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, 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, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors.

INTERVENORS' ANSWER TO AMICUS BRIEFS

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I. INTRODUCTION

This Court must decide whether the Legislature's 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—is constitutionally valid. The briefs of amici curiae National Taxpayers Union Foundation, et al. (collectively, "NTUF"), Building Industry Association of Washington and Washington Retail Association (collectively, "BIAW"), and Association of Washington Business, et al. (collectively, "AWB") do not assist the Court in answering this question. Instead, these amici repeat Plaintiffs' incorrect arguments as to the nature and operation of the tax, argue the "law" without citation to case authority, and advance self-serving policy arguments. None of these arguments undermine the conclusion that under this Court's long-standing precedent, the capital gains tax is a valid excise tax, not a tax on property. The trial court erred in ruling otherwise.

Nor do amici opposing the tax offer any reason for this Court to adhere to its line of cases holding that an income tax is a property tax. Indeed, some of the authority they cite distinguishes between an income tax and a property tax. This Court's income tax cases were wrong when decided, are wrong now, and should be overturned. Accordingly, if the Court rules the capital gains tax is a tax on income, it should still uphold the tax. Either way, the Court should reverse the trial court.

II. ARGUMENT

A. The Capital Gains Tax Is a Valid Excise Tax Under the State and Federal Constitutions.

In challenging the capital gains tax's validity under state and federal law, amici NTUF, BIAW, and AWB primarily regurgitate legal arguments already raised by Plaintiffs. For the reasons stated in the State's Opening and Reply Briefs and Answer to Amici, the capital gains tax is a valid excise tax not subject to Washington Constitution article VII's restrictions on property taxes. Nor does the tax violate the federal dormant

Commerce Clause. Intervenors adopt by reference the State's arguments on these points. *See* RAP 10.1(g).

Further, as amici Mary Ann Warren et al. (collectively, "Warren") and Law Professors correctly note in their briefs supporting the tax, applying this Court's consistent and well-settled excise tax precedent, rather than its muddled and inconsistent income tax precedent, best serves the purpose of stare decisis: "[T]he evenhanded, predictable, and consistent development of legal principles" so as to preserve judicial integrity. *State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (quotations and citations omitted); *see also* Warren Br. at 28–29; Law Professors' Br. at 11–12. This Court has long articulated a clear rule distinguishing between property taxes that apply solely because a person owns property, and excise taxes that apply to the sale or transfer of property (even though a person may derive income from the transaction). *See* Warren Br. at 23–24 (citing cases); State's Opening Br. at 21–29 (same);

Law Professors' Br. at 5–8 (excise tax operates upon the act or incidence of the transfer of property).

On the other hand, this Court's income tax precedent is conflicting, inconsistent, and inapplicable here. *See* Warren Br. at 26–28; Law Professors' Br. at 10–12. For example, although the Court has held taxes on persons engaging in business activities measured by income and taxes on individual income of government employees making more than $200 per month are excise taxes, it has held broad-based taxes on personal income are property taxes. *Compare State ex rel. Stiner v. Yelle*, 174 Wash. 402, 405–07, 25 P.2d 91 (1933) and *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 74–78, 34 P.2d 363 (1934), *with Culliton v. Chase*, 174 Wash. 363, 376–78, 25 P.2d 81 (1933) and *Jensen v. Henneford*, 185 Wash. 209, 217–18, 53 P.2d 607 (1936); *see also* Warren Br. at 26–27; Law Professors' Br. at 10-12. As Warren points out, the Court's treatment of certain income taxes as property taxes in *Culliton* and *Jensen* also is inconsistent with its cases holding "functionally identical" taxes on the

transfer of money and property from one individual to another, measured by the value of the property transferred, are excise taxes. *See* Warren Br. at 27–28 (citing cases).

