

FILED
SUPREME COURT
STATE OF WASHINGTON
12/12/2022 4:12 PM
BY ERIN L. LENNON
CLERK

NO. 100769-8

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS QUINN, *et al.*,

Respondents,

v.

STATE OF WASHINGTON, *et al.*,

Appellants,

and

EDMONDS SCHOOL DISTRICT, *et al.*,

Intervenors.

**AMICI CURIAE BRIEF OF MARY ANN WARREN,
MELIESA TIGARD, KRISTEN CAMERON, NICK
PITSILIONIS, CHILDREN'S ALLIANCE, AND DR.
KATHERINE BAIRD**

SMITH & LOWNEY, PLLC
Claire E. Tonry, WSBA No. 44497
2317 E. John St.
Seattle, WA 98112
(206) 860-2883
*Attorney for Mary Ann Warren,
Melisa Tigard, Kristen Cameron,
Nick Pitsilionis, Children's Alliance,
and Dr. Katherine Baird*

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF AMICI	3
A. Mary Ann Warren.....	3
B. Meliesa Tigard.....	5
C. Kristen Cameron.....	7
D. Nick Pitsilionis	9
E. Children’s Alliance.....	11
F. Dr. Katherine Baird	13
III. ISSUE ADDRESSED BY AMICI	16
IV. STATEMENT OF THE CASE	16
V. ARGUMENT	16
A. The Trial Court’s Decision Harms Rural Communities by Perpetuating Washington’s Regressive Tax Code and Child Care Crisis.	16
1. Washington’s regressive tax code is bad for working families and rural economies.....	17
2. The capital gains tax will boost rural economies and help rebalance the tax system so those who should pay more do.....	20
3. Exceptionally wealthy Washington residents would pay the tax, disproportionately benefiting rural communities.	22
B. Affirming Consistent Excise Tax Precedent Best Serves the Purpose of Stare Decisis.	23

1. The Court should follow its precedent holding that taxes on capital transactions are excise taxes.	23
2. Income tax precedent is inapplicable, inconsistent, and untenable.....	26
3. Applying excise tax precedent best serves the consistency goals of stare decisis.	28
VI. CONCLUSION	31

TABLE OF AUTHORITIES

CASES

<i>Adarand Constructors v. Pena</i> , 515 U.S. 200, 115 S. Ct. 2097 (1995).....	29, 30
<i>Black v. State</i> , 67 Wn.2d 97, 406 P.2d 761 (1965).....	24
<i>Bromley v. McCaughn</i> , 280 U.S. 124 (1929).....	24
<i>Citizens United v. FEC</i> , 558 U.S. 310, 130 S. Ct. 876 (2010).	30
<i>Culliton v. Chase</i> , 174 Wash. 363, 25 P.2d 81 (1933)...	2, 27, 28
<i>H & B Commc'ns Corp. v. Richland</i> , 79 Wn.2d 312, 484 P.2d 1141 (1971).....	25, 26
<i>In re Estate of Hambleton</i> , 181 Wn.2d 802, 335 P.3d 398 (2014).....	27
<i>Jensen v. Henneford</i> , 185 Wash. 209, 53 P.2d 607 (1936).....	27
<i>Mahler v. Tremper</i> , 40 Wn.2d 405, 243 P.2d 627 (1952)	24, 25, 28
<i>Morrow v. Henneford</i> , 182 Wash. 625, 47 P.2d 1016 (1935)	23, 24, 28, 31
<i>Seattle Sch. Dist. v. State</i> , 90 Wn.2d 476, 585 P.2d 71 (1978)..	2
<i>State v. Baldwin</i> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	29
<i>State v. Barber</i> , 170 Wn.2d 854, 248 P.3d 494 (2011).....	28, 29
<i>State v. Scherf</i> , 192 Wn.2d 350, 429 P.3d 776 (2018).....	29
<i>State v. W.R.</i> , 181 Wn.2d 757, 336 P.3d 1134 (2014)	29
<i>Stiner v. Yelle</i> , 174 Wash. 402, 25 P.2d 91 (1933)	passim
<i>Supply Laundry Co. v. Jenner</i> , 178 Wash. 72, 34 P.2d 363 (1934).....	27
<i>Wash. Bankers Ass'n v. Dep't of Revenue</i> , 198 Wn.2d 418, 495 P.3d 808 (2021)	20
<i>Wolman v. Walter</i> , 433 U.S. 229, 97 S. Ct. 2593 (1977).....	29

