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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, 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.

**APPELLANTS' STATEMENT OF GROUNDS FOR
DIRECT REVIEW**

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I. INTRODUCTION

Washington has long had the most regressive tax system in America, forcing low- and middle-income residents to pay a far larger share of their income in state taxes than their wealthy counterparts. In 2021, the Legislature continued its efforts to fix this problem by adopting a narrow capital gains excise tax, which will be owed by only the wealthiest Washingtonians, with the proceeds used to fund education. The tax applies to the sale of stocks, bonds, and certain other capital assets, but it exempts each individual's first \$250,000 in annual capital gains, as well as gains from the sale of real estate, retirement assets, and qualified small businesses. Roughly 1 in 1,000 Washingtonians will owe the tax in any given year.

Two groups of plaintiffs challenged the tax in Douglas County Superior Court. They claimed that the tax is an invalid property tax under article VII of the Washington Constitution, that it violates the privileges and immunities clause of the state constitution, and that it violates the dormant Commerce Clause.

The Superior Court held that the capital gains tax is a property tax, rather than an excise tax, but it did so only by ignoring this Court's precedent. For ninety years, this Court has held that a tax is a property tax only if it “falls upon the owner *merely because he is owner*, regardless of the use or disposition made of his 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)) (emphasis added). By contrast, a tax that applies to the sale of property, or to another “particular use of property . . . , is an excise” tax. *Id.* at 630 (quoting *Bromley*, 280 U.S. at 136). Under this test, the capital gains tax is clearly an excise; it does not apply “merely because” a person owns property, *id.* at 631, but rather only when a person sells property and incurs capital gains.

Instead of applying this Court's established test, the Superior Court analyzed whether the capital gains tax bore certain alleged “hallmarks” of a property tax. But all of the “hallmarks” the court identified are also features of other taxes

this Court has concluded are excise taxes. For example, the Superior Court emphasized that the capital gains tax is based on net gains, allows certain deductions, and relies on federal tax forms. But all of those “hallmarks” are also true of Washington’s estate tax, which this Court unanimously held is an excise tax. *In re Estate of Hambleton*, 181 Wn.2d 802, 832, 335 P.3d 398 (2014). Based on its flawed analysis, the Superior Court held that the capital gains excise tax is a property tax that violates the uniformity and rate limitation requirements in article VII. The court did not reach plaintiffs’ other arguments.

This Court should grant direct review for three reasons. First, as just explained, the Superior Court invalidated the capital gains tax using a flawed constitutional analysis. Second, the court’s ruling has broad fiscal and tax policy implications, undermining legislative efforts to address Washington’s regressive tax system and to fund education. Finally, direct review would expedite a final ruling on the constitutionality of the tax, which—if upheld—will be due on April 17, 2023.

II. NATURE OF THE CASE AND DECISION

A. **The Legislature Enacts the Capital Gains Excise Tax to Make the Tax Code Fairer to Working People and to Advance the State’s Paramount Duty to Fund Education**

In April 2021, the Legislature adopted Engrossed Substitute Senate Bill (ESSB) 5096 (Laws of 2021, ch. 196, codified at RCW 82.87), which imposes a seven percent tax on the sale of certain long-term capital assets. RCW 82.87.050(1).

The Legislature’s stated purpose for the tax is two-fold. First, it advances 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[.]” RCW 82.87.010. Revenue from the capital gains tax is dedicated to the state’s Education Legacy Trust Account (ELTA) and the Common School Construction Account. *Id.* Specifically, the first \$500 million collected from the tax each fiscal year will be deposited into the ELTA. RCW 82.87.030(1)(a). Funds from the ELTA “may be used only for support of the common schools, and for expanding access to

higher education through funding for new enrollments and financial aid, early learning and child care programs, and other educational improvement efforts.” RCW 83.100.230. Tax collections exceeding \$500 million each fiscal year are dedicated to building or renovating public schools. RCW 82.87.030(1)(b). In the first six years, the Department of Revenue estimates that the law will generate approximately \$2.5 billion for these important education investments. Decl. of Kathy L. Oline in Support of Defs.’ Mot. Summ. J. (filed 12/2/2021) (“Oline Decl.”), Ex. 1 at 1.

