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' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Washington Cases

Other Cases

Washington Statutes and Constitutional Provisions

Washington Rules

Other Authorities

I. INTRODUCTION

Washington has long had the most regressive tax system in the country, in which low-income and middle-income Washingtonians pay a disproportionate share of their income in state taxes compared to residents with high incomes. To help remedy this problem and to provide essential investments in K-12 education and early learning, 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 this tax will provide significant funding for public education in Washington. Under this Court's long-standing precedent, the capital gains tax is an excise tax, not a tax on property. As such, the tax is not subject to the uniformity and levy limit requirements found in Washington Constitution article VII. The trial court erred in ruling otherwise.

Should this Court nevertheless rule that the capital gains tax is an income tax (which it is not), the Court should still uphold the tax. This Court's cases holding that an income tax is

a property tax were wrong when decided and they are wrong now. The weight of judicial authority at the time, and today, holds that an income tax is not a property tax. The time has come to overturn unsound and outdated legal authority that erroneously held income taxes unconstitutional.

Plaintiffs' remaining constitutional challenges to the capital gains tax fail because the tax implicates no protected privilege or immunity, reasonable grounds exist for the deductions and exemptions provided by the Legislature even if it did, and the tax is fairly apportioned and non-discriminatory. For all of these reasons, this Court should reverse the trial court and uphold the capital gains tax.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in granting Plaintiffs' motion for summary judgment invalidating Engrossed Substitute Senate Bill 5096 ("ESSB 5096") under article VII, sections 1 and 2 of the Washington Constitution.

2. The trial court erred in denying the State's motion for summary judgment requesting summary dismissal of Plaintiffs' constitutional challenges under article VII, sections 1 and 2 and article I, section 12 of the Washington Constitution and the dormant Commerce Clause of the U.S. Constitution.

B. Issues Pertaining to Assignments of Error.

1. The capital gains tax applies to the sale or exchange of capital assets. Under this Court's established precedent, which holds that a tax on the sale, transfer, or use of property is an excise tax, is the capital gains tax an excise tax that is not subject to the limitations in article VII, sections 1 and 2 of the Washington Constitution?

2. Plaintiffs argued below that the capital gains tax violates the Washington Constitution's Privileges and Immunities Clause, but they identified no privilege or immunity protected under article I, section 12 and, regardless, reasonable grounds exist for the distinctions drawn by the Legislature in granting exemptions and deductions to the tax. Given its ruling

that the capital gains tax imposes a property tax prohibited under article VII, sections 1 and 2, the trial court did not reach this claim. If this Court reverses and rules in favor of the State and Intervenors on Plaintiffs' article VII claim, should the Court reject Plaintiffs' Privileges and Immunities claim as a matter of law?

3. Plaintiffs argued below that the capital gains tax violates the dormant Commerce Clause of the U.S. Constitution, but they also admitted that the tax can be applied consistent with the Commerce Clause in many circumstances. 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. Given its ruling that the capital gains tax imposes a property tax prohibited under article VII, sections 1 and 2, the trial court did not reach this claim. If this Court reverses and rules in favor of the State and Intervenors on Plaintiffs' article VII claim, should the Court reject Plaintiffs' dormant Commerce Clause claim as a matter of

law?

4. Prior case law holding that income is "property" is incorrect and harmful. The legal underpinnings of those decisions were always flawed and have now entirely 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 the capital gains tax is a tax on income, 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?

III. STATEMENT OF THE CASE

A. The Capital Gains Tax Funds Important Public Education Investments by Taxing the Sale or Exchange of Capital Assets.

Substantial funding is crucial to carry out the State's "paramount duty" to fund education. Const. art. IX, § 1. Among other things, such funding goes toward salaries for educators, counselors, nurses, and social workers; materials, supplies, and operating costs; special education programs and services; and

necessary capital projects. CP 56–57, 67–68, 73–74, 79–80.[1] While the State has made substantial progress in recent years toward funding public education, funding challenges remain. *See* CP 56, 68, 74, 80. This is all the more evident in the wake of the COVID-19 pandemic and resulting disruptions to Washington's public education system, including decreased enrollment and increased need for virus prevention and mitigation protocols and behavioral health services.[2]

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

[2] *See* Wash. Student Achievement Council, *Facing Learning Disruption: Examining the Effects of the COVID-19 Pandemic on K-12 Students* (2021), https://wsac.wa.gov/sites/default/files/2021-03-30-COVID-Learning-Disruption-Report.pdf?utm_medium=email&utm_source=govdelivery (last visited June 28, 2022); Wash. State Dep't of Health, *Requirements and Guidance to Mitigate COVID-10 Transmission in K-12 Schools, Child Care, Early Learning, Youth Development, and Day Camp Programs* (2022), https://doh.wa.gov/sites/default/files/2022-03/821-165-K12SchoolsChildCare.pdf (last visited June 28, 2022); Dahlia Bazzaz, *As Washington State Public Schools Lost Students During Pandemic, Home-Schooled Population Has Boomed*, Seattle Times (Nov. 26, 2021), https://www.seattletimes.com/seattle-news/education/as-

Meanwhile, Washington's tax system 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; *see also* CP 550-52 (section of Brief of Amici Curiae Mary Ann Warren et al., describing multiple studies that confirm the regressive nature of Washington's tax code). Under Washington's existing tax code, low-income families pay at least six times more in taxes as a percentage of household income than high-income earners, and middle-income families pay two to four times more. RCW 82.87.010; *see also* CP 551. The current tax scheme results in low- and middle-income residents paying a disproportionate share of the cost of state government and services compared to residents with high incomes.