STATUTES

RCW 82.87.010 21, 23
RCW 82.87.050 23

OTHER AUTHORITIES

Child Care Aware of Washington, *2021 State and County Data Reports*..... 17
Hugh Spitzer, *A Washington State Income Tax - Again?*, 16
Puget Sound L. Rev. 515 (Winter 1993) 1, 2
United States Department of Agriculture, *State Factsheets: Washington*, (Dec. 1, 2022)..... 19
Washington Dept. of Commerce, *State task force report recommends options to address lack of access to affordable child care* (Dec. 11, 2019) 17
Washington Economic Security Administration, *ESA-EMAPS Report #5545 using Census Bureau's American Community Survey (ACS) 5-year estimates for 2015-2019*, (Aug. 25, 2022) 19
Washington State Budget and Policy Center, *Capital gains tax opponents seek massive tax break for King County's ultra-wealthy*, (June 2022)..... 22

I. INTRODUCTION

The Legislature passed a capital gains tax to help fix our upside-down tax system so those who should pay more, do pay more. Only the exceptionally wealthy—an estimated 0.2% of all Washington households, most of which are in King County—would pay the tax. The revenue will greatly expand childcare and early learning programs, which are critical to rural communities’ ability to grow their economies and thrive long-term.

Rural Washingtonians have long backed similar efforts to “require profitable urban business and financial interests to contribute their appropriate share of the costs of government.” Hugh Spitzer, *A Washington State Income Tax - Again?*, 16 Puget Sound L. Rev. 515, 526–27, 538 (Winter 1993) (describing the Grange and other farms groups’ efforts in the 1920s and 30s which were thwarted by “big business interests unwilling to pay reasonable taxes.”). In the 1930s, the Grange spearheaded a statewide coalition of farming, labor, and education organizations to enact progressive taxes and subject stocks and

other assets of wealthy Washingtonians to taxation. *Id.* at 528. However, in a 5–4 decision, this Court struck down the popular tax based upon reasoning it derided as “bewildering” and inconsistent in a decision issued by a different 5–4 majority that same day. *Compare Culliton v. Chase*, 174 Wash. 363, 378, 25 P.2d 81 (1933) and *Stiner v. Yelle*, 174 Wash. 402, 405, 25 P.2d 91 (1933).

In the decades following *Culliton*, the state relied on regressive sales taxes and real estate levies which have systematically failed rural communities due to their tighter budgets and lower property values. *See Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 525-26, 585 P.2d 71 (1978). To this day, Washington’s notoriously regressive tax code continues to harm rural economies.

The capital gains tax is a critical step toward rebalancing the tax system and supporting a prosperous future for rural Washington.

II. IDENTITY AND INTEREST OF AMICI

A. Mary Ann Warren

Mrs. Mary Ann Warren is former President of the Wenatchee Chamber of Commerce, Downtown Wenatchee Rotary member, Board Member and President of the Wenatchee Valley Museum and Cultural Center, volunteer with the Greater Wenatchee Community Foundation, and a retired business owner. Her more than 50 years of extensive community service includes leadership positions with the Council on Aging, Chelan County Red Cross, Mobile Meals, and United Way of Chelan and Douglas Counties, and she was the first woman board member of the Community Foundation of North Central Washington. She currently serves on the boards of the Lake Chelan Health Guild and the Lake Chelan Historical Society and is a Lake Chelan Rotary member.

Mrs. Warren was born and raised in Wenatchee. She married her high school sweetheart, Thomas C. Warren, a former Chelan County District Court Judge, and they raised two

daughters in Wenatchee. She is a proud grandmother who cares deeply about the future of children, their parents, and the state of Washington.

Mrs. Warren owned and managed two successful family businesses and was the first woman elected President of the Wenatchee Chamber of Commerce. Mrs. Warren believes in paying her share in taxes because government spending creates more jobs and more spending at businesses, growing local economies and helping all communities.

In addition to her Central Washington business experience, Mrs. Warren is an expert on the importance of investing in early childhood education and high-quality childcare. She has served on the board of Head Start for nearly 35 years and worked for Catholic Family & Child Services for 18 years. She was Board President of the Child Care Resource and Referral Network and helped create one of Wenatchee's first low-income childcare centers. Mrs. Warren has decades of firsthand experience helping parents and children get the help

they need to succeed in school and life, and she has seen how early education and quality childcare can improve the lives of entire families.

