

No. 100769-8

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IN THE SUPREME COURT OF THE STATE OF  
WASHINGTON

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

*Respondents,*

vs.

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

*Appellants.*

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

*Intervenors.*

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APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, and individual;

BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERIN SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN MCKENNA, an individual; WASHINGTON FARM BUREAU; WASHINGTON STATE TREE FRUIT ASSOCIATION; WASHINGTON STATE DAIRY FEDERATION,

*Respondents,*

vs.

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

*Appellants.*

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

*Intervenors.*

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**BRIEF OF *AMICUS CURIAE***

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## I. INTRODUCTION

Black, Indigenous, and People of Color (“BIPOC”) have long endured the lasting effects of institutional and economic racism, including lopsided wealth distribution and income disparities. Washington’s tax code—the most regressive in the nation—exacerbates those disparities by imposing on lower-income residents, who are disproportionately BIPOC, the harsh burden of paying a higher share of their income in taxes than the wealthiest.

For this reason, community-based organizations—representing a broad coalition of workers, families, and BIPOC communities—have advocated over the last decade for progressive changes to Washington’s tax code, seeking to close the gap between rich and poor and to ensure critical state programs and services are funded without further burdening those with the lowest incomes.

The efforts of these organizations, including Amici (identified below), culminated in 2021 with the passage of

Engrossed Substitute Senate Bill 5096 (“ESSB 5096”). By imposing a seven percent tax on the sale or exchange of certain long-term capital assets, the Legislature recognized the need to remedy the inequities of the current system. The tax modestly impacts a small group of Washington’s wealthiest households and ultimately raises the economic well-being of *all* Washington families.

The Legislature’s decision should be upheld for the reasons stated in the State and Intervenors’ briefs and, as Amici detail here, for several important public policy reasons. For example, as Amici recognize, “the tax code is ultimately an incredibly powerful and essential tool to advance racial justice in our State.”<sup>1</sup> Similarly, this Court recently recognized that “the injustices faced by black Americans are not relics of the

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<sup>1</sup> Kelli Smith & Andy Nicholas, Wash. State Budget & Pol’y Ctr., *Washington’s Tax Code is an Untapped Resource to Advance Racial Justice 2* (October 2019), <https://budgetandpolicy.org/wp-content/uploads/2019/10/2019-Brief-WA-Tax-Code-is-untapped-resource-for-racial-justice.pdf>.

past” and “[t]he injustice still plaguing our country has its roots in the individual and collective actions of many, and it cannot be addressed without the individual and collective actions of us all.”<sup>2</sup> A collective action, ESSB 5096 helps remedy the state’s inequitable tax code and, in turn, injustices faced by BIPOC. As set forth below, Amici support upholding ESSB 5096 and reversing the trial court’s order.

## **II. INTEREST OF AMICI**

Equity in Education Coalition (“EEC”) is a state-wide coalition working toward a more targeted and comprehensive approach to improving educational achievement and growth as well as ending generational poverty throughout Washington. EEC works to ensure children, particularly low-income children and children of color, have access to the resources and services

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<sup>2</sup> Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty. (Wash. June 4, 2020), <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf>.

they need to be successful in and out of the classroom. EEC believes that public services for all Washingtonians should be amply funded to the benefit of every person living in Washington State.

*Firelands Workers Action/Acción de Trabajadores* (“Firelands”) is an organization of low-wage workers primarily in Grays Harbor and Pacific Counties who mostly work in the natural resources and care sectors of the economy – the sectors most impacted by climate change, racial and economic inequality, and most implicated in a transition to a just and sustainable economy. Firelands’ members are loggers, cannery workers, oyster farm workers, house cleaners, homecare providers, grocery workers, healthcare workers, millworkers, cooks, unemployed workers, full-time parents, and more. Firelands’ members speak English, Spanish, and Indigenous languages from across North and Central America.

OneAmerica was established in 2001 by U.S. Representative Pramila Jayapal and has since become a locally

and nationally recognized leader in advancing immigrant, civil, and human rights. OneAmerica is working to strengthen our response to the emboldened racism and xenophobia facing immigrants and refugees in Washington State. OneAmerica works at the intersection of immigrant rights and human rights, economic justice for working families, education reform to close the opportunity gap facing English language learner students and expand access to affordable childcare, and democracy reform to expand voting rights and strengthen access to democracy. OneAmerica supports the capital gains excise tax to ensure that the responsibility of revenue in Washington is shared more fairly across all residents.

The Urban League of Metropolitan Seattle (“ULMS”) and Tacoma Urban League (“TUL”) empower Black people to achieve economic parity by providing direct service in housing and financial empowerment, workforce development, education and youth development, public health, and advocacy and civic engagement. Through connecting with participants,

ULMS/TUL see the disparities within our community as more than statistics; they know them by name. Balancing the upside-down tax code ensures that Washington State can make key investments into direct services our Black community deserves and provides a necessary step toward systemic change and racial equity.