To address these challenges, the Legislature adopted ESSB 5096, imposing a seven percent tax on the sale or exchange

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washington-state-public-schools-lost-students-during-pandemic-home-schooling-population-has-boomed/ (last visited June 28, 2022).

of certain long-term capital assets beginning January 1, 2022. RCW 82.87.040(1). The Legislature's stated purpose for the tax is twofold.

First, the tax will advance the State's paramount duty to amply fund educational opportunities by "invest[ing] in the ongoing support of K-12 education and early learning and child care." RCW 82.87.010. Revenue from the tax is dedicated to Washington's Education Legacy Trust Account ("ELTA") and the Common School Construction Account ("CSCA"). RCW 82.87.030. Each year, the first $500 million collected from the tax 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 [(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." RCW 83.100.230. Any revenue above $500 million each year is dedicated to the CSCA. RCW 82.87.030(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 and required public education investments.[3]

Second, the tax is intended to "mak[e] material progress toward rebalancing the state's tax code." RCW 82.87.010. As a step toward making the tax code fairer to working people, the law 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, RCW 82.87.040(1), defined as capital assets held for more than a year. RCW 82.87.020(6). 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

[3] *See* Fiscal Note, ESSB 5096, *available at* https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363 (last visited June 28, 2022).

as a qualified family-owned small business deduction. *See* RCW 82.87.050 - .070.

In light of these generous exemptions and deductions, 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.[4]

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

Plaintiffs filed two separate lawsuits (later consolidated) seeking to invalidate the capital gains tax. Plaintiffs alleged the tax 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,

[4] *See* Fiscal Note, *supra* n. 3.

607–25. 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") intervened in the case as defendants in support of the capital gains tax's constitutionality. CP 112–13, 136–40.

On cross-motions for summary judgment,[5] the trial court ruled that the capital gains tax 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

[5] Plaintiffs did not pursue 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 the capital gains tax 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 307–23, 399–406, 661–83, 790–93, 801–03, 812–25.

P.2d 627 (1952); *see also* CP 308–16, 671–79, 813–19 (citing and discussing cases). Rather, the trial court 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 867–69 (citing *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), and *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951)). 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.

Finally, the trial court ruled the capital gains tax 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 and seek direct review by this Court.

IV. ARGUMENT

The capital gains tax is an excise tax, not an income or property tax, and as such the restrictions on property taxes in article VII do not apply. Nor does the tax violate the state Privileges and Immunities Clause or the federal dormant Commerce Clause. This Court should reverse and uphold the tax.

Even if the Court rules that the capital gains tax is an income tax (which it is not), there is an alternative ground on which the Court should uphold the tax. Plaintiffs' central arguments are based on this Court's line of cases from the 1930s

holding that income is property for constitutional taxation purposes. Those cases were wrong when decided, are wrong now, and should not be relied upon in determining the validity of the capital gains tax. Accordingly, even if the tax is an income tax, the Court should still hold that it is not a tax on property for purposes of Washington Constitution article VII.

A. Standard of Review.

This Court reviews a grant or denial of summary judgment de novo. *Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 386, 473 P.3d 1205 (2020). Statutes like ESSB 5096 are presumed constitutional, and the party challenging a statute "must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution." *Island Cnty. v. State*, 135 Wn.2d 141, 146–47, 955 P.2d 377 (1998). For the reasons set forth in the State's Opening Brief and herein, Plaintiffs fail to do so. The Court should reverse the trial court and uphold the capital gains tax.

B. The Capital Gains Tax Is a Valid Excise Tax, and Plaintiffs' Remaining Constitutional Claims Fail.

Education Parties hereby join in the State's arguments as to the nature and constitutionality of the capital gains tax. For the reasons stated in the State's Opening Brief, the capital gains tax is a valid excise tax not subject to article VII's restrictions on property taxes. Nor does the tax violate the Washington Constitution's Privileges and Immunities Clause or the federal dormant Commerce Clause. This Court should reverse the trial court, uphold the capital gains tax against Plaintiffs' article VII challenge, and reject Plaintiffs' remaining constitutional claims.

C. Even If This Court Rules the Capital Gains Tax Is a Tax on Income, Such a Tax Is Not a Tax on Property: *Culliton* and Progeny Should Be Overturned.

Even if this Court agrees with the trial court that the capital gains tax is a tax on income (which it should not), the case does not end there. Rather, resolution of the tax's validity depends on the answer to a threshold question: What is the proper characterization 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 discussed below, those cases should be overturned. An income tax is best characterized as a form of excise tax or, alternatively, another kind of non-property tax (i.e., a *sui generis* tax). Either way, it is not a tax on property. Article VII's limitations on property taxes do not apply.

1. *Stare Decisis* Does Not Apply If the Prior Cases Were Incorrect and Harmful or Their Legal Underpinnings Have Disappeared.