Mrs. Warren is deeply concerned about the childcare crisis in Washington's rural communities. She has seen how the lack of accessible childcare harms working families in Douglas, Chelan, and other rural counties in Washington. She believes the capital gains tax on Washington's wealthiest residents is the wisest way for the State to pay for substantial increases in childcare and early childhood education.

B. Meliesa Tigard

Meliesa Tigard is a small business owner in Wenatchee and an education expert. Since 2003 she has owned Focal Point Educational Services, a private after-school learning center where more than 1,000 Wenatchee students have received critical help with math and language skills. Ms. Tigard teaches all levels of children, from kindergarten through grade 12, from

those with learning disabilities to foster children to honor students. Her business does not receive any direct state funding.

Ms. Tigard's great-grandfather was one of Wenatchee's first homesteaders, arriving in 1898 to form what is now the 350-acre Tyee Ranch on the Entiat River. Ms. Tigard has worked, lived, and raised two children in Wenatchee because she loves the area's people and strong sense of community. She believes that the capital gains tax is a much-needed improvement in Washington's tax code because "those of us who are doing well are beneficiaries of our public education system, either directly or indirectly."

Ms. Tigard's life's work is helping Wenatchee's children succeed academically so that they have the tools to succeed in life. She has seen that the lack of early education, such as pre-K, can be extremely detrimental to students. She believes revenues from the capital gains tax will dramatically improve Wenatchee students' access to early education.

C. Kristen Cameron

Mrs. Kristen Cameron is a retired teacher and former corporate recruiter who has lived in Wenatchee for 30 years. She is a board member of the Wenatchee Confluence Rotary and was the club's Local Service Projects Committee chair where she served the community by arranging weekend food packages for students who are food insecure, stocking neighborhood essential pantries, arranging bell ringing for the Salvation Army, and purchasing winter clothing and gifts for children under Child Protective Services review. She believes that very wealthy Washingtonians have a responsibility to pay back the communities and public systems that helped them succeed so that others may follow.

As a Human Resources professional, Mrs. Cameron witnessed how the childcare shortage directly affects the labor market and economic growth as businesses invest in hiring, training, and then losing employees who cannot find childcare. Three of Mrs. Cameron's adult nieces have been forced to leave

lucrative, rewarding careers because they could not find affordable, quality childcare.

Over her 27-year career in public education, Mrs. Cameron taught more than 2,500 Wenatchee students at Pioneer Middle School and Wenatchee High School. She's felt heartbroken for the many children she encountered who had to raise themselves because their parents worked long hours just to survive. These students' frustration and anger made it difficult for them to concentrate on schoolwork.

Mrs. Cameron served as President of the Wenatchee Education Association and as co-chair of several district-wide committees, including teacher evaluation, with the Wenatchee School District. She became a teacher to empower Wenatchee's young people to positively contribute to their communities. She has seen firsthand how the growing funding gap for schools directly impacts education and health outcomes for students. For example, the Wenatchee School District currently has state funding for just a small fraction of the nursing staff needed to

protect the health and learning environments of almost 8,000 students. Mrs. Cameron believes that the capital gains tax's new investments of millions more into Wenatchee's and other communities' childcare, early learning, and education programs will pay huge dividends for students, families, communities, and future generations.

D. Nick Pitsilionis

Mr. Nick Pitsilionis is a small business owner in Pullman, Washington. In 2009 he started The Black Cypress, a popular restaurant and showcase for Palouse food and drink.

As a Pullman small business owner, Mr. Pitsilionis believes that it is each community member's responsibility to pay what they owe in taxes to fund education, health care, public safety, and other shared services. He is proud that his small business creates well-paying jobs and pays its share of taxes, circulating more money in the local economy.

Mr. Pitsilionis is disadvantaged by Washington's regressive tax system in which the wealthy few pay less in taxes

as a percentage of income, leaving small business owners like him to pay a larger share. Worse, those with the most pay the lowest tax rates, while those with the least pay the highest tax rates. To Mr. Pitsilionis, Washington's current tax system sets up a bifurcation of the economy that disproportionately harms people who already have less.