In sum, *Culliton* and *Jensen*'s income tax holdings are inconsistent with all other lines of excise tax precedent. And extending *Culliton* and *Jensen* to hold the capital gains tax is a tax on income would be a significant departure from this Court's otherwise consistent precedent classifying taxes on transfers of property as excise taxes. As Warren notes, stare decisis permits a choice between two inconsistent precedents, and adhering to the "intrinsically sounder" doctrine better serves the purposes of stare decisis. Warren Br. at 28–30 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). The Court should apply its consistent, "intrinsically sounder" precedent and hold that a tax on the sale or transfer of certain capital assets is an excise tax, not a property tax. Warren Br. at 28–30; *see also* Law Professors' Br. at 26–27 (arguing Court should "refrain from broadening *Culliton*'s

dubious logic to invalidate a tax that operates only upon the transfer of a capital asset" and should instead rely on its "substantial excise tax precedent" to uphold the capital gains tax).

Intervenors respectfully request that this Court reverse the trial court and uphold the tax as an excise tax.

B. An Income Tax Is Not a Property Tax, and *Culliton* Should Be Overturned.

Even if the Court rules that the capital gains tax is an income tax (which it is not), the Court should still uphold the tax. Amici NTUF, BIAW, and AWB repeat Plaintiffs' argument that non-uniform income taxes are illegal under this Court's precedent. *See* NTUF Br. at 3, 26; BIAW Br. at 2, 6–8, 17–18; AWB Br. at 2. But for the reasons stated in Intervenors' Opening and Reply briefs, the line of authority on which that argument is based—*Culliton* and its progeny, which held that income is "property" and thus broad-based income taxes are "property taxes"—should be overturned. The legal underpinnings of *Culliton* were always flawed, have since disappeared, and the

Culliton line of authority is incorrect and harmful. *See* Int. Opening Br. at 15–43; Int. Reply Br. at 2–34. None of the amici opposing the capital gains tax argue otherwise.

NTUF argues at length that an excise tax is distinct from an income tax. NTUF Br. at 8–22. But even if that were true, it does not answer the relevant question for purposes of the Washington Constitution: Whether an income tax is a tax on property. None of the authorities NTUF cites answer that question. And as Intervenors have previously explained, the overwhelming weight of authority is that an income tax is **not** a property tax. *See* Int. Opening Br. at 31–34; Int. Reply Br. at 8–15; *see also Watson v. City of Seattle*, 189 Wn.2d 149, 167, 401 P.3d 1 (2017) (listing property, income, and excise taxes as distinct categories). NTUF does not address that authority, nor does it dispute that *Culliton*'s holding to the contrary is an outlier.

Indeed, some of the authorities that NTUF cites in arguing an excise tax is distinct from an income tax also demonstrate that an income tax is distinct from a property tax. Both Black's Law

Dictionary and Webster's Dictionary cited and relied upon by NTUF distinctly define "excise tax," "income tax," and "property tax," demonstrating that an "income tax" is not a "property tax."[1] The case cited by NTUF, *Hughes Communications India Private Limited v. DirecTV Group, Inc.*, No. 20 Civ. 2604 (AKH), 2021 WL 5359662 (S.D.N.Y. Nov. 16, 2021), likewise supports the concept that an income tax is distinct from a property tax. The contract at issue there specifically listed the taxes excluded from indemnification

[1] *See* Black's Law Dictionary (11th ed. 2019) (defining "excise tax" as "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)"; "income tax" as "[a] tax on an individual's or entity's net income"; and "property tax" as "[a] tax levied on the owner of property (esp. real property), usu. based on the property's value," and juxtaposing each type of tax with the other two types); Merriam-Webster Dictionary, *available at* https://www.merriam-webster.com/ (defining "excise tax" as "a tax on certain things that are made, sold, or used within a country"; "income tax" as "a tax on the net income of an individual or a business"; and "property tax" as "a tax levied on real or personal property").

identifying income taxes as distinct from real or personal property taxes. *Id*. at *4.