Education Parties acknowledge that this Court previously has held that income is "property" and thus broad-based income taxes are "property taxes." *See, e.g., Culliton*, 174 Wash. at 373–79; *Jensen*, 185 Wash. at 215–17. But "'stare decisis is neither a straightjacket nor an immutable rule; it leaves room for courts to balance their respect for precedent against insights gleaned from new developments, and to make informed judgments as to whether earlier decisions retain preclusive force.'" *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (quoting *Carpenters Local Union*

No. 26 v. U.S. Fid. & Guar. Co., 215 F.3d 136, 142 (1st Cir. 2000)). Accordingly, "[r]ules of law, like governments, should not be changed for light or transient causes; but, when time and events prove the need for a change, changed they must be." *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 665–66, 384 P.2d 833 (1963) (reversing precedent interpreting state debt limit under Const. art. VIII, §§ 1, 3).

This Court has identified two circumstances in which it will reconsider prior decisions. First, the Court will reconsider precedent "when the legal underpinnings of [the] precedent have changed or disappeared altogether." *W.G. Clark Constr. Co.*, 180 Wn.2d at 66 (overturning federal preemption cases due to evolving U.S. Supreme Court precedent and national shift in preemption jurisprudence); *see also State v. Allen*, 192 Wn.2d 526, 533–43, 431 P.3d 117 (2018) (overturning prior rule that double jeopardy does not apply to aggravating circumstances in light of subsequent decisions of the U.S. Supreme Court). Second, the Court will reject prior holdings upon a clear showing

that an established rule is incorrect and harmful. *State v. Abdulle*, 174 Wn.2d 411, 415, 275 P.3d 1113 (2012). "An opinion can be incorrect when it was announced, or it can become incorrect because the passage of time and the development of legal doctrines undermine its bases." *Id*. at 415–16. And "[t]he meaning of 'incorrect' is not limited to any particular type of error"; this Court has recognized that a decision may be incorrect if it is inconsistent with the Court's precedent, the state Constitution or statutes, or public policy considerations, or "if it relies on authority to support a proposition that the authority itself does not actually support." *State v. Barber*, 170 Wn.2d 854, 864, 248 P.3d 494 (2011).

Both of these circumstances apply to this Court's prior cases holding income is property and, thus, those cases should be overturned.

2. Article VII of the Washington Constitution Was Amended in 1930 to Ensure Intangible Assets No Longer Evaded Taxation.

This Court's 1933, divided 5-4 ruling in *Culliton* struck

down a statewide graduated income tax initiative overwhelmingly approved by the people in 1932.[6] The historical and social context leading up to the 1932 income tax initiative—including, in 1930, a constitutional amendment intended to expand the Legislature's taxing authority—is relevant to understanding the flaws in *Culliton*'s reasoning.

As originally adopted with the ratification of the Washington Constitution in 1889, article VII, sections 1 and 2 provided in relevant part:

> All property in the state, not exempt under the laws of the United States, or under this Constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. . . .
>
> The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its

[6] *See* Results of 1932 General Election, Initiative to the People 69, *available at* https://www.sos.wa.gov/elections/results_report.aspx?e=102&c=&c2=&t=&t2=5&p=&p2=&y (last visited June 28, 2022).

property . . . .

For the first forty years of Washington's statehood, the State relied primarily on real property taxes to support government services. *Culliton*, 174 Wash. at 385–87 (Blake, J. dissenting). At the time, this system of taxation worked because most people's wealth was kept in real property, and "the value of tangible property was great and the cost of government little." *Id.* at 385. But economics soon began to shift. Increasingly, "wealth was going into intangibles, into stocks, bonds, securities of various sorts—indicia of property which could easily elude the search of the tax collector." *Id.* At the same time, the cost of government increased greatly and property values began to collapse, resulting in an onerous tax burden on real estate. *Id.* at 386; *see also* Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. Puget Sound L. Rev. 515, 523–24 (1993). By 1929, the problem was so acute that the Legislature created a commission to investigate the issue. *Culliton*, 174 Wash. at 387. The commission performed an exhaustive study of Washington

taxation and ultimately recommended both a graduated personal income tax and a business income tax to provide property tax relief. Spitzer, 16 U. Puget Sound L. Rev. at 527.

In 1930, Washington voters passed Amendment 14 to the Constitution to capture intangible property in the definition of "property" and allow for different rates of taxation between classes of property. Const. amend. XIV; *see also State v. Wooster*, 163 Wash. 659, 663–64, 2 P.2d 653 (1931) (evasion of taxation by owners of intangibles (classified as "credits") was one of "the evils sought to be eradicated and abolished" by Amendment 14). Amendment 14 "entirely swept away" the older, more restrictive version of article VII quoted above and replaced it with a new section 1 providing in relevant part:

> The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. *The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership*. . . .

Const. art. VII, § 1 (emphasis added); *Wooster*, 163 Wash. at

662.