On a personal level, Mr. Pitsilionis has seen firsthand the strain of trying to raise a family while owning a restaurant. Mr. Pitsilionis is particularly concerned about his own employees, especially those who cannot find reliable, accessible childcare. He accommodates his employees who cannot find childcare, sometimes even allowing their children to sit in the restaurant's office while their parents work. He says the lack of adequate childcare in Pullman puts a strain on the rest of his crew, who must pick up the slack when an employee cannot come to work. He has lost employees to other industries due to the lack of childcare in Pullman. Mr. Pitsilionis also hears from others who struggle to get back to work when they cannot find childcare. The

childcare crisis is a systemic problem for parents, employers, and small business owners in Pullman.

He supports the capital gains tax's investments in expanding childcare openings in rural communities like Pullman, and he supports making those who benefit the most from a vibrant, high functioning consumer economy pay their fair share in taxes. As he wrote in an editorial in the Spokesman Review (March 6, 2021), "We need the political will to raise wealth taxes on Washingtonians, who in turn need to think very seriously about what sort of community they want to live in, and realize that we all depend on our shared recovery."

E. Children's Alliance

Children's Alliance is a nonprofit, statewide children's advocacy organization. Formed in 1983, it now has more than 6,000 individual and organizational members in nearly every county of the state. Although Children's Alliance advocates for the interests of all of Washington's 1.6 million children, it has a specific focus on the welfare of children of color as well as those

from low-income and rural families, and other children furthest from their vast potential.

The organization conducts data and policy analysis, informs and mobilizes stakeholders, and pursues legislative and administrative solutions to challenges faced by children, families and service providers. The organization's primary advocacy is centered on childcare and early learning, health and oral care, and assuring that the state has sufficient revenue to provide these services.

Children's Alliance serves as the backbone organization convening the Early Learning Action Alliance, a coalition of more than 65 advocacy organizations, childcare providers and parents. This group was instrumental in germinating policy recommendations to improve Washington's childcare and early learning sector and was involved in all levels in the passage of the Fair Start for Kids Act. Rural childcare providers and advocates continue to play a critical role, helping to shape policy recommendations that include important considerations for rural

children, families and providers that might otherwise be lost. Rural children are particularly vulnerable because there may be no childcare providers within an easy drive, and their families may need childcare as much or more than other parents to pursue their livelihoods.

Children's Alliance believes that a robust childcare and early learning sector in rural, urban, and suburban parts of the state is essential to eliminating opportunity gaps for children. Without significant investments in this sector, hundreds of thousands of children will not have access to the environments necessary to find success in K-12 education and beyond and will perpetuate the pernicious disparities that continue to plague our state and society.

F. Dr. Katherine Baird

Dr. Baird is an international expert in economics and public policy, served as Fulbright Senior Lecturer, and has authored more than three dozen books, peer-reviewed articles, editorials, and other publications including *Trapped in*

Mediocrity: Why Our Schools Aren't World-Class and What We Can Do About It (Rowman & Littlefield Publishers, 2012). Dr. Katherine Baird earned her Ph.D in Economics from the University of Massachusetts and her M.Sc. in Agricultural Economics from Michigan State University.

Dr. Baird is a fourth generation Washingtonian. Her great-grandfather was a dairy farmer in what is now Lakewood. She believes that her own success and that of her family, including her two adult children and both of her parents, resulted from excellent education opportunities provided by Washington's public education and higher education systems.

Dr. Baird has dedicated her career to public service as a Professor at the University of Washington Tacoma where she has taught Foundational Economics and Public Policy to an estimated 4,000 students over her 20-year career. She is the recipient of numerous grants, honors, and awards including the UWT Distinguished Community Engagement Award (2020), and the Distinguished Teacher of the Year Nomination,

University of Washington Tacoma (2002, 2014). She has an interest in the success of her (hopefully) future grandchildren, as well as her students, and many future generations of Washingtonians who will benefit from greater access to childcare, early learning programs, and other education opportunities funded by the capital gains tax.

As an economist, Dr. Baird also has an interest in Washington's economic and workforce health. She writes that "spending cuts take money directly out of people's hands. When those with less money spend less, the economic effect is multiplied. A laid-off social worker has less income, which via her lower spending, translates into less income elsewhere. It is why in a recent New York Times op-ed, Kitty Richards and Nobel Prize winning economist Joseph Stiglitz estimate that each dollar in state cuts leads to \$1.50 to \$2.50 less in state income." *Opinion: It's time for Olympia to impose new taxes on the wealthy*, Puget Sound Business Journal (2020).