The Washington Community Alliance (“WCA”) is a statewide coalition of dozens of organizations and tribes across the state, led by and working in communities of color. WCA was founded to ensure that working-class communities of color were counted in the 2020 Census. Now, WCA focuses on ensuring Washington State is a thriving multiracial democracy whose politics and economy are equitable and just. WCA advances policies that enable Black and Brown communities to share in the prosperity built in this state, including working to rebalance Washington’s upside-down tax code and investing in an economy that works for all of Washington’s people.

Washington for Black Lives (“WBL”) is a unified, Black-led, multiracial coalition of organizations across the state building on the innate power of our communities. WBL is a collection of community-based organizations, nonprofits, and faith communities in Washington fighting for change in public safety, police and prisons and demanding substantial investment in Black & Brown communities. WBL shares a commitment to creating economic justice and believes that a more equitable tax system is long overdue in our state. WBL wants to see revenue directly impact and enrich our communities.

The Washington State Budget & Policy Center (“BPC”) is a non-profit research organization that works to advance the well-being of all Washingtonians and build a stronger, more equitable state. BPC policy analysts and leadership have broad expertise in a variety of areas including tax policy, budget analysis, jobs and social policy, and racial and economic equity. BPC has an interest in moving toward a balanced and just state

tax code that generates the revenue needed to equitably meet the needs of Washington communities.

### **III. STATEMENT OF THE CASE**

Amici concur with and adopt the statements of the case set forth in the State and Intervenors' Opening Briefs.

### **IV. ARGUMENT**

#### **A. Decades of Institutional Racism Has Resulted in Vast Disparities of Wealth and Income**

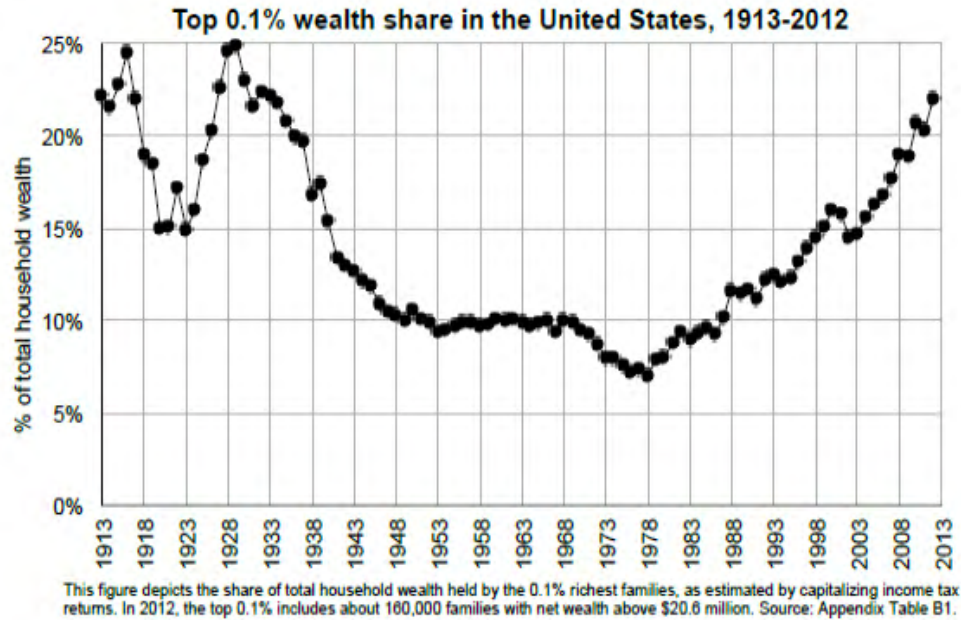
For decades, institutional racism—at both the federal and local levels—has led to significant disparities in wealth accumulation between white and BIPOC households.

##### **1. Racial Wealth Disparities Nationally**

As depicted below, the top 0.1 percent of households hold more than 20 percent of the total household wealth in the



United States as of a decade ago, mirroring figures from right before and after the Great Depression more than a century ago.<sup>3</sup>



As applied to race, white households own 87 percent of national wealth, with the wealthiest 10 percent among them owning 63 percent.<sup>4</sup> In 2019, the median value of financial

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<sup>3</sup> Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* 51 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20625, 2014), [https://www.nber.org/system/files/working\\_papers/w20625/w20625.pdf](https://www.nber.org/system/files/working_papers/w20625/w20625.pdf).