This Court explained the effect of the constitutional amendment as follows: "[T]he Legislature, freed from the former limitations, may now determine what property shall be taxed, the different rates upon which different classes of property shall be taxed, and what property shall pay no tax at all, subject only to the limitations found in the new constitutional provisions." *Wooster*, 163 Wash. at 663 (contrasting Amendment 14 to the Constitution's prior uniformity provision). As supporters of the (ultimately successful) amendment noted in the 1930 Voter's Pamphlet, the measure was based on a simple principle: "Every fair man should be willing to pay towards the cost of government, whether his money is invested in land, merchandise, bonds, or stocks."[7] By adding a definition of property that expressly included intangible property ("everything, whether tangible or

[7] *See* Voter's Pamphlet, November 4, 1930 Election, *available at* https://www.sos.wa.gov/_assets/elections/voters'%20pamphlet%201930.pdf (last visited June 28, 2022).

intangible, subject to ownership") and providing for classification of property, it became "possible to tax bonds and stocks . . . at moderate rates . . . ." *Id.*[8]

"At the time of the 1930 amendment's passage, many of its supporters believed that the new classification authority would allow the state to impose personal and corporate income taxes." Don Burrows, *The Economics and Politics of Washington's Taxes From Statehood to 2013* 131 (2013).[9] Indeed, groups that favored income taxes were among the strongest supporters of Amendment 14. *Id*. With this understanding, in 1931, the Legislature passed a personal, graduated income tax and a business income tax to create revenue streams that did not rely on real property taxes. *See*

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[8] *See also id.* (1930 Voter's Pamphlet discussing the unfairness of property taxation where "[s]tocks and bonds . . . escape altogether under our present system" and noting that "[t]he dog tax brings in more revenue than is received from all of the bonds and stocks owned in the state").

[9] This book is available online at https://guides.lib.uw.edu/ld.php?content_id=59560797 (last visited June 28, 2022).

Spitzer, 16 U. Puget Sound L. Rev. at 527–28. After the governor vetoed both measures, the people enacted the personal income tax by initiative in 1932. *Id.*; *see also* Laws of 1933, ch. 5.[10]

3. The Primary Case Law Relied on for *Culliton*'s Holding That "Income is Property" Was Incorrect and Unfounded, and Its Underpinnings Have Disappeared.

In *Culliton*, this Court struck down the 1932 income tax initiative as a violation of recently-amended article VII, reasoning that income is property under Amendment 14's definition of "property"; taxes must be uniform within each class of property; income constitutes a single class of property; and therefore a graduated income tax violates the uniformity requirement. 174 Wash. at 373–77. The Court's holding was based in significant part on the mistaken proposition that the question of whether income constituted a form of property under

[10] For a detailed history of Washington's income tax movement in the late 1920s, culminating in the 1932 initiative campaign, see Phil Roberts, *A Penny for the Governor, A Dollar for Uncle Sam: Income Taxation in Washington* 56–99 (2002).

article VII had already been considered and decided. *See id.* at 376 ("It has been definitely decided in this state that an income tax is a property tax, which should set the question at rest here."). 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* did not so hold. And to the extent *Aberdeen* relied on federal case law for the proposition that an income tax may be a property tax for purposes of the U.S. Constitution, that federal case law has since been overruled by the U.S. Supreme Court.

Aberdeen struck down a 1929 law that imposed a "tax measured by income upon banks and financial corporations," under which savings and loans paid a different corporate income tax than commercial banks and other competitors. 157 Wash. at 353, 360–61. The law was challenged on several grounds, including that it violated the Equal Protection Clause of the U.S. Constitution and the then-existing uniformity provision in article VII of the Washington Constitution. *Id.* at 357. The *Aberdeen*

Court struck down the law as a violation of Equal Protection based almost exclusively on *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928), a *Lochner*-era case[11] in which the U.S. Supreme Court held that a tax on certain cab companies but not on other entities conducting the same business violated Equal Protection. *Id.* at 361–64, 373–74.[12] The *Aberdeen* Court did not examine the characteristics of property or income under Washington law and 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 361, 373–74.

The State and the legislatively-created Advisory Tax Commission, as *amici curiae*, petitioned this Court for rehearing in *Aberdeen* and its companion cases. Spitzer, 16 U. Puget Sound

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[11] *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905), *overruled by Ferguson v. Skrupa*, 372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963).

[12] *Aberdeen* also held that a provision of the 1929 law that taxed interest income from government securities violated federal law. *Id*. at 365–74.

L. Rev. at 550–51. They argued that *Aberdeen* potentially could be misread as deciding additional constitutional issues, impacting the legality of future taxes. *Id.* In denying rehearing, this Court confirmed the limited scope of its holding, stating that the decision "should not be construed as determining any question which was not before the court" and was based solely on "the decisions of the Supreme Court of the United States [(*Quaker City Cab*)]," which treated the tax at issue as attempting "to establish a property and not an excise or corporation franchise tax." *Wash. Mut. Savings Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930).

Accordingly, to the extent *Aberdeen* treated an income tax as a property tax, it was only for federal Equal Protection Clause purposes pursuant to the U.S. Supreme Court's decision in *Quaker City Cab*.[13] In 1973, the U.S. Supreme Court expressly

[13] The same was true in the companion case to *Aberdeen*, *Burr v. Chase*, 157 Wash. 393, 396, 289 P. 551 (1930) ("The opinion of the Supreme Court of the United States in the case of *Quaker City Cab Co. v. Pennsylvania* . . . is even more exactly in point

overruled *Quaker City Cab*, deeming it "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). As such, not only does *Aberdeen* fail to support *Culliton*'s holding that income is property for *state* constitutional purposes, the legal underpinnings of *Aberdeen* (and therefore *Culliton*) have been overruled and are no longer valid.