III. ISSUE ADDRESSED BY AMICI

Amici address the equities of making our state's tax code less regressive using a capital gains tax borne almost exclusively by the wealthiest Washingtonians. Amici also explain why applying the Court's extensive and consistent line of excise tax precedent best serves the purpose of stare decisis.

IV. STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the State's opening brief.

V. ARGUMENT

A. The Trial Court's Decision Harms Rural Communities by Perpetuating Washington's Regressive Tax Code and Child Care Crisis.

The trial court's decision to strike down the capital gains tax perpetuates Washington's regressive tax system at the expense of rural communities and future generations. The capital gains tax will provide an equitable source of funding for childcare, which is so scarce in rural areas it prevents parents from taking jobs and furthering their own education. *See*

Washington Dept. of Commerce, *State task force report recommends options to address lack of access to affordable child care* (Dec. 11, 2019) (“It’s a workforce issue. It’s an education issue. It’s a rural issue.”).¹ Without the capital gains tax, rural economies will continue to suffer disproportionate, compounding harms from regressive taxes and lack of childcare.

1. Washington’s regressive tax code is bad for working families and rural economies.

Washington has a deeply regressive state and local tax code, meaning lower income rural families pay a much larger share of their income to taxes than do the wealthiest individuals, the vast majority of whom reside in urban areas.

The Institute on Taxation and Economic Policy (“ITEP”) has been modeling the distribution (progressivity) of the state and local tax codes of all 50 states since 1996. CP 550. ITEP has

¹ Available at <https://www.commerce.wa.gov/news/state-task-force-report-recommends-options-to-address-lack-of-access-to-affordable-child-care/>. See also Child Care Aware of Washington, *2021 State and County Data Reports*, <https://childcareawarewa.org/2021-state-and-county-data-reports/> (last visited December 2, 2022).

consistently found that Washington State has the most regressive state and local tax code in the nation. *Id.* In their 2018 report, they found the poorest fifth of households in Washington pay 17.8% of their incomes in state and local taxes, on average. *Id.* The wealthiest 1% of households pay 3% on average. *Id.*

The bipartisan Tax Structure Work Group, composed of members of the Legislature, representatives from the Governor’s office and Department of Revenue, and representatives from city and county governments, recently issued similar findings: the second poorest 10% of households pay 15% of their incomes in Washington state and local taxes on average, while the wealthiest 10% pays 3.4% on average. CP 550–51.²

² These recent studies echo what state economists have been reporting for decades. A 2011 report from the State’s Office of Financial Management found that the poorest 10% of households in Washington state pay 23.2% of their incomes in state and local taxes on average while the wealthiest 10% pay 5.1% on average. CP 551. Ten years earlier, a study of Washington’s state and local tax code commissioned by the Legislature found that the poorest households pay 15.7% of their incomes in taxes while the wealthiest households pay 4.4% on average. *Id.*

This regressive tax system disproportionately harms rural Washingtonians, whose average annual income is nearly \$20,000 lower than their urban counterparts (\$49,577 vs. \$69,085).³ The harm is especially acute for families in rural counties like Ferry, Grant, Okanogan, Yakima, Whitman, and Adams, where over 40–50% of residents have incomes below 200% of the federal poverty line.⁴

Numerous organizations, ranging from the Retired Public Employees Council of WA to the Arc of Washington State, summarized the pandemic-era tax and revenue climate in stark and accurate terms when they noted that the ultra-wealthy:

can reap extra billions from e-commerce during this crisis while millions of families across Washington suffer. This suffering will only be compounded if lawmakers do not take swift action to raise new, progressive revenue and stave off devastating cuts

³ United States Department of Agriculture, *State Factsheets: Washington*, (Dec. 1, 2022), <https://data.ers.usda.gov/reports.aspx?StateFIPS=53&StateName=Washington&ID=17854>.

⁴ Washington Economic Security Administration, *ESA-EMAPS Report #5545 using Census Bureau's American Community Survey (ACS) 5-year estimates for 2015-2019*, (Aug. 25, 2022).

to essential services and programs. But more so, this is an opportunity to make a historic shift in how our state approaches revenue, a shift to make our tax system equitable and just, formidable to economic downturns, and responsive to a 21st century economy where traditional revenue streams are changing.

CP 551–52.