Regardless, NTUF's attempt to distinguish between income taxes and excise taxes is erroneous. The weight of authority holds that an income tax is best understood as a form of excise tax. *See, e.g., Brushaber v. Union Pac. R. Co*., 240 U.S. 1, 17, 36 S. Ct. 236, 60 L. Ed. 493 (1916) (recognizing that an income tax is "in its nature an excise entitled to be enforced as such"); *Hale v. Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 104–05 & n.7, 58 S. Ct. 102, 82 L. Ed. 72 (1937) (observing that "[t]he question as to the nature of [an income] tax has come up repeatedly under state constitutions requiring taxes upon property to be equal and uniform, or imposing similar restrictions. Many, perhaps most, courts hold that a net income tax is to be classified as an excise."); *Thorpe v. Mahin*, 250 N.E.2d 633, 635–36 (Ill. 1969) (discussing *Hale* and other authorities on the nature of an income tax); *Dooley v. City of Detroit*, 121 N.W.2d 724, 728–30 (Mich. 1963) (same;

concluding city income tax was an excise).[2] Underlying these cases is the concept that an income tax is "an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits," founded upon "the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received." *State of N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 313, 57 S. Ct. 466, 81 L. Ed. 666 (1937); *see also* Int. Opening Br. at 44–46 & n.19 (citing additional cases).

NTUF does not address these authorities except to claim that *Brushaber*—which upheld a federal income tax following passage of the Sixteenth Amendment to the U.S. Constitution—does not support the premise that income taxes are excise taxes under federal law. *See* NTUF Br. at 9–10 n.1. Specifically, NTUF asserts: "If the Supreme Court really considered income

[2] Alternatively, such a tax could be characterized as *sui generis*. *See* Int. Opening Br. at 50–52. Either way, it is not a property tax.

taxes to be excise taxes . . . the Sixteenth Amendment would have been unnecessary since the U.S. Constitution authorized excise taxes since the beginning." *Id*. NTUF further cites the U.S. Supreme Court's decision in *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 (1895), as support for the premise that income taxes are not excise taxes. *Id*.

NTUF misunderstands the history and import of *Pollock*, the Sixteenth Amendment, and the subsequent *Brushaber* decision. Prior to 1895, all income taxes had been considered indirect taxes not subject to apportionment requirements. In other words, such taxes were within Congress' constitutional power to "lay and collect taxes, duties, imposts and excises" so long as they were uniform throughout the country. *Brushaber*, 240 U.S. at 12–13, 17–19; *see also* Law Professors' Br. at 15–17 (noting that the pre-*Pollock* Supreme Court broadly construed Congress's power to levy a "duty, impost or excise").

In 1895, however, the U.S. Supreme Court in *Pollock* ruled that while a tax on income from "professions, trades, employments, or vocations" was an excise (indirect) tax, a tax on income derived from property (such as interest or rents) should be treated as a direct tax subject to constitutional apportionment requirements. 158 U.S. at 634–35, 637; *see also Brushaber*, 240 U.S. at 17; Law Professors' Br. at 17.

The Sixteenth Amendment, ratified in 1913, overruled *Pollock*'s holding that taxing income from property was tantamount to taxing the property itself. *See* Law Professors' Br. at 20.[3] The Amendment granted Congress the power to "lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const. amend. XVI. In 1916, the *Brushaber* Court explained that the Sixteenth Amendment

[3] As amici Law Professors note, while *Pollock* was ultimately overruled by the Sixteenth Amendment, the U.S. Supreme Court had already refused to expand *Pollock*'s reasoning to other forms of taxation. Law Professors' Br. at 17–20.

was intended to restore the view of income taxes that existed pre-*Pollock*. The Court classified all income taxes as being inherently indirect (i.e., excises), notwithstanding *Pollock*'s contrary holding:

> [T]he command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income may be derived **forbids the application to such taxes of the rule applied in the Pollock Case by which alone such taxes were removed from the great class of excises, duties and imports subject to the rule of uniformity** and were placed under the other or direct class.

Brushaber, 240 U.S. at 18–19 (emphasis added).

In another case decided less than a month after *Brushaber*, the Court further clarified that point:

> [T]he provisions of the 16th Amendment **conferred no new power of taxation, but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged**, and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived, that is, by testing the tax not by what it was, a tax on income, but by a mistaken theory

> deduced from the origin or source of the income taxed.