<sup>4</sup> Ctr. on Budget and Pol'y Priorities, *Wealthiest 10 Percent of US Households Hold Two-Thirds of US Wealth*, <https://www.cbpp.org/wealthiest-10-percent-of-white->

assets held by white households (\$49,300) was *nine times* that of Black households (\$5,500) and over *sixteen times* that of Hispanic or Latino households (\$3,000).<sup>5</sup>

Scholars attribute these disparities to the enduring legacies of enslavement and Jim Crow laws.<sup>6</sup> While these wealth disparities dramatically narrowed in the fifty years after Emancipation (from a starting point of 60-to-1 white-to-Black per capita wealth ratio to 10-to-1 by 1920 and 7-to-1 by the 1950s), that progress slowed over the first half of the 20<sup>th</sup> century and has effectively stalled over the last 70 years,

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[households-own-two-thirds-of-us-wealth-0](#). (Source: Federal Reserve’s Study of Consumer Finances, 2019).

<sup>5</sup> Bd. of Governors of the Fed. Reserve Sys., *Survey of Consumer Finances, Excel Based on Internal Data*, “Table 6: Family holdings of financial assets, by selected characteristics of families and type of asset, 1989–2019 surveys,” at L129–131, [https://www.federalreserve.gov/econres/files/scf2019/tables\\_internal\\_nominal\\_historical.xlsx](https://www.federalreserve.gov/econres/files/scf2019/tables_internal_nominal_historical.xlsx).

<sup>6</sup> Ellora Derenoncourt et al., *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860–2020* 1 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30101, 2022), [https://www.nber.org/system/files/working\\_papers/w30101/w30101.pdf](https://www.nber.org/system/files/working_papers/w30101/w30101.pdf).

hovering at 6-to-1.<sup>7</sup> Even worse, the wealth disparities have widened since the 1980s, as rising capital gains and high wealth-to-income ratios have predominantly benefitted white households.<sup>8</sup>

Stark differences in composition of wealth across white and Black households further accentuate these disparities. As compared to Black households, housing and other non-financial assets make up a much smaller share of the total assets of white households whereas business and stock equity account for much greater shares (*i.e.*, comprising 24 percent and 16 percent, respectively, of total white households' assets versus 13 percent and five percent of Black households' assets).<sup>9</sup>

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 20.

Moreover, because low income and African American<sup>10</sup> households have built up fewer financial resources, the web of wealth for family members to draw upon is significantly more limited than that of white households. For example, a 2014 study found that nearly half of white households received financial transfers from family members, with a median amount received of \$83,692.<sup>11</sup> By contrast, only one in ten African American households received a financial transfer, and, when a transfer occurred, the median amount received was substantially less at \$52,240.<sup>12</sup> The individual achievements of current households are alone insufficient to overcome these intergenerational wealth disparities—indeed, the median

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<sup>10</sup> For purposes of this brief, Amici have opted for the term “Black” or “Black households” unless the specific cited source has used “African American.”

<sup>11</sup> Hannah Thomas et al., Inst. on Assets & Soc. Pol’y, *The Web of Wealth: Resiliency and Opportunity or Driver of Inequality?* 4 (July 2014), <https://heller.brandeis.edu/iere/pdfs/racial-wealth-equity/leveraging-mobility/web-of-wealth.pdf>.

<sup>12</sup> *Id.*

household headed by a Black college graduate has less wealth than the median white household headed by a person without a high school diploma.<sup>13</sup>

Indigenous communities fare even worse given the history of widespread displacement. In the 19th century, racist policies such as the Indian Removal Act and the Dawes Act forcibly relocated such communities and seized, converted, and redistributed over 90 million acres of tribal lands for the benefit of white Americans.<sup>14</sup> The institutional racism continued into the 20th century, when, between 1945-1968, Congress passed laws that terminated recognition and assistance to more than 100 tribal nations and imposed state criminal and civil

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<sup>13</sup> Carl Davis et al., Inst. on Tax'n & Econ. Pol'y, *State Income Taxes and Racial Equity: Narrowing Racial Income and Wealth Gaps with State Personal Income Taxes* 6 (October 4, 2021), [https://itep.sfo2.digitaloceanspaces.com/State-Income-Taxes-and-Racial-Equity\\_ITEP\\_October2021.pdf](https://itep.sfo2.digitaloceanspaces.com/State-Income-Taxes-and-Racial-Equity_ITEP_October2021.pdf).

<sup>14</sup> Nat'l Cong. of Am. Indians, *Tribal Nations and the United States: An Introduction* 14 (February 2020), [https://www.ncai.org/tribalnations/introduction/Indian\\_Country\\_101\\_Updated\\_February\\_2019.pdf](https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf).

jurisdiction that contributed to the loss of millions of acres of valuable natural resource land through tax forfeiture sales.<sup>15</sup>

It is no surprise that, as a result of these policies, the Indigenous community has the highest poverty rates of any race,<sup>16</sup> and, according to a 2000 study, Indigenous households possess only eight cents of wealth (\$0.08) for every dollar of wealth held by an average white American household.<sup>17</sup>

## **2. Racial Wealth Disparities Locally**

Public sector discrimination has further contributed to these disparities at the state level. Institutional policies in Washington have targeted virtually every BIPOC community, including (i) impeding Indigenous peoples' treaty rights to harvest fish and other resources, (ii) endorsing certain vestiges

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<sup>15</sup> *Id.* at 15.