2. The capital gains tax will boost rural economies and help rebalance the tax system so those who should pay more do.

While for decades the Washington tax code has relied heavily on sales and use taxes, it is within the province of the Legislature to move away from this regressive structure. *See Wash. Bankers Ass’n v. Dep’t of Revenue*, 198 Wn.2d 418, 444, 450, 495 P.3d 808 (2021). In *Washington Bankers*, the Court upheld a tax that “asked the wealthy few to contribute more to funding essential services and programs to the benefit of all Washingtonians,” recognizing that it is legitimate for the Legislature to “raise revenue and address disparities in wealth and income by imposing an additional tax on institutions generating immense profits.” *Id.* Through the capital gains tax,

the Legislature intended to take a step toward shifting the burden of funding essential state services off those least able to pay and onto those who can. RCW 82.87.010 (“The legislature further recognizes that a tax system that is fair, balanced, and works for everyone is essential to help all Washingtonians grow and thrive. But Washington’s tax system today is the most regressive in the nation.”)

Furthermore, revenue from the tax will support education and childcare which bring immediate and long-term benefits for rural economies. For example, small business owners like Mr. Pitsilionis will have an easier time retaining employees if children in Pullman have reliable care while their parents are at work. And, as amici have observed throughout their careers, early learning is critical to future generations’ success in K-12 education and beyond.

3. Exceptionally wealthy Washington residents would pay the tax, disproportionately benefiting rural communities.

The capital gains tax will help balance the tax code that is currently stacked against rural communities. Only about 0.2% of Washingtonians would be subject to the capital gains tax. CP 553. As the following table details, the vast majority of these households are in urbanized Western Washington:

Region	Eastern	Western	King County
Households subject to state capital gains excise tax	838	7,333	4,791
Share of total households subject to state capital gains excise tax	10%	90%	59%
Percentage of households in the region that may be subject to capital gains excise tax	0.11%	0.23%	0.39%
Contribution as a percent of total state excise tax revenue	9%	91%	66%
Average income of affected taxpayers	\$2,718,569	\$1,814,890	\$3,796,491

CP 553–54; *see also* Washington State Budget and Policy Center, *Capital gains tax opponents seek massive tax break for*

King County's ultra-wealthy, (June 2022).⁵

Furthermore, among other exemptions, all sales of real estate and sales of livestock by farmers and ranchers are exempt from the tax. RCW 82.87.050(1), (5). The tax will thus be paid almost exclusively by exceptionally wealthy households in urban Western Washington, thereby serving the public interest in making the tax code more equitable while providing desperately needed funding for childcare and education in rural communities. *See* RCW 82.87.010.

B. Affirming Consistent Excise Tax Precedent Best Serves the Purpose of Stare Decisis.

1. The Court should follow its precedent holding that taxes on capital transactions are excise taxes.

This Court has consistently held that taxes on transfers of property are excise taxes. *Morrow v. Henneford*, 182 Wash. 625, 47 P.2d 1016 (1935). In *Morrow*, the Court unequivocally held that such taxes, whether an estate tax, gift tax, or, as here, a “tax

⁵ Available at <https://budgetandpolicy.org/wp-content/uploads/2022/06/2022-Statewide-data-fact-sheet-1.pdf>.

upon sales of shares of stock” are excise taxes, not property taxes. 182 Wash. at 630–31 (citing *Bromley v. McCaughn*, 280 U.S. 124 (1929)). The Court has repeatedly affirmed that it is “committed to the proposition that a tax upon the sale of property” is an excise tax. *Mahler v. Tremper*, 40 Wn.2d 405, 406-10, 243 P.2d 627 (1952); *see also Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) (“We have repeatedly rejected similar arguments that taxes were in reality taxes on property.”).

Only by ignoring the breadth and reasoning of the Court’s excise tax precedent can Plaintiffs argue that the capital gains tax is a property tax. Plaintiffs’ primary argument is that the taxpayer’s receipt of income, i.e., the proceeds of the sale of capital, is an acquisition of property that transforms the tax into a property tax. However, simply because a person derives income from a transaction does not mean a tax on the transaction is a property tax.⁶ Indeed, Washington excise taxes are frequently

⁶ To the contrary, whether a tax is measured by income does not affect whether it is a tax on property. *See, e.g., Stiner v. Yelle*,

based on transactions in which the taxpayer derives income or acquires property. *See, e.g., Mahler*, 40 Wn.2d at 406-07.