Stanton v. Baltic Mining Co., 240 U.S. 103, 112–13, 36 S. Ct. 278, 60 L. Ed. 546 (1916) (emphasis added).

In sum, *Brushaber* supports Intervenors, not NTUF. An income tax is generally considered an excise tax, not a tax on property. To the extent the Court determines the capital gains tax is a tax on income, it should overturn the *Culliton* line of cases characterizing income as "property" for purposes of the Washington Constitution.

C. Amici's Policy Arguments Opposing the Tax Are Overblown, Unsupported, and Inconsistent with the Legislature's Intent.

Legal challenges aside, amici opposing the tax also assert it is bad policy. Such arguments go to the wisdom, not the constitutionality, of the capital gains tax. As such, they are properly addressed to the Legislature, not this Court. *See Sonitrol Nw., Inc., v. City of Seattle*, 84 Wn.2d 588, 593–94, 528 P.2d 474 (1974) ("It is not the function of this Court . . . to consider the propriety or justness of the tax . . . or to criticize the public policy

which prompted the adoption of the legislation." (quotation and citation omitted)). But to the extent this Court considers policy arguments in evaluating the legal claims at issue here, the arguments BIAW, AWB, and NTUF raise in opposition to the tax do not support its invalidation.

BIAW and AWB first claim the capital gains tax will result in economic injuries ranging from discouraging investment in Washington businesses to forcing business owners to flee the state. BIAW Br. at 8–9, 14–17, 20–21; AWB Br. at 10–16. For multiple reasons, this argument falls flat. As an initial matter, while BIAW and AWB imply that every business owner in the state will be subject to the tax, in reality their argument is made on behalf of approximately 7,000 taxpayers, or less than one in every thousand Washingtonians, who will owe the capital gains tax in the first year.[4] The tax's $250,000 standard

[4] See Fiscal Note, Engrossed Substitute Senate Bill 5096, available at https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363 (last visited Jan. 4, 2023).

deduction, its deduction for gains from the sale or transfer of a taxpayer's interests in a qualified family-owned small business, and its exemptions applicable to real estate and livestock (among other things) are designed to ensure only the wealthiest Washingtonians are likely to pay the tax. The vast majority of residents and business owners would not be subject to the tax.

BIAW and AWB's claim of economic harm also incorrectly assumes business owners have a right to rely on the tax system that existed prior to the Legislature's enactment of the capital gains tax. There is no such right. *See* Int. Reply Br. at 29–32. The Legislature has "broad plenary powers in its capacity to levy taxes." *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 96, 558 P.2d 211 (1977). As such, there is no vested right in the continuance of any particular tax or method of taxation, nor any vested right securing a person against the imposition of new taxes. *See In re Estate of Hambleton*, 181 Wn.2d 802, 829, 335 P.3d 398 (2014); *Everett v. Adamson*, 106 Wash. 355, 358, 180

P. 144 (1919); *United States v. Carlton*, 512 U.S. 26, 33, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994).

Here, the capital gains tax does not tax any prior gains, only those starting in 2022—the year following the enactment of the tax. RCW 82.87.040(1). Even if the tax was not contemplated by taxpayers before its enactment, that does not make it illegal or invalid. *See Carlton*, 512 U.S. at 33–34 ("An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

BIAW and AWB's economic fearmongering is also unsupported by any data or other authority indicating the capital gains tax (or any other state tax) will discourage investment or cause businesses to leave the state.[5] In contrast, Washington

[5] AWB points to the Seattle Sonics as an example of a business (in that case, a professional basketball team) leaving the state. The Sonics left after the team's owner failed to secure public funding for a new or renovated arena and sold the team to an out-of-state investment group—not to escape state business taxes. *See* Jim Brunner & Sharon Pian Chan, *Sonics*