Second, the capital gains tax “will have the additional effect of making material progress toward rebalancing the state’s tax code,” which is the “most regressive in the nation because it asks those making the least to pay the most as a percentage of their income.” RCW 82.87.010. Under Washington’s current tax code, which relies extensively on retail sales tax imposed on buyers of everyday goods and services, middle-income Washingtonians pay two to four times

more in state taxes as a percentage of household income than high-income earners, and low-income Washingtonians pay at least six times more. *Id.* The tax thus advances the Legislature’s goals by funding education and imposing the tax on those with the greatest ability to pay.

The capital gains tax, which took effect January 1, 2022, applies only to sales or exchanges of long-term capital assets, which are defined as capital assets held for more than one year. RCW 82.87.020(6), .040(1). To achieve its goal of imposing the tax on those with the greatest ability to pay, the Legislature provided generous deductions and exemptions. For example, RCW 82.87.050(1) exempts “[a]ll real estate transferred by deed, real estate contract, judgment, or other lawful instruments” Subsection (3) exempts assets held in various retirement accounts. RCW 82.87.050(3). Additionally, the tax applies only

if an individual's taxable capital gains in a given year exceed \$250,000. RCW 82.87.060(1).¹

Due to these generous deductions and exemptions, it is estimated that the capital gains tax will apply to only 0.1% percent of Washingtonians in any given year. Specifically, the Department of Revenue estimates that approximately 7,000 individuals will owe the tax in the first year, Oline Decl., Ex. 1 at 4, which is fewer than one in every one thousand Washingtonians.

Individuals owing the capital gains tax will be required to file "a return with the department on or before the date the taxpayer's federal income tax return for the taxable year is

¹ An example illustrates how these exemptions and deductions will operate. Imagine a Washington taxpayer who in a single year sells a large rental property at a \$1 million profit, a small business at a \$1 million profit, assets in a retirement account at a \$1 million profit, and ordinary stocks held outside a retirement account at a \$200,000 profit. Though these transactions would result in over \$3 million in capital gains, the taxpayer will owe no Washington capital gains tax because the first three asset categories are exempt and the \$250,000 standard deduction exceeds the profit from non-exempt assets.

required to be filed.” RCW 82.87.110(1)(a). Since the tax took effect on January 1, 2022, “the first payments are due on or about April 17, 2023.” Oline Decl., Ex. 1 at 4.

B. The Superior Court Holds That the Capital Gains Tax is an Unconstitutional Property Tax

Four days after the Legislature passed the capital gains tax on April 25, 2021, and even before the Governor signed the law on May 4, 2021, the Quinn plaintiffs served state defendants with their Douglas County Superior Court action challenging the tax. Compl. Decl. & Inj. Relief (Quinn). The action filed by the Clayton plaintiffs followed soon thereafter on May 20, 2021. Compl. Decl. & Inj. Relief (Clayton). The Superior Court consolidated the two actions. Joint Mot. Consolidate Cases & Order Granting Mot. at 3. The court also granted a motion to intervene filed by several education parties. Order Granting Educ. Parties’ Mot. Intervene as Defs., at 2.

State defendants moved to dismiss, asserting that plaintiffs’ actions failed to present an actual, present, and existing dispute because none of the named plaintiffs could

know whether they would actually owe the tax in the future. Mot. Dismiss Pls.’ Compls., at 7-8. Plaintiffs countered that immediate review was necessary because (among other reasons) their “tax concerns arise much sooner than the State asserts because the tax in ESSB 5096 applies to capital gains beginning January 1, 2022,” and they could not “afford to wait until 2023 to challenge the constitutionality of ESSB 5096.” Pls.’ Joint Opp. to Defs.’ Mot. Dismiss, at 5-6.