Respondents also argue that the capital gains tax is not sufficiently tied to a “voluntary” transaction because some taxable sales will be carried out by pass-through corporations that the individual taxpayer does not actively manage. This argument fails because under this Court’s case law, excise taxes are not limited to transactions voluntarily initiated by the taxpayer. Estate taxes are triggered by someone’s death, for example.

At most, Plaintiffs’ attempt to distinguish the capital gains tax from other excise taxes amounts to a distinction without a difference. The Court should follow its consistent precedent in this case and hold that the capital gains tax, which is triggered by and imposed on sales of capital, is an excise tax.

174 Wn. at 405; *H & B Commc ’ns Corp. v. Richland*, 79 Wn.2d 312, 316, 484 P.2d 1141 (1971).

2. Income tax precedent is inapplicable, inconsistent, and untenable.

In contrast to the Court’s consistent excise tax precedent, Plaintiffs rely on “conflicting and bewildering decisions”⁷ to argue that a capital gains tax is a tax on income that should be treated as a property tax. Plaintiffs’ attempt to shoehorn the capital gains tax into this category should be rejected for the reasons explained above. In addition, the fundamental inconsistencies within the Court’s income tax precedent render that precedent untenable.

On the one hand, the Court has consistently held that a tax on persons engaging in business activities that is measured by income is an excise tax. *Stiner*, 174 Wash. at 405; *H & B Commc’ns Corp.*, 79 Wn.2d at 316. In *Stiner*, the Court held that, despite “a maze of conflicting and bewildering decisions” and inconsistent language in the Court’s prior holdings, income is not property until it is acquired, and thus taxing the act of acquiring

⁷ *Stiner*, 174 Wash. at 405–06.

it is not a property tax. 174 Wn. at 405–06. In *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 78, 34 P.2d 363 (1934), the Court held that a tax on individual income of government employees making more than \$200 per month was a valid extension of the excise tax upheld in *Stiner*. On the other hand, in *Culliton v. Chase*, 174 Wash. at 378, and *Jensen v. Henneford*, 185 Wash. 209, 217-18, 53 P.2d 607 (1936), the Court held that broad-based taxes on personal income were property taxes, not excise taxes.

The Court’s precedent holding that some income taxes are property taxes is also inconsistent with its precedent holding that functionally identical taxes on the transfer of money and real and personal property from one individual to another, measured by the value of the property, are excise taxes. For example, *In re Estate of Hambleton*, 181 Wn.2d 802, 811, 832, 335 P.3d 398 (2014), holds that “[a]n estate tax is an excise tax because the tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits.” (Internal

quotation omitted). Likewise, in *Mahler*, the Court held that “a sales tax upon real property is a tax upon the act or incidence of transfer,” not a property tax. 40 Wn.2d at 409–10. These cases and others like them hold that taxes upon “the exercise of one of the powers incident to ownership” of property are excise taxes, not property taxes. *Morrow*, 182 Wash. at 630. Plaintiffs primarily rely on *Culliton’s* and *Jensen’s* holding that a tax upon any incident of ownership is a property tax, but this holding is inconsistent with all other lines of excise tax precedent.

3. Applying excise tax precedent best serves the consistency goals of stare decisis.

Extending *Culliton’s* “bewildering,” inconsistent income tax precedent to the capital gains tax would conflict with extensive jurisprudence classifying taxes on transfers of property as excise taxes and undermine the very purpose of stare decisis, which is consistency. *See, e.g., State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011) (“[T]he principle of stare decisis . . . ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial

decisions, and contributes to the actual and perceived integrity of the judicial process.”). Thus, “the doctrine of stare decisis cannot foreclose an eventual choice between two inconsistent precedents.” *Wolman v. Walter*, 433 U.S. 229, 265 n.2, 97 S. Ct. 2593 (1977) (Stevens, J., concurring/dissenting).

Indeed, this Court has repeatedly found fault with prior cases because they were inconsistent with other precedent. *E.g.*, *Barber*, 170 Wn.2d 854 at 864 (citing *State v. Baldwin*, 150 Wn.2d 448, 460-61, 78 P.3d 1005 (2003)); *State v. Scherf*, 192 Wn.2d 350, 379, 429 P.3d 776 (2018); *see also State v. W.R.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) (faulting past cases because neither “explains how two things can be conceptual opposites without negating one another”).

