NO. 100769-8

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS QUINN, et al.,

Respondents,

v.

STATE OF WASHINGTON, et al.,

Appellants,

EDMONDS SCHOOL DISTRICT, et al.,

Intervenors/Appellants.

APRIL CLAYTON, et al.,

Respondents,

v.

STATE OF WASHINGTON, et al.,

Appellants,

EDMONDS SCHOOL DISTRICT, et al.,

Intervenors/Appellants.

APPELLANT STATE OF WASHINGTON'S ANSWER TO AMICI

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I. INTRODUCTION

The amicus briefs filed in this case confirm that this Court should uphold the legislature's decision to enact the capital gains excise tax. As detailed in the amicus briefs of Law Professors and the Children's Alliance, Washington's capital gains tax is entirely consistent with the state and federal constitutions. And as detailed in the amicus briefs of the Washington State Labor Council and many BIPOC groups, the legislature furthered important goals in passing the tax: rebalancing our state's tax code to make it less slanted in favor of the wealthy, and bringing in vital funds for public schools.

Nonetheless, three groups filed amicus briefs attacking the tax: (1) the Washington Policy Center, et al., (2) the Association of Washington Business, et al., and (3) the Building Industry Association of Washington, et al. These organizations offer a series of muddled and misguided legal and policy arguments. This Court should reject those arguments and uphold the constitutionality of the capital gains tax.

II. ARGUMENT

A. The Capital Gains Tax is an Excise Tax under This Court's Established Precedent

The Washington Policy Center (WPC), et al., in their amicus brief, argue that the capital gains tax is an income tax, offering what they describe as four general differences between excise taxes and income taxes. WPC Am. Br. at 11-12. Under their theory, which cites no Washington case law, income taxes (unlike excise taxes) (1) are levied directly on people who cannot pass the economic burden on to others, (2) often permit deductions and credits for "a *de minimis* level of income and legislatively favored sources of income," (3) are levied as a percentage of income, and (4) are justified as a progressive way of raising general tax revenue. *Id*.

WPC's proposed distinctions fall flat in light of this Court's many decisions upholding a variety of taxes having

these characteristics as excise taxes.[1] The Court has deemed taxes to be excises under Washington law that are (1) levied directly on people that lack the ability to pass on the economic burden (like the retail sales tax, real estate excise tax, and leasehold excise tax), (2) computed net of non-*de minimis* deductions and credits (like the business and occupation (B&O) tax and estate tax), (3) calculated as a percentage of income derived from the taxed transaction (like the B&O tax and real estate excise tax) and (4) justified as a way of raising general tax revenue (like the B&O tax, retail sales tax, real estate excise tax, and other "general fund" taxes).

In any event, WPC starts with the wrong premise. Article VII of Washington's constitution never mentions "income taxes." Rather, it imposes limitations on property taxes. *In re*

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[1] It also falls flat even under the authorities WPC cite, which all recognize that excise taxes apply to, among other things, the sale or use of property, WPC Am. Br. at 13-14, and that an excise tax "include[s] practically any tax which is not an *ad valorem* tax." *Id*. at 16 (quoting *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989) (citation omitted)).

Estate of Hambleton, 181 Wn.2d 802, 832, 335 P.3d 398 (2014). If the capital gains tax is not a property tax under Washington law, it cannot violate article VII. *Id*.; *Cosro, Inc. v. Liquor Control Bd.*, 107 Wn.2d 754, 761, 733 P.2d 539 (1987). Thus, the question before this Court is not whether a tax on capital gains applies to part of a person's income, but rather whether it is a tax on property.

Under this Court's decisions, property taxes are taxes that apply merely because a person owns property, while excise taxes are ones that apply because a person sells, transfers, or uses property. *Morrow v. Henneford*, 182 Wash. 625, 630-31, 47 P.2d 1016 (1935); *see also Cosro*, 107 Wn.2d at 761 ("An excise tax is a tax on the right to use or transfer items, while a property tax is a tax on the items themselves."). The capital gains tax falls squarely on the excise tax side of this line.

