 185 Wash. at 216–17. While this Court subsequently has repeated that holding, it has not engaged in substantive analysis of the question in more than 80 years. But the primary case law relied on for the holding that income is property was incorrect and unfounded, and its underpinnings have disappeared.

Culliton, the seminal case deciding "income is property," held a graduated income tax was a property tax that violated the Constitution's uniformity requirement. But that holding is not tenable for three reasons.

First, the *Culliton* Court plainly erred when it stated that "[i]t has been definitely decided in this state that an income tax is a property tax, which should set the question at rest here." 174

Wash. at 376. The sole authority cited in support of this statement was *Aberdeen Savings & Loan Association v. Chase* ("*Aberdeen*"), 157 Wash. 351, 289 P. 536, 290 P. 697 (1930). But *Aberdeen* struck down a "tax measured by income upon banks and financial corporations" as a violation of the federal Equal Protection Clause, relying almost exclusively on the case of *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928). *Id*. at 353, 361–64, 373–74. The *Aberdeen* Court expressly declined to decide whether the tax "violates the uniform taxation provisions of the Constitution of the state of Washington, or other provisions thereof." *Id*. at 374. Thus, contrary to *Culliton*, the *Aberdeen* Court did not rule that income is property for purposes of the Washington Constitution. And certainly it did not "definitely" decide the issue.

Further, in 1973, the U.S. Supreme Court expressly overruled *Quaker City Cab*, noting it was "a relic of a bygone era." *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 365, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973). Accordingly, the

legal underpinnings of *Aberdeen* and *Culliton* have changed and are no longer valid.

Second, *Culliton*'s conclusory statement that "[t]he overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property," 174 Wash. at 374, was and is incorrect. By the 1930s the majority of courts held that an income tax is *not* a property tax. In his exhaustive treatise on state taxation, Professor Wade Newhouse concluded that "for all the bitter controversy of the 1920s and the 1930s," in the end only "two state courts [were left] seemingly standing by their strict uniformity interpretations with respect to income taxes: Washington and Pennsylvania. . . . *A majority of those courts reviewed above have characterized the income tax as a 'nonproperty' tax*." WADE J. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 2021, 2029 (1984) (emphasis added); *see also Thorpe v. Mahin*, 250 N.E.2d 633, 635 (Ill. 1969) ("We have reviewed the many State cases dealing with this question and find the weight of authority to be

that an income tax is not a property tax."). Washington's treatment of an income tax as a property tax was and remains an outlier that should be corrected.

Third, the *Culliton* Court relied on what it characterized as the "peculiarly forceful constitutional definition" of property in the Washington Constitution and reasoned that "[i]ncome is either property . . . or no one owns it." 174 Wash. at 374. This was erroneous. The Constitution's definition of property as "everything . . . subject to ownership" does not answer the relevant question, it simply raises it: Is income subject to ownership? The nature of income is not that of a static asset subject to ownership that can be kept or sold, such as land (tangible property) or stocks and bonds (intangible property). Rather, income is better characterized as money in motion, a non-transferrable expectancy that is earned either from time worked or the outcome of a business and is taxed accordingly.

The U.S. Supreme Court articulated this concept to distinguish between property and income in *State of N.Y. ex rel.*

Cohn v. Graves, 300 U.S. 308, 314, 57 S. Ct. 466, 81 L. Ed. 666 (1937): "[A taxpayer's] income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently."

Further, the 1930 constitutional amendment defining "property" in the Constitution was passed in response to the new trend of wealth being put into intangible property (not taxed), rather than real property (taxed), resulting in lower revenue and undue tax burdens on real property. *See Culliton*, 174 Wash. at 385–87 (Blake, J. dissenting). That concern does not support characterizing income as intangible property, as it is not an asset into which wealth can be transferred.

Culliton has had a ripple effect throughout Washington jurisprudence. The erroneous and harmful concept—that it is well-settled that "income is property"—has been repeated

throughout Washington's income tax case law without question. But as noted above, *Culliton*'s statement of the law was incorrect and unfounded, and the bases on which *Aberdeen* (and thus *Culliton*) was decided have since disappeared. If this Court rules ESSB 5096 imposes an income tax, it should revisit *Culliton* and progeny.

In sum, this Court's definitive resolution of the issues here is of great importance as it will guide the people and government as they seek to address increasingly vexing issues on how best to pay for public services without exacerbating growing income inequality issues. Direct review is warranted.

V. CONCLUSION

This case presents an opportunity for this Court to address the nature and constitutional validity of a tax on the sale or exchange of long term capital assets, the proceeds of which will fund important education investments in Washington. Doing so—and, in the event the Court holds the tax is an income rather than an excise tax, correcting wrongfully decided cases that have

influenced economic policy for decades—are issues of great public importance to all Washingtonians. This Court should accept direct review.

This document contains 3,502 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of April, 2022.

PACIFICA LAW GROUP LLP

By: */s/ Paul J. Lawrence*
Paul J. Lawrence, WSBA #13557
Sarah S. Washburn, WSBA #44418

Attorneys for Intervenors

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused a true copy of the foregoing document to be served via the Washington State Appellate Portal's e-filing service and via electronic mail to the following parties by agreement:

Scott Edwards
Callie Castillo
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
EdwardsS@lanepowell.com
CastilloC@lanepowell.com
CraigA@lanepowell.com
Docketing@lanepowell.com

Robert McKenna
Amanda McDowell
Daniel Dunne
Orrick Herrington & Sutcliffe
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
rmckenna@orrick.com
Amcdowell@orrick.com
ddunne@orrick.com
abrecher@orrick.com
lpeterson@orrick.com
CaseStream@orrick.com

Eric Stahlfeld
c/o The Freedom Foundation
P.O. Box 552
Olympia, WA 98507
EStahlfeld@freedomfoundation.com
KElder@freedomfoundation.com

ROBERT W. FERGUSON
Attorney General
Cameron G. Comfort, Sr. Assistant Attorney General
Noah G. Purcell, Solicitor General
Jeffrey T. Even, Deputy Solicitor General
Peter B. Gonick, Deputy Solicitor General
Charles Zalesky, Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Revenue and Finance Division
7141 Cleanwater Dr. SW
P.O. Box 40123
Olympia, WA 98504-0123
noah.purcell@atg.wa.gov
cam.comfort@atg.wa.gov
jeffrey.even@atg.wa.gov
peter.gonick@atg.wa.gov
chuck.zalesky@atg.wa.gov
carrie.parker@atg.wa.gov
carly.summers@atg.wa.gov

Dated this 11th day of April, 2022, at Seattle, Washington.

/s/ Cathy Hendrickson
Cathy Hendrickson, Legal Assistant

PACIFICA LAW GROUP

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- peter.gonick@atg.wa.gov
- revolyef@atg.wa.gov
- rmckenna@orrick.com
- sarah.washburn@pacificalawgroup.com
- sea_wa_appellatefilings@orrick.com

Comments:

Sender Name: Cathy Hendrickson - Email: cathy.hendrickson@pacificalawgroup.com
Filing on Behalf of: Paul J. Lawrence - Email: paul.lawrence@pacificalawgroup.com (Alternate Email: dawn.taylor@pacificalawgroup.com)

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Phone: (206) 245-1700

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