Plaintiffs also urged that their constitutional challenge involves a matter of “broad public importance” that requires “prompt resolution.” *See id.* at 8-9. In support, they alleged that “[t]he constitutionality of the tax affects every citizen in the State” by affecting economic activity. *Id.* at 8.

The Superior Court agreed with plaintiffs and denied state defendants’ motion to dismiss. Order Denying Defs.’ Mot. Dismiss. Thereafter, the parties filed cross motions for summary judgment on the constitutionality of the capital gains tax. The State’s primary arguments in support of summary

judgment were that tax is an excise tax, article VII's uniformity and rate restrictions apply only to property taxes, and ESSB 5096 does not violate the state constitution's privileges and immunities clause or the federal constitution's Commerce Clause. Defs.' Mot. Summ. J. at 9-24.²

Plaintiffs' summary judgment motion argued the opposite, contending that some aspects of ESSB 5096 violate the Commerce Clause, the capital gains tax is a property tax, and that the law impermissibly taxes certain persons while exempting others in violation of the privileges and immunities clause. Pls.' Mot. Summ. J. at 7-28.

The parties agreed that the central question under article VII is whether the tax is a property tax or an excise tax. Article VII section 1 requires that all property taxes be uniform, and

² Intervenors joined in state defendants' summary judgment motion. Intervenors additionally argued that this Court's cases holding that income is property "were wrong when decided, are wrong now, and should not be relied upon in determining the validity of ESSB 5096." Intervenors' Joinder & Suppl. Br. at 1.

section 2 requires that they not exceed one percent of fair value of the property taxed; but these provisions apply only to property taxes. Thus, if a tax is not a property tax, these sections do not apply. *Estate of Hambleton*, 181 Wn.2d at 832; *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 761, 733 P.2d 539 (1987).

The Superior Court heard oral argument on February 4, 2022. On March 1, the court issued a letter ruling on the parties' cross motions for summary judgment, concluding that the capital gains tax is a property tax and not an excise tax. Letter Ruling.

Rather than apply the standard employed by this Court, the Superior Court held that "some of the most significant 'incidents' of ESSB 5096 show the hallmarks of an income tax rather than an excise tax." Letter Ruling at 9. Consequently, using its "hallmarks" approach and relying on cases holding that an annual broad-based income tax is a property tax, the court concluded that the capital gains tax is "properly

characterized as a tax on property” and, as such, “violates the uniformity requirement by imposing a 7% tax on an individual’s long-term capital gains exceeding \$250,000 but imposing zero tax on capital gains below that \$250,000 threshold.” *Id.* at 12. Similarly, the court concluded that the tax “violates the limitation requirement because the 7% tax exceeds the 1% maximum property tax rate[.]” *Id.* The court declined to reach the plaintiffs’ additional arguments. *Id.*

On March 22, 2022, the Superior Court filed an order granting summary judgment to plaintiffs and denying summary judgment to state defendants. Order Granting Pls.’ Mot. Summ. J. & Denying Defs.’ Mot. Summ. J., at 3. State defendants then filed this direct appeal.

III. ISSUES PRESENTED FOR REVIEW

Petitioners seek direct review by this Court of the following issues.

1. Under this Court’s precedent, a property tax is an “absolute and unavoidable” tax levied on the property owner as

a consequence of ownership. In contrast, a tax on the sale or transfer of property is an excise tax. Is the capital gains tax, which applies to voluntary sales of long-term capital assets, an excise tax or an absolute and unavoidable property tax?

2. The Legislature routinely provides deductions and exemptions in the taxes that it enacts. Do taxpayers have a fundamental right under the privileges and immunities clause to be exempt from a state tax merely because the Legislature has enacted rational deductions and exemptions benefitting some other taxpayers?