<sup>16</sup> Poverty USA, *The Population of Poverty USA*, <https://www.povertyusa.org/facts> (Source: 2018 U.S. Census Data).

<sup>17</sup> Nat'l Indian Council on Aging, *Native Households Make 8 Cents for Every Dollar a White Household Has* (April 5, 2021), <https://www.nicoa.org/native-households-make-8-cents-for-every-dollar-a-white-household-has/>.

of enslavement, (iii) participating in the Mexican guest worker program during World War II that cheated Mexican workers out of wages and imposed other hardships, and (iv) imposing court fines and fees more harshly against defendants of color, among other injustices.<sup>18</sup>

In 2019, the median net worth of white households in Washington (\$286,200) was over four times the median net worth of households of color (\$67,600).<sup>19</sup> Further, households of color are 1.5 times as likely as white households to have zero

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<sup>18</sup> Smith & Nicholas, *supra*, at 3–4. See also Donald W. Meyers, *It Happened Here: Mexican Farm Workers Come to Valley in World War II*, Yakima Herald, (May 6, 2018), [https://www.yakimaherald.com/news/local/it-happened-here-mexican-farm-workers-come-to-valley-in-world-war-ii/article\\_58276e40-4fa2-11e8-848f-cfe8b41384dc.html](https://www.yakimaherald.com/news/local/it-happened-here-mexican-farm-workers-come-to-valley-in-world-war-ii/article_58276e40-4fa2-11e8-848f-cfe8b41384dc.html); Evan Walker & Andy Nicholas, Wash. State Budget & Pol’y Ctr., *It’s Time to Reform Washington’s Harmful System of Fines and Fees* (January 2022), <https://budgetandpolicy.org/resources-tools/2022/01/2022-LFO-Brief.pdf>. Similarly in the private sector, BIPOC communities have experienced pervasive patterns of discrimination in housing, education, and employment creating additional obstacles to wealth accumulation. Smith & Nicholas, *supra*, at 4.

<sup>19</sup> Wash. Future Fund Comm., *A Report to the Legislature 17* (Dec. 1, 2022), [https://www.tre.wa.gov/wpcontent/uploads/2022-WFF-Committee-Report\\_Submitted-11.30.22.pdf](https://www.tre.wa.gov/wpcontent/uploads/2022-WFF-Committee-Report_Submitted-11.30.22.pdf).

or negative net worth.<sup>20</sup> Indeed, 30 percent of households of color in Washington in 2018 lacked sufficient net worth to subsist at the poverty level for three months without income.<sup>21</sup>

**B. Washington’s Tax Code Favors the Wealthy By Placing the Tax Burden on Middle- and Lower-Income Residents**

Washington’s upside-down tax code perpetuates wealth disparities built upon institutional racism by disproportionately burdening those least able to pay, particularly BIPOC communities. As the Legislature observed in 2021:

Washington’s tax system today is the most regressive in the nation because it asks those making the least to pay the most as a percentage of their income. Middle-income families in Washington pay two to four times more in taxes, as a percentage of household income, as compared to top earners in the state. Low-income Washingtonians pay at least six times more than do our wealthiest residents.

RCW 82.87.010.

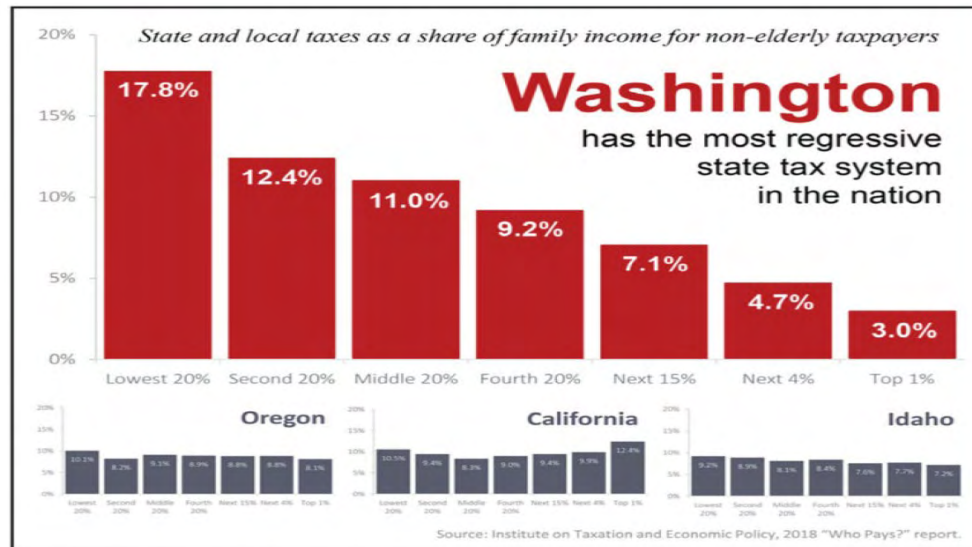
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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