This Court has applied this straightforward test for decades. For example, in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933), the Court upheld a gross receipts tax

imposed on business activity—similar to the current B&O tax—as an excise tax. Even though the tax was imposed annually based on the "gross proceeds of sales, or gross income" of a business, 174 Wash. at 404 (quoting Laws of 1933, ch. 191, § 2(2)), the Court concluded it was "an excise tax and not . . . a tax on property." *Id.* at 407. Further, the Court debunked the notion that a tax is a property tax if it is measured by a person's income. *Id.* "To hold otherwise would render it exceedingly difficult if not impossible to sustain any excise tax." *Id*. at 406.

Similarly, in *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), this Court unanimously upheld the real estate excise tax as a valid excise tax, *id*. at 407, even though the tax is measured by the gross proceeds from sales of real property. The Court explained that while real estate is property, and an annual levy on the value of property is a property tax, taxing proceeds earned from the sale of property is an excise tax. "We are committed to the proposition that a tax upon the sales of

property is not a tax upon the subject matter of that sale." *Id.* at 409. "The imposition relates to an exercise of one of several rights in and to property. Imposition is not upon each and every owner merely because he is the owner of the property involved." *Id*. at 409-10.

Most recently, in *Hambleton*, this Court unanimously held that Washington's estate tax—which applies at various rates to the transfer of property occurring at death—is an excise tax. The Court explained that "[a] tax is an 'excise' or 'transfer' tax if the government is taxing a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property." *Id*. at 832 (quotation marks and citations omitted).

As these cases demonstrate, the capital gains tax is an excise tax, not a property tax, under this Court's precedent and without regard to the alleged characteristics of an income tax claimed by amici. The tax is imposed on the *sale or exchange* of long-term capital assets, not on those assets themselves.

RCW 82.87.040(1). It does not apply to every owner of capital assets merely as a result of ownership, but only to those that sell or transfer those assets. Moreover, unlike a property tax, the capital gains tax is measured only on the amount of gain derived from the sale, not on the value of the assets themselves. For example, if a person purchased $1 million of stock in 2017 and did not sell it until 2025, they would not owe capital gains excise tax at any point until they sold it. When they sold it, the tax due would depend only on the increase in value, so if the value were still $1 million, they would owe nothing. (And because the first $250,000 in gains are exempt, they would owe nothing unless they sold the stock for more than $1,250,000.) The value of the stock is not assessed and taxed annually. The capital gains tax is not a tax one owes "merely because" they own property. *Morrow*, 182 Wash. at 631.

In addition to ignoring Washington law as applied by this Court, WPC engages in a fundamentally flawed syllogism. They say that the Washington capital gains tax must be an

income tax because the federal government and other states impose their broad-based income taxes on capital gains. WPC Am. Br. at 23.[2] But they ignore a key feature of broad-based income taxes; under decisional law from the United States Supreme Court and virtually every state, *income taxes are a type of excise tax*, not property taxes.

For example, the federal income tax is considered an excise tax under federal law. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 17, 36 S. Ct. 236, 60 L. Ed. 493 (1916) (recognizing that an income tax is "in its nature an excise entitled to be enforced as such" and that the Court had sustained federal taxes on income as indirect excise taxes even before adoption of the 16th Amendment).[3] Likewise, the United States

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[2] BIAW amici make a similar argument. BIAW Am. Br. at 7.

[3] WPC claims in a footnote that the State misreads *Brushaber*. WPC Am. Br. at 10 n.1. Not so. It is WPC that misreads that seminal case. The Court in *Brushaber* was explaining why its prior decision in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759, *on reargument*, 158 U.S. 601 (1895), did not hold that income

Supreme Court noted in the late 1930s that most state courts had expressly held that "a net income tax is to be classified as an excise," not a property tax. *Hale v. Iowa State Bd. of Assessment & Revenue*, 302 U.S. 95, 104, 58 S. Ct. 102, 82 L. Ed. 72 (1937); *see also id*. at n.7 (collecting cases). And in the years after *Hale*, even more states have expressly held that an income tax is a form of excise tax. *See Dooley v. City of Detroit*, 121 N.W.2d 724, 728 (Mich. 1963) (citing cases); *see also Thorpe v. Mahin*, 250 N.E.2d 633, 635 (Ill. 1969) ("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.").