Further, the U.S. Supreme Court, on which the *Aberdeen* Court relied, has consistently rejected the characterization of an income tax as a property tax. As far back as 1916, the Court explained that a prior, influential decision striking down a federal income tax as a "direct" tax on property for federal constitutional apportionment purposes (*Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 (1895)), did not hold that income taxes are property taxes: "[T]he conclusion reached in the Pollock Case did not in any degree involve holding that

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in this case than it was in the case of *Aberdeen Savings & Loan Association* . . . .").

income taxes generically and necessarily came within the class of direct taxes on property, but, on the contrary, recognized the fact that taxation on income was in its nature an excise entitled to be enforced as such . . . ." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 16–17, 36 S. Ct. 236, 60 L. Ed. 493 (1916). And the U.S. Supreme Court has explicitly rejected the concept articulated in *Pollock*, and subsequently relied on by this Court in *Jensen*, that a tax on income is inherently the same as a property tax.[14] *Graves v. People of State of N.Y. ex rel. O'Keefe*, 306 U.S. 466, 480, 59 S. Ct. 595, 83 L. Ed. 927 (1939) ("The present [state income] tax . . . applie[s] to salaries at a specified rate. . . . It is measured by income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on

[14] *See Jensen*, 185 Wash. at 222 (so holding and citing *Pollock*).

income is legally or economically a tax on its source, is no longer tenable . . . .").[15]

Culliton's mischaracterization of *Aberdeen*—and implicit acceptance of the (now obsolete) U.S. Supreme Court authority on which *Aberdeen* relied—has profoundly impacted subsequent decisions. The erroneous statement that it is well-settled that "income is property" has been repeated throughout Washington's income tax case law since the 1930s without any substantive analysis of the nature of an income tax. *See, e.g.*, *Jensen*, 185 Wash. at 216–17 (invalidating personal income tax framed as privilege tax and relying on *Culliton* for the premise that "income is property, and that an income tax is a property tax"); *Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 496–97, 55 P.2d 1056 (1936) (rejecting corporate income tax framed as a privilege tax based on *Aberdeen*, *Culliton*, and *Jensen*);

[15] *See also S. Carolina v. Baker*, 485 U.S. 505, 515–25, 108 S. Ct. 1355, 99 L. Ed. 2d 592 (1988) (confirming that *Pollock* has been overruled in its entirety).

Power, Inc., 39 Wn.2d at 195–97 (similarly rejecting corporate net income tax framed as an excise tax). As demonstrated above, because *Culliton*'s statement of the law was incorrect and unfounded, and because the bases on which *Aberdeen* was decided have since disappeared, this Court should revisit the question with a fresh view toward the true nature of an income tax. *See infra*, Section IV.D.

4. *Culliton*'s Statement that the Majority of Courts Characterized Income as Property was Incorrect and Unfounded.

In addition to mischaracterizing *Aberdeen*, the *Culliton* Court also mistakenly stated—without citation to authority—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. To the contrary, by the 1930s the majority of courts held that an income tax is *not* a property tax. In compiling his exhaustive treatise on state taxation, Professor Wade Newhouse researched every state's income tax laws and cases. Wade J. Newhouse, *Constitutional Uniformity and Equality in State*

Taxation (1984). Professor Newhouse notes that nationwide the issue of how to characterize an income tax "came to a boil from 1922 through 1936"—the exact timeframe in which this Court decided *Culliton* and *Jensen*. *Id.* at 2020. Professor Newhouse concludes:

> Overall, for all the bitter controversy of the 1920s and the 1930s, in the end there were only five state courts which actually ruled negatively on income taxes under the uniformity limitations, with that negative position either abandoned or modified in three of them, *leaving only two state courts 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. Without determining its precise nature in relation to all those other various kinds of taxes which are not property taxes, it was ruled not to be a tax upon property.*

Id. at 2021, 2029 (emphasis added); *see also Mills v. State Bd. of Equalization*, 33 P.2d 563, 564–65 (Mont. 1934) (rejecting *Culliton*'s "overwhelming weight of judicial authority" statement and referring to an article concluding that by 1933 the

opinions were "preponderantly" in favor of the view that an income tax was a non-property tax); Newhouse, *Constitutional Uniformity and Equality in State Taxation* 1991–92 (discussing *Mills*' rejection of *Culliton*). Washington's treatment of an income tax as a property tax was and remains an outlier.

The approach that Illinois' highest court took in dealing with the exact issue presented here provides a blueprint for rejecting *Culliton*'s mischaracterization regarding the weight of authority. In 1932, the Illinois Supreme Court invalidated an income tax under Illinois' constitutional restrictions on property taxes, holding that "income is property" based on *Pollock* and a mistaken claim that the "overwhelming weight of judicial authority" so held. *Bachrach v. Nelson*, 182 N.E. 909, 914–15 (Ill. 1932) (quotations omitted). In 1969, the Illinois Supreme Court reversed that holding, noting that *Pollock* was no longer good law. *Thorpe v. Mahin*, 250 N.E.2d 633, 634–36 (Ill. 1969). The *Thorpe* Court further stated: "The court in *Bachrach* also implied that the 'overwhelming weight of judicial authority'

holds that an income tax is a property tax. 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." *Id*. at 635 (citation omitted). Tellingly, *Bachrach*'s (now overruled) misstatement of law was part of the briefing before this Court in *Culliton*, and likely is what *Culliton* relied on for its own nearly identical "weight of judicial authority" statement. *See* Br. of Amici Curiae Allen et al. at 9–10, *Culliton*, 174 Wash. 363 (No. 24491); Br. of Respondents Culliton at 7–10, *Culliton*, 174 Wash. 363 (No. 24491); Br. of Respondents McKale's, Inc. et al. at 60–61, *Culliton*, 174 Wash. 363 (No. 24491); *see also* Spitzer, 16 U. Puget Sound L. Rev. at 558 & n.282. *Culliton*'s statement regarding the weight of judicial authority was not accurate. Washington should follow Illinois' lead and correct this error.