Numerous studies support the Legislature’s findings. For example, a 2018 study by the Institute on Taxation and Economic Policy illustrated, by the following chart, that Washington families in the lowest fifth of income—earning less than \$24,000 per year—paid 17.8 percent of their income in taxes, while families in the top one percentile of income—earning an average income of \$1,618,200—paid only three percent in taxes.<sup>22</sup>



<sup>22</sup> Inst. on Tax’n & Econ. Pol’y, *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States*, 6th Ed., 1 (Oct. 2018), <https://itep.sfo2.digitaloceanspaces.com/itep-whopays-Washington.pdf>.

Commenting on these disproportionate burdens, the 2018 study labeled Washington “the most unfair state and local tax system in the country.”<sup>23</sup>

Indeed, historically, Washington’s tax code has largely favored white-owned financial assets. More than \$3 trillion in mostly white-owned wealth—ownership of corporate stocks, bonds, and other intangible assets—is exempt from state and local property taxes.<sup>24</sup> Many businesses, including private

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<sup>23</sup> *Id.* at 2. See also Off. of Fin. Mgmt., *The Distribution of Income, Wealth, and Taxes Across Washington Households 2* (Sept. 2012), [https://ofm.wa.gov/sites/default/files/public/legacy/reports/income\\_wealth\\_report.pdf](https://ofm.wa.gov/sites/default/files/public/legacy/reports/income_wealth_report.pdf) (in 2009, 54.8 percent of total Washington income went to the top 20 percent of households while 1.6 percent of income went to the bottom 20 percent); Wash. Dep’t of Revenue, *Wash. State Tax Structure Study, Chapter 4 Evaluation of Current Washington Tax Structure 2* (Nov. 2002), [https://dor.wa.gov/sites/default/files/legacy/Content/AboutUs/StatisticsAndReports/WAtaxstudy/Chapter\\_4.pdf](https://dor.wa.gov/sites/default/files/legacy/Content/AboutUs/StatisticsAndReports/WAtaxstudy/Chapter_4.pdf) (“Washington’s tax structure is regressive. The lowest income households pay 15.7 percent of income for total excise and property taxes, while the highest income households pay 4.4 percent of income for the same taxes. Sales tax is the main cause of regressivity.”).

<sup>24</sup> Wash. State Dep’t of Revenue, *2020 Tax Exemption Study* 510–11, [https://dor.wa.gov/sites/default/files/202202/2020\\_Tax\\_Exemption\\_Study\\_Entire\\_Report.pdf?uid=63920dbe5583a](https://dor.wa.gov/sites/default/files/202202/2020_Tax_Exemption_Study_Entire_Report.pdf?uid=63920dbe5583a) (RCW 84.36.070 exemption).

equity firms and hedge funds, claim a B&O tax deduction on investment income, which exempts more than \$300 million per year in potential tax revenue for schools, health care, and other public priorities.<sup>25</sup> Similarly, sales of precious metals and bullion are exempt from the state B&O tax and state local sales taxes.<sup>26</sup>

Further to this point, studies show that the top 20 percent of white households claim nearly half the total income generated in Washington State, but contribute *less than one-third* in taxes.<sup>27</sup> In accord, a 2020 preliminary report on Washington's tax code, commissioned by the bipartisan Tax

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<sup>25</sup> *Id.* at 133 (RCW 82.04.4281(1)(a) exemption).

<sup>26</sup> *Id.* at 13, 714 (RCW 82.04.062 exemptions).

<sup>27</sup> See Margaret Babayan, Wash. State Budget & Pol'y Ctr., *Washington State's Upside-Down Tax Code is Even More Racist Than You Think* (February 10, 2021), <https://budgetandpolicy.org/schmudget/washington-states-upside-down-tax-code-is-even-more-racist-than-you-think/> (internal citation omitted). See also *The Distribution of Income, Wealth, and Taxes Across Washington Households*, *supra*, at 2 (noting that while 54.8% of total Washington income went to the top 20 percent of households in Washington State, a mere 1.6% of income went to the bottom 20 percent (citing 2009 figures)).