3. If ESSB 5096 implicates a privilege or immunity of state citizenship, do reasonable grounds exist for the deductions and exemptions provided by the Legislature?

4. Is the capital gains tax fairly apportioned and non-discriminatory and, therefore, consistent with the federal Commerce Clause?

IV. STATEMENT OF GROUNDS FOR DIRECT REVIEW

Direct review is appropriate in this case because the Superior Court has held ESSB 5096 unconstitutional. RAP 4.2(a)(2). Direct review also is appropriate because the Superior Court's decision is inconsistent with this Court's decisions upholding comparable taxes on sale transactions as valid excise taxes. RAP 4.2(a)(3). Finally, direct review is appropriate because whether the capital gains tax is constitutional is "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4).

RAP 4.2 applies straightforwardly to this case because the Superior Court invalidated ESSB 5096. The court's order declaring the tax unconstitutional raises an issue appropriate for direct review. RAP 4.2(a)(2).

In addition, this Court repeatedly has held that taxes imposed on sale transactions and other uses or transfers of property are excise taxes. For example, in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933), the Court upheld a

gross receipts tax imposed on businesses—the “business and occupation tax”—as an excise tax rather than a property tax. Even though the tax was calculated based on businesses’ “gross proceeds of sales, or gross income,” *id.* at 404 (quoting Laws of 1933, ch. 191, § 2), the Court concluded it was “an excise tax and not . . . a tax on property.” *Id.* at 407.

Similarly, in *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), the Court unanimously upheld the constitutionality of the real estate excise tax, concluding that a tax on the sale of real estate is an excise tax. *Id.* at 407. *See also Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) (upholding tax on the lease of a boat used as a floating hotel as an excise tax);³ *Wash. Pub. Ports Ass’n v. Dep’t of Revenue*, 148 Wn.2d 637, 651-52, 62 P.3d 462 (2003) (upholding leasehold excise tax on rental of public property as an excise tax). Most recently, in *Estate of*

³ Under Washington’s tax code, rentals and leases of tangible personal property are “sales.” *See* RCW 82.04.040(1) (“‘sale’ . . . includes lease or rental . . .”).

Hambleton, 181 Wn.2d at 832, the Court unanimously held that Washington’s estate tax—which applies at various rates to the transfer of property at death—is an excise tax.

Notwithstanding this long line of Washington Supreme Court precedent, the Superior Court held that a tax on sales of long-term capital assets is not an excise tax, but instead an absolute and unavoidable property tax. Because the court’s holding is inconsistent with decisions such as *Stiner*, *Mahler*, *Black*, and *Hambleton*, direct review under RAP 4.2(a)(3) is warranted.

Finally, this appeal involves “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” RAP 4.2(a)(4). The Superior Court’s order declaring ESSB 5096 unconstitutional undermines the Legislature’s efforts to fully fund education and to make the state’s tax code less regressive. The tax will raise hundreds of millions of dollars annually for education purposes that benefit all Washingtonians. Moreover, the Legislature needs to know

promptly whether that funding will be available for use in the 2023-2025 biennium, as it is tasked with enacting a budget for that biennium by the end of the 2023 legislative session. Additionally, throughout the Superior Court proceedings, plaintiffs themselves repeatedly argued that their challenge to the capital gains tax involved a matter of broad public importance requiring prompt resolution. Thus, they argued that they could not “afford to wait until 2023 to challenge the constitutionality of ESSB 5096.” Pls.’ Joint Opp. to Defs.’ Mot. Dismiss, at 6. The first payments under the tax will be due April 17, 2023, and taxpayers and the State need to know whether those taxes will be paid. Accordingly, direct review is warranted under RAP 4.2(a)(4).

V. CONCLUSION

For these reasons, this Court should retain this matter for determination on direct review.

This document contains 2,859 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of April, 2022.

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I certify under penalty of perjury under the laws of the
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DATED this 11th day of April, 2022, at Olympia, WA.

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