State Labor Council et al. (collectively, "WSLC") has submitted an amicus brief in support of the tax that persuasively argues it will **not** cause wealthy Washingtonians or businesses to flee the state. WSLC points to research and studies finding there is no robust relationship between taxes and economic competitiveness, and indicating higher taxes on capital gains do not inhibit economic growth. WSLC Br. at 23–24. As WSLC further explains, 41 states and the District of Columbia tax both income and capital gains, and it is unlikely a wealthy taxpayer subject to Washington's capital gains tax would move to one of the few remaining states without such taxes for that reason alone. *Id*. at 24–27 (citing studies). In sum, the proposition that wealthy people have chosen to live or establish businesses in Washington because the State did not previously tax capital gains, and/or lacks an income tax, or that they will leave solely to avoid the

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Moving to Oklahoma City, THE SEATTLE TIMES (July 3, 2008), https://www.seattletimes.com/seattle-news/sonics-moving-to-oklahoma-city/ (last accessed Jan. 4, 2023).

new capital gains tax, is not supported by the studies and data on this issue.

In addition to the above economic impact arguments, BIAW claims the tax is "bad policy" because it is "complex" and because it contains deductions and exemptions for "seemingly incongruous interest groups, such as certain auto dealerships and timber owners," which BIAW summarily asserts must be the result of lobbying rather than sensible policy. BIAW Br. at 20–21. As to BIAW's first point, Washington businesses already navigate a multitude of complex laws and regulations touching on areas as diverse as licensing, insurance, intellectual property, employment, and taxation, among others. Moreover, existing taxes such as the business and occupation ("B&O") tax distinguish between types of businesses. *See, e.g.*, RCW 82.04.330 (exempting farmers from B&O tax with respect to certain sales); RCW 82.04.334 (exempting certain sales of standing timber from B&O tax); RCW 82.04.426 (exempting manufacturers of semiconductor microchips from B&O tax).

BIAW does not explain how the capital gains tax is any more complex than any other law applicable to businesses. Regardless, simply because a law is complex does not mean it is unconstitutional. If that were the standard, the state's entire tax code would be in legal jeopardy. *See, e.g., Raymond v. King Cnty.*, 117 Wash. 343, 344, 201 P. 455 (1921) (noting "[t]he statutes relating to the assessment and collection of taxes upon personal property are somewhat complicated, and to a certain extent confusing"); *Wash. State Dep't of Revenue v. Hoppe*, 82 Wn.2d 549, 550, 512 P.2d 1094 (1973) (referring to "state's complex scheme of property taxation").

As to BIAW's second point, pure speculation that the Legislature's exemptions and deductions were somehow improperly adopted does not justify invalidating the tax. *See Hoppe v. State*, 78 Wn.2d 164, 169, 469 P.2d 909 (1970) (legislative enactments are presumed constitutional and should not be invalidated unless unconstitutionality is shown beyond a reasonable doubt).

Regardless, BIAW's claim is meritless. The Legislature has broad power with respect to defining or classifying taxable events amenable to an excise tax. *See Armstrong v. State*, 61 Wn.2d 116, 119–22, 377 P.2d 409 (1962). A particular tax classification is permissible "if it is reasonably related to some lawful taxing policy of the state, such as greater ease or economy in the administration or collection of a tax, the selection of a fruitful source of revenue with the exemption of sources less promising, or the equalization of the burdens of taxation." *Texas Co. v. Cohn*, 8 Wn.2d 360, 386–87, 112 P.2d 522 (1941). Here, the Legislature adopted the capital gains tax with the lawful objective to "mak[e] material progress toward rebalancing the state's tax code." RCW 82.87.010; *see also Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 444, 450, 495 P.3d 808 (2021) (upholding a progressive tax on financial institutions that "asked the wealthy few to contribute more to funding essential services and programs to the benefit of all Washingtonians"). The tax's reasoned deductions and exemptions help to achieve this lawful

purpose by targeting those with the greatest ability to pay. BIAW simply disagrees with the Legislature's valid policy choice to ask wealthy individuals to contribute more to funding essential education programs that benefit all Washingtonians. That is not a sufficient reason to set aside the Legislature's decision.