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taxes are "generically and necessarily . . . direct taxes on property." *Brushaber*, 240 U.S. at 17. As support, the Court noted that even the *Pollock* decision sustained as indirect excise taxes the federal income tax on "professions, trades, employments, or vocations." *Id*. (quoting *Pollock*, 158 U.S. at 637). Thus, *Pollock* did not hold that income taxes are necessarily direct taxes on property, while the Court in *Brushaber* held that income taxes are in the nature of excise taxes. WPC is simply wrong on this point.

The overwhelming weight of authority holding that an income tax is a form of excise tax shows how misleading it is for capital gains tax opponents to look to other states and the federal government to determine whether a tax on capital gains is an income tax or an excise tax. *See, e.g.*, WPC Am. Br. at 23. There simply is no substantive difference within those jurisdictions between an income tax and an excise tax, and *none of them treat a tax on capital gains as a property tax*. Thus, if this Court were to accept amici's invitation to examine the overwhelming consensus of the United States Supreme Court and other states in deciding an issue of Washington law, the logical conclusion would be that the capital gains tax is not a property tax subject to article VII's limitations.

The Court, however, need not follow WPC down their "other jurisdictions" rabbit hole. What matters here is Washington law, under which the capital gains tax is not a property tax because it is not an "absolute and unavoidable demand against property or the ownership of property" arising

from the taxpayer's "status as property owners." *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995). That ends the article VII inquiry. *Cosro*, 107 Wn.2d at 761.

B. The Capital Gains Tax Applies to Sales of Long-Term Capital Assets with a Physical or Legal Situs in Washington, Consistent with Established Precedent, and Will Not Result in Multiple State Taxation

The Association of Washington Business (AWB), et al. and the Building Industry Association of Washington (BIAW), et al. offer a different theory in their effort to nullify the capital gains excise tax. They claim that the tax should be invalidated in its entirety because certain asset sales that could be included in the Washington tax allegedly occur outside of Washington's jurisdictional reach. AWB Am. Br. at 15; BIAW Am. Br. at 12-14. The argument is meritless, as these amici raise improbable hypotheticals, misunderstand controlling law, and seek as a remedy a new rule favoring the wealthy that would invalidate an entire tax system based merely on claims that a tax could be applied beyond constitutional limits as to some hypothetical future taxpayer.

As a starting point, all agree that Washington has jurisdiction to tax the sale of tangible property located in the state. This is settled law, as the Quinn plaintiffs and opposing amici correctly concede. *See* Quinn Br. at 49 (citing *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S 175, 184, 115 S. Ct. 1311, 131 L. Ed. 2d 261 (1995); AWB Am. Br. at 15 (citing *Jefferson Lines*).[4]

It is also settled law that Washington has nexus to tax intangible property sold or transferred by persons domiciled in the state. *In re Estate of Grady*, 79 Wn.2d 41, 43, 483 P.2d 114 (1971); *In re Plasterer's Estate*, 49 Wn.2d 339, 343, 301 P.2d 539 (1956). Opposing amici ignore this settled principle.

In *Estate of Grady*, this Court explained that Washington had authority to impose an excise tax (the state's former

[4] The Supreme Court in *Jefferson Lines* explained that "[i]t has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." 514 U.S. at 184.

inheritance tax) on the value of intangible property passing at the death of a Washington resident.[5] "Personal property owned by a resident of this state is subject to the jurisdiction of this state," and the transfer of such property at death is properly taxed under the inheritance tax code. 79 Wn.2d at 43.