Structure Work Group, found that the second poorest 10 percent of households pay 15 percent of their incomes in state and local taxes on average, whereas the richest 10 percent pay just 3.4 percent on average.<sup>28</sup>

In sum, the wealthiest households among us contribute significantly less to state and local tax revenue compared to the amount of economic resources those households control.

### **C. Washington Communities Achieve Progressive Capital Gains Tax After Extended Grassroots Efforts**

Washingtonians have proposed, through their representatives, remedies for Washington's inequitable tax code on multiple occasions in the recent past.<sup>29</sup> For example, in

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<sup>28</sup> Tax Structure Work Group Meeting (Dec. 4, 2020) 80, [https://dor.wa.gov/sites/default/files/202202/TSWGMeeting2020\\_1204.pdf](https://dor.wa.gov/sites/default/files/202202/TSWGMeeting2020_1204.pdf).

<sup>29</sup> Washington has historically relied heavily on the retail sales tax for revenue. A major criticism of a tax system so dependent on retail sales tax is that it is volatile and not recession-proof. See Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. Puget Sound L. Rev. 515, 517 (1993) (citing Wash. State Dep't of Revenue, *Tax Base Growth And Stability: A*

2019, the Legislature enacted a surtax on specific financial institutions, finding that “in the decade since the great recession, some economic sectors have rebounded, stronger than ever, while many Washington families struggle to afford basic necessities.”<sup>30</sup> The Legislature concluded “that those wealthy few who have profited the most from the recent economic expansion can contribute to the essential services and programs all Washington families need.”<sup>31</sup>

In conjunction with the surtax, community organizations shifted their focus, around 2012, to capital gains as a recession-resilient resource that had experienced exponential prosperity to benefit a few while widening racial wealth disparities.<sup>32</sup> From

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*Comparative Examination Of Washington’s Major Tax Sources 1976-1985*, 5 (1986)).

<sup>30</sup> RCW 82.04.29004

<sup>31</sup> *Id.*

<sup>32</sup> Andy Nicholas, Wash. State Budget & Pol’y Ctr., *A Capital Reform: Using Capital Gains to Fuel Job Creation and Economic Prosperity in Washington State* 1–3 (Nov. 2011), <https://budgetandpolicy.org/wp-content/uploads/2018/11/a-capital-reform-using-capital-gains-to-fuel-job->

2009 through 2019, the period encompassing the most recent economic expansion, capital gains in Washington grew by a staggering 414 percent with an average annual growth rate of 18 percent.<sup>33</sup> In dollars, untaxed capital gains in Washington grew from \$5.8 billion to \$29.9 billion. By contrast, taxable retail sales—a mainstay of Washington’s regressive tax code—only grew at an annual rate of 5.1 percent.<sup>34</sup> Notably, Washington tax data established that placing a modest tax on the three percent of households with qualifying capital gains

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[creation-and-economic-prosperity-in-washington-state.pdf](#). See also Dorothy A. Brown, *The Whiteness of Wealth: How the Tax System Impoverishes Black Americans – And How We Can Fix It* 178 (Crown 2021) (“[I]ncome and wealth are not the same, and even black and white Americans with comparatively high incomes do not have the same amount of wealth.”); Nicholas, *A Capital Reform*, *supra*, at 2–3.

<sup>33</sup> I.R.S., Stat. of Income Div., *Table 2. Individual Income and Tax Data, by State and Size of Adjusted Gross Income, Tax Year 2019* (2022), [https://www.irs.gov/pub/irs\\_soi/19in48wa.xlsx](https://www.irs.gov/pub/irs_soi/19in48wa.xlsx). See also I.R.S. Stat. of Income Div., *Historical Table 2 (2005-2009)*, <https://www.irs.gov/statistics/soi-tax-stats-historic-table-2-2005-2009>.

<sup>34</sup> Econ. Revenue & Forecast Council, *Washington State Economic and Revenue Forecast* (Sept. 2022, Volume XLVI, No. 3).

would raise hundreds of millions in funds for critical government needs.<sup>35</sup> The revenue was necessary because the state cut billions from its budget in response to the Great Recession, thereby impacting public health, education, and community safety systems.<sup>36</sup>

Today, the fact remains that (i) the state desperately needs additional funds for critical functions and services such as education, (ii) the current tax system burdens lower-income residents who are disproportionately BIPOC, and (iii) capital gains constitute a powerful (and untapped) resource for generating revenue in a regressive system.

Speaking to the correlation between capital gains and institutional racism, Dorothy Brown, a nationally recognized scholar in the areas of race, class, and tax policy, explains:

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<sup>35</sup> Nicholas, *A Capital Reform*, *supra*, at 5–9.

<sup>36</sup> *Id.* at 10.