5. *Culliton*'s Characterization of Income Based on the Constitutional Definition of "Property" Was Erroneous.

The *Culliton* Court also relied on what it characterized as the "peculiarly forceful constitutional definition" of property in

Amendment 14 to the Washington Constitution—"everything, whether tangible or intangible, subject to ownership"—and reasoned that "[i]ncome is either property . . . or no one owns it." 174 Wash. at 374; Const. amend. XIV. That conclusion is erroneous. It ignores entirely that Amendment 14's definition of property was intended to allow taxation of stocks, bonds, and other intangible property that had, until that point, evaded taxation. *See supra*. And 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 "something in motion, something that can either cease moving and itself become an income-producing asset (i.e., 'property') or that can alternatively be consumed and disappear." Spitzer, 16 U. Puget Sound L. Rev.

at 570; *see also Waring v. City of Savannah*, 60 Ga. 93, 99–100 (1878) ("[N]et income, after expenses are paid, becomes property when invested, or if it be money lying in a bank, or locked up at home. But, to call it property when it is all consumed as fast as it arises—going on the back, or in the stomach, or in carriages and horses (which are taxed), or in travel and frolic—to call such income, so used, property, would seem to be a perversion of terms."); *Sims v. Ahrens*, 271 S.W. 720, 732 (Ark. 1925) ("The word 'income' as used for taxation purposes involves time as an essential element in its measurement or definition, and thus differs from capital, which commonly means the amount of wealth which a person has on a fixed date." (quotation omitted)); *Miles v. Dep't of Treasury*, 199 N.E. 372, 378 (Ind. 1935) ("Income implies accruals over a period of time, while property implies possession at a given time.").

Courts have adopted this understanding of income in discussing the nature of an income tax. 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." (Emphasis added).[16] And in *Sims*, the Supreme Court of Arkansas, in holding an income tax was not a property tax, explained that "because of [income's] *fluctuating and indeterminate nature, during this period and process of its making*, [it] has not yet become an investment or an increment to the permanent wealth or property

[16] This Court favorably cited and quoted *Cohn* for a different proposition last year. *See Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 450, 495 P.3d 808 (2021) ("'Taxes are what we pay for civilized society . . . [.]' A[n apportioned] tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.'").

of the individual who has to pay the tax . . . .” 271 S.W. at 732 (emphasis added).

This concept also finds support in the common meaning of the term “income.” The leading English-language dictionary defines “income” as “1: a coming in: entrance, influx . . . 2: a gain or recurrent benefit usually measured in money that derives from capital or labor . . . .” Webster’s Third New Int’l Dict. 1143. One does not own a “coming in” or “gain” until after it is realized as an asset. This contrasts with the pertinent dictionary definition of “property,” which is “something owned or possessed . . . something to which a person or business has a legal title . . . .” *Id.* at 1818.[17] Contrary to the *Culliton* Court’s characterization of Washington’s constitutional definition as

[17] *See also* Merriam-Webster Dictionary, *available at* merriam-webster.com/dictionary (defining “income” as “a gain or recurrent benefit usually measured in money that derives from capital or labor” or “the amount of such gain received in a period of time,” and “property” as “something owned or possessed,” “the exclusive right to possess, enjoy, and dispose of a thing **:** OWNERSHIP,” or “something to which a person or business has a legal title”).

"peculiarly forceful," 174 Wash. at 374, it appears to mirror this standard dictionary definition closely. *See* Const. art. VII, § 1 ("The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership.").

Further, as noted above, Amendment 14's definition of "property" was passed in 1930 in response to widespread concern that wealth was increasingly being moved from real property (taxed) to intangible property (not taxed) and, thus, escaping taxation. That concern does not support characterizing income as property, as income is not an asset into which wealth can be transferred. Indeed, such a characterization would be contrary to the intent of the people in passing Amendment 14, which was to *expand* the ability to tax, not limit it. *See supra*.

Common definitions of "intangible property" further support the conclusion that income is not property. Webster's defines "intangible property" as "property having no physical substance apparent to the senses: incorporeal property . . . often

evidenced by documents (as stocks, bonds, notes, judgments, franchises) having no intrinsic value or by rights of action, easements, goodwill, trade secrets." Webster's at 1173. Similarly, Black's defines "intangible property" as "Property that lacks a physical existence. Examples include stock options and business goodwill." Black's Law Dictionary (11th ed. 2019). Income is not listed as an example in either definition. The definitions instead reflect property in which wealth can be kept or transferred.

In sum, income is not property in the common or constitutional sense. *Culliton*'s conclusion to the contrary was erroneous.

6. Categorizing Income as Property Harms Low- and Moderate-Income Residents and State Efforts to Adequately Fund Services.