Plasterer's Estate is similar. In that case, this Court held that the right to receive payments due from a real estate sales contract is intangible personal property with its situs at the domicile of the owner of the right "regardless of the actual location of the evidence of ownership." 49 Wn.2d at 341-42. Consequently, the intangible personal property is "within the jurisdiction and subject to an inheritance tax by the state of the owner's domicile at the time of his death." *Id*. at 342 (citing

[5] The estate tax replaced the former inheritance tax in 1982 following an initiative passed by Washington voters. *See Matter of Estate of Hitchman*, 100 Wn.2d 464, 465, 670 P.2d 655 (1983). The primary difference between an inheritance tax and an estate tax is that the former is imposed on the recipient of the decedent's property while the latter is imposed on the estate making the transfer. Both are excise taxes under this Court's precedent.

Curry v. McCanless, 307 U.S. 357, 59 S. Ct. 900, 83 L. Ed. 1339 (1939)). *Accord In re Ellis' Estate*, 169 Wash. 581, 589-90, 14 P.2d 37 (1932) (intangible personal property of resident is subject to excise tax imposed at death of the owner).

Established authority from the United States Supreme Court supports these controlling decisions, most notably *Curry v. McCanless* (cited and followed in *Plasterer's Estate*) and *Graves v. Elliott*, 307 U.S. 383, 59 S. Ct. 913, 83 L. Ed. 1356 (1939). As pointed out in the State's prior briefs, these cases hold that the power to sell or dispose of intangible property "is the appropriate subject of taxation at the place of the domicile of the owner of the power." *Graves v. Elliott*, 307 U.S. at 386; *see also Graves v. Schmidlapp*, 315 U.S. 657, 665-66, 62 S. Ct. 870, 86 L. Ed. 1097 (1942) (overruling a 1926 Lochner-era case that was inconsistent with the holdings in *Curry* and *Elliott*).

Consistent with this controlling law, the legislature established a detailed allocation process in the capital gains tax code so that the tax will apply to sales or transfers of property

with a physical or legal situs in the state. RCW 82.87.100(1). In general, that statute allocates to Washington long-term capital gains from the sale or exchange of tangible personal property located in Washington and intangible property (like stocks) owned by an individual domiciled in the state. RCW 82.87.100(1)(a), (b). The statute looks to the physical or legal situs of the tangible or intangible property being sold, which satisfies transactional nexus concerns.

Additionally, the legislature included a credit to prevent the tax from applying to "the amount of any legally imposed income or excise tax paid by the taxpayer to another taxing jurisdiction on capital gains derived from capital assets within the other taxing jurisdiction . . . ." RCW 82.87.100(2)(a). Providing such a credit to prevent multiple state taxation of the same transaction is an accepted method of avoiding dormant Commerce Clause concerns. *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988). The credit, when coupled with the allocation provision

discussed above, will ensure that the Washington tax applies only when the transaction being taxed has constitutional nexus with Washington and no other state is lawfully taxing the same transaction. As was the case in *D.H. Holmes*, there is "'nexus' aplenty here." 486 U.S. at 33.

In addition to being wrong on the law, amici opponents seek an extreme remedy—invalidation of the entire capital gains tax—that is contrary to precedent and common sense. Courts do not invalidate an entire tax system based on a claim that the law might exceed constitutional constraints in some hypothetical circumstance. A plaintiff claiming such a violation can bring an as-applied challenge, in which the court invalidates only the unconstitutional application of the law, leaving the rest intact. *See, e.g., Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 483 U.S. 232, 248, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (invalidating a B&O tax exemption on dormant Commerce Clause grounds while leaving the rest of Washington's B&O tax code intact). Thus, opposing amici's hypothetical claims of

extra-jurisdictional taxation provide no legal or logical reason to invalidate the capital gains tax in its entirety.[6]

C. The Legislature Acted Well Within its Proper Sphere of Authority in Balancing Competing Policy Interests

In addition to their misguided legal arguments, opposing amici offer various policy arguments against the capital gains tax, claiming it will hurt business owners or drive wealthy individuals out of the state. *See, e.g.,* AWB Am. Br. at 10-14; BIAW Am. Br. at 4-5. They also decry the fact that Washington imposes a stand-alone excise tax on the sale of long-term capital gains, while most states and the federal government tax these gains as part of their broad-based income tax systems. *See* BIAW Am. Br at 6-8.