The tax code rewards and encourages generational wealth building in two major ways. The first is the preferential tax treatment that comes with asset ownership. The second is the provision for tax-free financial transfers to family members, both while the giver is alive and after they die, as part of their estate. In both cases, reduced or eliminated taxes result in increased savings and investment opportunities for the next generation. . . . each one has been influenced by the interests of the wealthy, white, and powerful.<sup>37</sup>

“Stock ownership disparities transcend income, education levels, and many of the commonly held ideas about what limits black wealth building.”<sup>38</sup> Because capital gains are generated by sales or transfers of financial assets, they are highly concentrated: about 80 percent of capital gains profits goes to the wealthiest five percent of taxpayers, and 69 percent goes to

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<sup>37</sup> Brown, *The Whiteness of Wealth*, *supra*, at 169.

<sup>38</sup> *Id.* at 177.



the top one percent.<sup>39</sup> In 2019, the richest one percent of tax filers nationally reported three-quarters of long-term capital gains while the top 0.1 percent of filers—with incomes over \$3.8 million—accounted for more than half of all long-term capital gains, reporting an average gain of \$5.5 million.<sup>40</sup> That same year, Washingtonians reported \$29.9 billion in capital gains with 61 percent of those gains generated by those with an adjusted gross income over one million dollars.<sup>41</sup>

Given the rapid explosion of capital gains and the ongoing wealth disparities affecting low-income households and BIPOC, community-led organizations representing a broad

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<sup>39</sup> The Urban-Brookings Tax Pol’y Ctr., *Distribution of Long-Term Capital Gains and Qualified Dividends by Expanded Cash Income Percentile* (Nov. 16, 2008), <https://www.taxpolicycenter.org/model-estimates/distribution-individual-income-tax-long-term-capital-gains-and-qualified-30>.

<sup>40</sup> Leonard E. Burman, The Urban-Brookings Tax Pol’y Ctr., *Capital Gains Cuts Won’t Cure the Covid-19 Economy* (May 11, 2020), <https://www.taxpolicycenter.org/taxvox/capital-gains-cuts-wont-cure-covid-19-economy>.

<sup>41</sup> *Table 2. Individual Income and Tax Data, by State and Size of Adjusted Gross Income, Tax Year 2019, supra.*

spectrum of Washingtonians advocated for the Legislature to adopt a reasonable capital gains tax. After a decade of relentless advocacy, the Legislature responded by enacting the capital gains tax at issue in this case: RCW 82.87.010, .040, .060 (seven percent excise tax on capital gains above \$250,000 per year). If implemented, only the wealthiest 0.2% of Washingtonians—whose annual income averages *around \$2.2 million* and who currently enjoy some of the lowest effective state and local tax rates in the nation—would see a modest increase to their tax bill.<sup>42</sup>

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<sup>42</sup> Andy Nicholas, Wash. State Budget & Pol’y Ctr., *Seattle’s Millionaires Would Profit Most If Schools Lose Funding From Capital Gains Tax 1* (July 5, 2022), <https://budgetandpolicy.org/schmudget/seattles-millionaires-would-profit-most-if-schools-lose-funding-from-capital-gains-tax/> (Source: State of Wash. Dept. of Revenue, *Capital Gains Return Counts and Net Tax Stratified on County or Region for Tax Year 2022 - ESSB 5096 as passed the Legislature* (May 27, 2021)). See also Wash. State Budget & Pol’y Ctr., *Capital gains tax opponents seek massive tax break for King County’s ultra-wealthy* (June 2022), <https://budgetandpolicy.org/resourcestools/2022/06/2022-Statewide-data-fact-sheet-1.pdf>.

In exchange, the tax would “fund K-12 education, early learning, and childcare, and advance our paramount duty to amply provide an education to every child in the state.”<sup>43</sup> The capital gains tax is expected to raise about \$500 million per year for K-12 education and early-learning programs.<sup>44</sup> Tax collections above \$500 million will be placed in the common school construction account, which funds school buildings.<sup>45</sup>

As this Court is well aware, the state has previously experienced difficulties meeting its paramount duty to fund the education of all children. *See McCleary v. State*, No. 84362-7, 2017 WL 11680212 (Wash. Nov. 15, 2017) (order of contempt). While the state has made progress in recent years to

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<sup>43</sup> RCW 82.87.010; *see also* Const. art. IX, § 1 (“It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”).

<sup>44</sup> RCW 82.87.030

<sup>45</sup> *Id.* *See also* Multiple Agency Fiscal Note Summary, Bill Number: 5096 S SB PL, Capital Gains Tax, 21, <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363>.

that end, challenges remain. The capital gains tax not only “mak[es] material progress toward rebalancing the state’s tax code,”<sup>46</sup> but it helps the state meet its constitutional obligation to provide an education for every child in Washington.