Stare decisis does not counsel for adherence to a prior case “when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” *Adarand Constructors v. Pena*, 515 U.S. 200, 231, 115 S. Ct. 2097 (1995). “Remaining true to an ‘intrinsically

sounder’ doctrine established in prior cases better serves the values of stare decisis” than does compounding an error by following or extending an inconsistent case. *Id.*

There are also pragmatic reasons for affirming the Court’s excise tax precedent rather than extending inconsistent income tax precedent. “Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects” such as when the errant “rationale threatens to upend our settled jurisprudence in related areas of law.” *Citizens United v. FEC*, 558 U.S. 310, 378-79, 130 S. Ct. 876 (2010) (Roberts, C.J., concurring). The threat of upending settled jurisprudence is very real here. Much of the funding at every level of state government is based on well-settled law that a tax on the sale or transfer of property is an excise tax. *See Stiner*, 174 Wash. at 406 (“To hold otherwise would render it exceedingly difficult if not impossible to sustain any excise tax.”).

The Court should affirm its “intrinsically sounder” precedent by once again holding that a “tax upon sales of shares of stock” or other capital is an excise tax, not a property tax. *Morrow*, 182 Wash. at 630–31.

VI. CONCLUSION

The Court’s consistent excise tax precedent strongly supports upholding the capital gains tax, as do the equities. The tax will raise well over \$500 million annually from just 0.2% of all Washington households, 90% of which are in Western Washington. The revenue will support schools, childcare, and early learning – spending which has been shown to immediately boost local economies and sustain long-term economic growth. The tax thus provides a long needed equitable step toward rebalancing Washington’s regressive tax code with outsized benefits for rural communities across Washington.

This document contains 4,983 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of December
2022.

SMITH & LOWNEY PLLC

By: /s/ Claire E. Tonry
Claire E. Tonry, WSBA No. 44497
2317 E. John St.
Seattle, Washington 98112
(206) 860-2883
claire@smithandlowney.com

*Attorney for Mary Ann Warren, Melisa
Tigard, Kristen Cameron, Nick Pitsilionis,
Children's Alliance, and Dr. Katherine
Baird*

SMITH & LOWNEY

December 12, 2022 - 4:12 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 100,769-8
Appellate Court Case Title: Chris Quinn et al. v. State of Washington et al.
Superior Court Case Number: 21-2-00075-8

The following documents have been uploaded:

- 1007698_Briefs_20221212161004SC202276_5736.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Warren et al Amicus Brief_221212.pdf
- 1007698_Motion_20221212161004SC202276_3628.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Warren et al Motion for Amicus_221212.pdf

A copy of the uploaded files will be sent to:

- Chuck.Zalesky@atg.wa.gov
- EStahlfeld@freedomfoundation.com
- GSFUJITA@MSN.COM
- SGOOlyEF@atg.wa.gov
- TammyMiller@dwt.com
- aaron@rockelaw.com
- allison@fhbzlaw.com
- amcdowell@orrick.com
- andrienne@washingtonappeals.com
- ashlit@biaw.com
- bobbb@awb.org
- cam.comfort@atg.wa.gov
- castilloc@lanepowell.com
- cindy.bourne@pacificallawgroup.com
- craiga@lanepowell.com
- dawn.taylor@pacificallawgroup.com
- ddunne@orrick.com
- drubens@orrick.com
- edwardss@lanepowell.com
- gfujita@eisenhowerlaw.com
- howard@washingtonappeals.com
- hozaifa@baileyduquette.com
- jacksonm@biaw.com
- jeffrey.even@atg.wa.gov
- jwmaynard2003@yahoo.com
- lawyer@stahlfeld.us
- noah.purcell@atg.wa.gov
- paul.lawrence@pacificallawgroup.com
- peter.gonick@atg.wa.gov

- revolyef@atg.wa.gov
- rmckenna@orrick.com
- sarah.washburn@pacificallawgroup.com
- sea_wa_appellatefilings@orrick.com

Comments:

Sender Name: Kai McDavid - Email: kai@smithandlowney.com

Filing on Behalf of: Claire Elizabeth Tonry - Email: claire@smithandlowney.com (Alternate Email: claire@smithandlowney.com)

Address:

2317 E John St

Seattle, WA, 98112

Phone: (206) 860-1570

Note: The Filing Id is 20221212161004SC202276