Not only is the conclusion reached in *Culliton* and progeny incorrect and unfounded (for the reasons stated above), it has and continues to cause significant harm to the State and its residents. A decision may be "harmful" for any number of reasons, but the

"common thread" is the "decision's detrimental impact on the public interest." *Barber*, 170 Wn.2d at 865. For example, this Court has found prior precedent harmful where it undermined the principles underlying legislation and risked offending separation of powers, *see id*. at 871–73; where it was "unnecessarily complex and difficult for courts to apply" and undermined and weakened the deterrent effect of tort law, *see Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 419–20, 150 P.3d 545 (2007); where it threatened to deprive crime victims of restitution contrary to more recent changes in constitutional and statutory law, *see State v. Devin*, 158 Wn.2d 157, 168, 170–71, 142 P.3d 599 (2006); and where it would have destroyed the public benefit in the best use of the State's trust lands, *see In re Rights to Use of Waters of Stranger Creek*, 77 Wn.2d 649, 657, 466 P.2d 508 (1970).

Washington's long-standing adherence to the incorrect and unfounded statements in *Culliton* is detrimental to the public interest in equitable taxation. Just last year, this Court upheld 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," citing favorably U.S. Supreme Court authority acknowledging the merits of income taxes: "'A[n apportioned] tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits.'" *Wash. Bankers Ass'n*, 198 Wn.2d at 444, 450 (quoting *Cohn*, 300 U.S. at 313); *see also Texas Co. v. Cohn*, 8 Wn.2d 360, 386–87, 112 P.2d 522 (1941) (listing "the equalization of the burdens of taxation" as a "lawful taxing policy of the state"); *Town of Tekoa v. Reilly*, 47 Wash. 202, 208–09, 91 P. 769 (1907) (upholding exemptions to a street poll tax that, if imposed on the exempted groups "without regard to property or ability to pay," would have been "unjust and oppressive in the extreme").

In outlawing graduated income taxes in Washington, the *Culliton* line of cases has prevented distributing the burdens of

government among those who are privileged to enjoy its benefits. As the Legislature recognized in enacting the capital gains tax, Washington thus has the most regressive tax structure in the nation, with our low- and moderate-income earners paying a significantly greater share of their income in taxes than high-income households. RCW 82.87.010; *see also* CP 550–52. Raising new revenue within the existing tax structure exacerbates harm to low- and moderate-income earners and limits the State's ability to meet increasing demand for services, particularly in the area of education funding. *See* RCW 82.87.010; CP 50, 74, 80. *Culliton* and its progeny have created and increased this harm, and should not be followed.

D. An Income Tax Is Best Understood as an Excise Tax and Should Be Upheld as Such.

For the reasons discussed above, even if this Court concludes the capital gains tax is an income tax, it should reject *Culliton* and hold the tax is not a tax on property. Rather, as the overwhelming weight of authority holds, an income tax is best understood as a form of excise tax. Numerous courts have so

held. *See, e.g., Brushaber*, 240 U.S. at 17 (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*, 250 N.E.2d at 635–36 (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).

Underlying these cases is the concept that an income tax is not a tax on the income itself, but rather is a means to share equitably the cost of providing government benefits among residents. In *Cohn*—which this Court quoted favorably in

Washington Bankers as noted above[18]—the U.S. Supreme Court explained:

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is 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. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship.

300 U.S. at 312–13; *see also Reynolds Metal Co. v. Martin*, 107 S.W.2d 251, 258 (Ky. 1937) (an income tax is "a contribution exacted from those domiciled or doing business in the state for the purpose of defraying the expenses of government, the

[18] *Wash. Bankers Ass'n*, 198 Wn.2d at 450.

contribution being measured by the ability of the taxpayer to pay, which in turn is determined by the extent of his income. He is required to pay this tax because he is domiciled or doing business in the state, and so enjoys the protection of government, the right to earn a living, to receive, keep, and expend, income, and to be safe in his property and pursuit of happiness.").[19] As these cases suggest, such an excise tax is commonly referred to as a privilege or benefit tax, which is quintessentially an excise tax.

Indeed, this Court has long upheld excises taxes as valid privilege taxes measured by income. In *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933), this Court held that a tax imposed on business activity, as measured by a business's gross proceeds of sales or gross income, was an excise

[19] *See also Hattiesburg Grocery Co. v. Robertson*, 88 So. 4, 5–6 (Miss. 1921) (same); *Kopp v. Baird*, 313 P.2d 319, 321–22 (Idaho 1957) (same); *Vilas v. Iowa State Bd. of Assessment & Review*, 273 N.W. 338, 340 (Iowa 1937) (same); *Ryan v. Commonwealth*, 193 S.E. 534, 537–38 (Va. 1937) (same); *Miles*, 199 N.E. at 378–79 (same); *Dooley*, 121 N.W.2d at 730 (same for city income tax).

tax and not a tax on property. The Court stated the tax "does not concern itself with income which has been acquired, but only with the privilege of acquiring, and that the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved." *Id*. The Court explained that laws and courts are created by government "for the protection of human rights, the rights of property and to prevent the weak or credulous from becoming the helpless victims of the force or fraud of the strong and the cunning." *Id.* at 406. As a result, "every citizen is now measurably safe in pursuing any gainful occupation with *the expectation that he will be by the state fully protected and made secure in his property investment, and also in his gains therefrom. This is the privilege*, far above mere property, which it is now sought to tax to the end that it may *pay in some part its fair share of the cost to the state of its creation and continuance*." *Id.* at 406–07 (emphasis added). This reasoning mirrors the rationale articulated by courts that recognize an income tax is a privilege excise tax based on

domicile and its attendant benefits to the taxpayer. *See supra*.