**D. This Court’s Commitment to Combat Racial Inequities and Principles of Democratic Self-Governance Favor Upholding the Legislature’s Objectives in Enacting ESSB 5096**

In addition to creating a more just economy and providing critical revenue to strengthen Washington’s infrastructure, the passage of ESSB 5096 is a progressive step toward combating the lasting impacts of structural racism.

In this regard, this Court in 2020 made a “commitment to achieving justice by ending racism,”<sup>47</sup> and recent decisions have demonstrated the Court’s adherence to that commitment. *See, e.g., Henderson v. Thompson*, 518 P.3d 1011, 1016 (Wn.

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<sup>46</sup> RCW 82.87.010

<sup>47</sup> Letter from Wash. State Supreme Court to Members of Judiciary & Legal Cmty, *supra*.

2022) (“Racism is endemic, and its harms are not confined to any place, matter, or issue.”); *State v. Zamora*, 199 Wn.2d 698, 719–20, 512 P.3d 512, 524 (2022) (“[O]ur nation’s history—remote and recent—is rife with examples of discrimination against Latinxs based on ethnicity.”); *State v. Sum*, 199 Wn.2d 627, 640, 511 P.3d 92, 101 (2022) (“Historically, many of this court’s opinions concerning the civil rights and lived experiences of BIPOC have been deplorable.”); *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 517, 475 P.3d 164, 170 (2020) (“As history has shown us, states routinely failed to protect racial minorities and many enacted discriminatory Jim Crow laws.”).

Now, the Court is provided another opportunity to make “new history, in which we are ‘constantly striving for better.’” *Sum*, 199 Wn.2d at 640, (quoting Letter to the Judiciary and Legal Community, *supra*). As Amici have detailed, Washington’s regressive tax code profoundly impacts lower-income communities that, due to institutional and economic

racism, are disproportionately BIPOC. Acknowledging this reality, the Legislature proposed a tax on certain capital gains transactions that will ameliorate the discriminatory tax burden faced by lower-income communities, including BIPOC, and ensure much-needed funding for education across the state, thus benefitting *all* Washingtonians.

Furthermore, the lower court’s order striking down the capital gains tax deprives the people of Washington of their respective constitutional authority and right to democratic self-governance. The U.S. Supreme Court<sup>48</sup> “has freely exercised its power to reexamine the basis of its constitutional decisions” when correction of the decision “depends upon amendment [of the constitution] and not upon legislative action.” *Smith v. Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 765, 88 L. Ed. 987

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<sup>48</sup> While “the highest court of each State, of course, remains the final arbiter of what is state law,” *Montana v. Wyoming*, 563 U.S. 368, 377 n.5, 131 S. Ct. 1765, 1773, 179 L. Ed. 2d 799 (2011) (internal quotation and citation omitted), this Court “may consider well-reasoned precedents from federal courts . . . [as] persuasive authority.” *State v. Chenoweth*, 160 Wn.2d 454, 470–71, 158 P.3d 595, 604 (2007).

(1944). The principle underlying this free exercise of reconsideration is that the Constitution “is ordained and established by the people of the United States” and constitutional interpretation by the Court should not “frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing.” *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787, 106 S. Ct. 2169, 2192, 90 L. Ed. 2d 779 (1986) (White, J., dissenting). “For this reason, it is essential that this Court maintain the power to restore authority to its proper possessors by correcting constitutional decisions that, on reconsideration, are found to be mistaken.” *Id.*

The Court should apply these principles and restore to Washingtonians the power to govern themselves through legislative action. Amici, and the communities they represent, have engaged in a long campaign—in concert with representatives of the people’s own choosing—to enact

progressive measures to remedy the most regressive tax code in the nation. As a result of this democratic and self-governed process, the Legislature enacted the capital gains excise tax to fund the state's paramount duty to educate every resident child regardless of race or household wealth. This Court should respect and maintain this democratic power by upholding the constitutionality of the capital gains tax.

## **V. CONCLUSION**

Centuries of institutional and economic racism have created vast racial wealth disparities for BIPOC. Regressive tax codes further perpetuate these disparities by requiring those least able to pay (disproportionately BIPOC) to bear the brunt of the tax burden. In 2021, in response to advocacy from a broad coalition of community organizations, the Legislature enacted a capital gains excise tax as a step toward remedying Washington's inequitable tax code and ameliorating the lasting effects of racism.



For these reasons, Amici support the State and  
Intervenors' efforts to reverse the trial court's order and uphold  
the capital gains tax.

*I hereby certify this document contains less than 5000  
words, in compliance with RAP 18.17(c)(6).*

RESPECTFULLY SUBMITTED this 12th day of December,  
2022.

BAILEY DUQUETTE P.C.

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**DECLARATION OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused a true copy of the foregoing document to be served via the Washington State Appellate Portal's e-filing service.

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