Finally, NTUF disputes that Washington's existing tax system is regressive, claiming that "highly progressive elements of the existing tax code (significant portions of corporate income taxes on shareholders, preferential treatment of retiree income, and federal income taxes)" make the "total tax system" progressive. NTUF Br. at 25 n.4. NTUF thus challenges the Legislature's primary policy rationale for enacting the tax. But the purportedly progressive schemes NTUF cites appear to involve elements of the federal tax code, not Washington's tax code. And even if elements of Washington's tax code could be viewed as progressive if considered in a vacuum,[6] NTUF ignores

[6] For example, the state estate tax and the exemption of groceries from the sales tax base.

that Washington's tax revenues come primarily from the sales tax, B&O tax, and property tax—each of which is undisputedly regressive because people and businesses with lower incomes pay much higher percentages of their incomes in taxes than do wealthy people and highly profitable businesses.[7]

In sum, BIAW, AWB, and NTUF offer no compelling policy reasons to invalidate the capital gains tax. If the Court chooses to consider policy arguments, it should instead rely on the points made by amici who filed briefs in support of the tax. In contrast to the claims addressed above, the policy arguments raised by amici Equity in Education Coalition et al. (collectively,

[7] *See* https://dor.wa.gov/sites/default/files/2022-04/SummaryWAStateTaxesFY2020-2021.pdf?uid=63a06b046bcae; https://dor.wa.gov/sites/default/files/2022-04/MajorWAStateTaxesPercentageDistributionFY2021.pdf?uid=63a06b0474999; https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/revenue-expenditures-trends/state-local-government-revenue-sources; https://www.opportunityinstitute.org/blog/post/a-quick-guide-to-washingtons-tax-code/ (last accessed Jan. 4, 2023).

"EEC"), Warren, and WSLC are well-grounded and consistent with the Legislature's stated policy reasons for enacting the tax.

As EEC points out, the state's regressive tax code perpetuates wealth disparities built on institutional racism by disproportionately burdening those least able to pay, who in turn are disproportionately Black, Indigenous, and People of Color. EEC Br. at 1, 8–20, 29–30. In asking the wealthiest Washingtonians to pay more of their fair share of the cost of state government, the capital gains tax makes progressive steps toward combating the lasting impacts of structural racism. *Id*. at 2–3, 28–32. Similarly, Warren notes that the state's regressive tax code disproportionately harms rural Washingtonians, whose average annual income is significantly lower than urban residents (meaning rural residents pay a greater percentage of their incomes in state taxes). Warren Br. at 16–20. The capital gains tax will make progress toward shifting the tax burden off of those least able to pay and onto those who can, while providing an equitable source of funding for education and childcare in rural

communities. *Id*. at 16–17, 20–23. And WSLC similarly explains that Washington's overreliance on sales taxes, inadequate education funding, and lack of access to and high cost of child care disproportionately harm the state's lowest-income residents, women, and people of color. WSLC Br. at 2, 5–19. The capital gains tax will provide badly needed funding for education, early learning, and child care, benefitting not only those disproportionately harmed groups but all Washingtonians—including those who pay the tax. *Id*. at 19–28.

In enacting the capital gains tax, the Legislature recognized that "a tax system that is fair, balanced, and works for everyone is essential to help all Washingtonians grow and thrive" and stated its intent to advance the State's paramount duty to amply fund education while making material progress toward rebalancing the state's upside-down tax code. RCW 82.87.010. EEC, Warren, and WSLC persuasively demonstrate how the tax will do exactly that. Accordingly, to the extent the Court considers policy arguments in evaluating the legal claims at issue

in this case, it should give greater weight to policy choices of the Legislature and the arguments made by those amici in support of the tax.

III. CONCLUSION

Although NTUF, BIAW, and AWB disagree with the Legislature's decision to tax the sale of certain long-term capital assets by wealthy Washingtonians, the Court may overturn this legislative policy choice only if there is proof beyond a reasonable doubt that the Legislature acted unconstitutionally. Plaintiffs and amici opposing the tax cannot meet that standard here. The capital gains tax is a valid excise tax and should be upheld as such. But if this Court holds the tax is an income tax, the Court's cases holding income is property rest on faulty premises and should be overruled. Either way, this Court should reverse the trial court and uphold the tax.

This document contains 4,563 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 5th day of January, 2023.

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