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[6] The legislature has also made clear its intent that "[i]f any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." Laws of 2021, ch. 196, § 21. Thus, if a taxpayer could muster a successful "as-applied" challenge to the tax, the reviewing court's duty would be to sever and strike only the offending provision, *State v. Abrams*, 163 Wn.2d 277, 289, 178 P.3d 1021 (2008), or invalidate only the offending application.

The proper forum in which to raise such policy concerns, however, is the legislature, not this Court. *See City of Tacoma v. Tax Comm'n*, 177 Wash. 604, 617, 33 P.2d 899 (1934) (arguments about state tax policy "might with propriety be directed to the Legislature, but are not pertinent to judicial inquiry"). The legislature's fundamental role "is to set policy and to draft and enact laws." *Hale v. Wellpinit Sch. Dist. No. 49*, 165 Wn.2d 494, 506, 198 P.3d 1021 (2009). Legislative authority is at its highest when adopting tax laws to support public services and fairly distribute tax burdens. *State ex rel. Bd. of Comm'rs v. Clausen*, 95 Wash. 214, 224, 163 P. 744 (1917). And when the legislature fulfills that role by enacting a tax, the statute is presumed to be constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Hambleton*, 181 Wn.2d at 817; *High Tide Seafoods v. State*, 106 Wn.2d 695, 698, 725 P.2d 411 (1986).

Opponents of the capital gains excise tax have come nowhere close to meeting that burden, as all of their claims are contrary to established precedent. Additionally, their claim of "extra-jurisdictional" taxation relies on hypotheticals that are unlikely to occur and, even if they did, could be remedied in an as-applied challenge without invalidating the entire tax. Their failure to prove a constitutional defect is not cured by claiming that the tax is bad public policy.

Moreover, even if policy arguments were appropriate in weighing the constitutionality of the capital gains tax, there is no evidence that the legislature has been (or will be) unresponsive to the concerns raised by amici, many of which already are addressed within the four corners of the tax statute. For example, the tax uses a taxpayer's federal tax reporting as the starting point to calculate Washington capital gains. RCW 82.87.020(1), (13). By starting with federal tax amounts and concepts, the legislature "avoided having to duplicate congressional effort" in defining terms and setting up a

convenient reporting system. *In re Estate of Bracken*, 175 Wn.2d 549, 583, 290 P.3d 99 (2012) (Madsen, C.J., concurring/dissenting). Providing a convenient method for computing the tax does not change its incidence or make it fall on owners merely because they own property. But it does help alleviate administrative and reporting complications that an entirely different reporting system would create. *See, e.g.,* State Reply at 9 (explaining that the legislature could have created a substantively identical tax where the tax was immediately due and payable on every sale of non-exempt capital assets, with refunds to taxpayers at the end of the year on the taxpayer's first $250,000 in gains).

The legislature acted well within its proper sphere of authority when it balanced competing policy interests, concluding that this tax serves two important goals: funding education services benefiting all Washingtonians and making progress toward a fairer tax system that asks more of those with a greater ability to pay. *See* RCW 82.87.010 (setting out

legislative findings and intent). The legislature's stated goals are not only rational, they deserve respect.

III. CONCLUSION

Opposing amici offer no legally sound reason to invalidate the capital gains excise tax. The tax is a valid excise tax under this Court's precedent, properly applies to transactions with a nexus to Washington, and serves important policy goals. It should be upheld.

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RESPECTFULLY SUBMITTED this 5th day of January, 2023.

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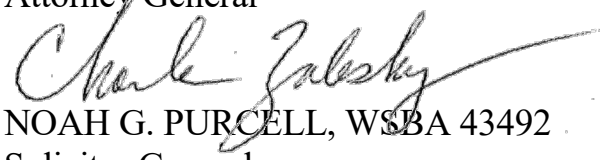

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DATED this 5th day of January, 2023, at Olympia, WA.

s/Charles Zalesky
Charles Zalesky
Assistant Attorney General

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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