There is no reasonable distinction between a privilege tax on a business based on income and a privilege tax on individual residents based on income. State laws and infrastructure allow residents to pursue their livelihoods and lives secure in the knowledge that they and their property are protected. An income tax does nothing more than ensure that residents, like businesses, pay their fair share of the State's cost of creating and maintaining that protective infrastructure.

Indeed, in *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 74–75, 78, 34 P.2d 363 (1934), this Court upheld the 1933 occupation tax as applied to public employees earning salaries of more than $200 per month, among others. Thus, in at least one context this Court already has recognized that taxing income above certain thresholds is a permissible privilege excise tax.

The *Jensen* Court's contrary holding that an income tax is not an excise tax should be overturned. *Jensen* attempted to distinguish *Stiner* and *Supply Laundry Co*. by stating that those

cases involved a tax on a privilege granted or permitted by the State (engaging in business activities), whereas an income tax imposed on individuals does not. 185 Wash. at 218. But as demonstrated above, the governmental benefits and protections that provided the grounds for upholding the B&O tax on resident businesses in *Stiner* apply equally to individual residents.

Further, the cases *Jensen* cites in support of its holding do not stand for the proposition that an income tax is something other than an excise tax. In one such case, *McFeely v. Commissioner of Internal Revenue*, 296 U.S. 102, 107, 56 S. Ct. 54, 80 L. Ed. 83 (1935), the U.S. Supreme Court stated that the time a person starts to own property is when he or she acquires it. Nothing in the case purported to equate income and property, or even suggested that income is owned as one would own a piece of land. The same is true in the other cases cited in *Jensen*—they all involve taxes on real or personal property, and none relate to income taxes. *See Dawson v. Kentucky Distilleries & Warehouse Co*., 255 U.S. 288, 293–95, 41 S. Ct. 272, 65 L.

Ed. 638 (1921) (tax on ownership of whiskey in bonded warehouses at the time it is removed); *Thompson v. Kreutzer*, 72 So. 891, 891–92 (Miss. 1916) (tax on timber lands); *In re Opinion of the Justices*, 94 N.E. 1043, 1044 (Mass. 1911) (taxes on real estate and personal property).

In sum, to the extent this Court rules the capital gains tax is a tax on income, the overwhelming consensus is that income taxes are excise taxes based on the privilege of receiving public governmental benefits, not property taxes. *Jensen*'s holding that an income tax is not an excise tax is grounded in the same errors as *Culliton* and should no longer be followed.

E. An Income Tax Could Also Be Characterized as *Sui Generis*.

Some jurisdictions do not classify income taxes as either excise taxes or property taxes; instead, they treat income taxes as a unique category. One court stated: "In many ways such a tax is sui generis. It imposes a tax on the net income or revenue which passes into or through a man's hands within a prescribed period, a large share of which never finds permanent investment." *Reed*

v. Bjornson, 253 N.W. 102, 105 (Minn. 1934); *see also Owen v. Fletcher Sav. & Trust Bldg. Co.*, 189 N.E. 173, 177 (Ind. 1934) ("An income tax is distinguished from other forms of taxation, in that it is not levied upon property nor upon the operation of a trade, or business, or subjects employed therein, nor upon the practice of a profession, the pursuit of a trade or calling, but upon the acquisitions of the taxpayer arising from one or more of these sources or from all combined. It is not a tax on property, and a tax on property does not embrace income."); *State ex rel. Haggart v. Nichols*, 265 N.W. 859, 876 (N.D. 1935) (Morris, J., concurring) ("Income as a tax subject is sui generis."); Robert C. Brown, *The Nature of the Income Tax*, 17 Minn. L. Rev. 127, 143–45 (1933) (analyzing income tax cases and urging that income taxes be treated as *sui generis*); Spitzer, 16 U. Puget Sound L. Rev. at 559-61 (discussing Professor Brown's alternate *sui generis* approach and noting that "had it been adopted by Washington's court, [it] would have enabled the justices to consider the income tax on its own legal merits").

This is an alternative and reasonable characterization that this Court could adopt. Indeed, the Court has already recognized this concept in the local taxation authority context, noting that local "taxation must fall into one of three categories: property, income, or excise taxes." *Watson v. City of Seattle*, 189 Wn.2d 149, 167, 401 P.3d 1 (2017) (citing Wash. State Dep't of Revenue, *Tax Reference Manual* 3 (Jan. 2010)). Income taxes can be considered their own category apart from property and excise taxes. Either way, an income tax is not a property tax and constitutional uniformity requirements do not apply.

V. CONCLUSION

The capital gains tax is a valid excise tax on the sale or exchange of long term capital assets. Plaintiffs' state and federal constitutional challenges to the tax fail under well-settled law. But in the event this Court holds the tax is an income tax, the Court's cases holding income is property for tax purposes rest on faulty premises. Rather, an income tax is either a form of excise tax or a *sui generis* tax not subject to article VII's limitations on

property taxes. This Court should reverse the trial court and hold that the capital gains tax is valid.

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RESPECTFULLY SUBMITTED this 30th day of June, 2022.

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