

FILED
SUPREME COURT
STATE OF WASHINGTON
12/12/2022 4:50 PM
BY ERIN L. LENNON
CLERK

NO. 100769-8

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants,

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

Intervenors.

APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, an individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an

individual; CATHERINE SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN McKENNA, an individual; WASHINGTON FARM BUREAU, WASHINGTON STATE TREE FRUIT ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION,

Respondents,

v.

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

Appellants,

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

Intervenors.

WASHINGTON STATE LABOR COUNCIL, SEIU WASHINGTON STATE COUNCIL, MOMSRISING, BALANCE OUR TAX CODE, PROGRESS ALLIANCE OF WASHINGTON, AND CIVIC VENTURES' BRIEF OF AMICI CURIAE

Dmitri Iglitzin, WSBA No. 17673
Jacob Harksen, MN Bar No. 0400097
BARNARD IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400, Seattle, WA 98119
Attorneys for Amici Curiae

TABLE OF CONTENTS

I. IDENTITY AND INTERESTS OF *AMICI CURIAE* ... 1

II. INTRODUCTION 1

III. STATEMENT OF THE CASE 3

IV. ARGUMENT..... 5

A. Washington State has the most regressive tax structure in the nation, which disproportionately harms people of color, but the capital-gains tax is well-targeted to ensure a more equitable generation of revenue. 5

B. The capital-gains tax will provide badly needed funding for education, early learning, and child care, which will improve the lives of children, women, and people of color, in particular..... 10

C. The capital-gains tax will not cause wealthy Washingtonians or business to flee; rather, the tax will help stabilize budgets and grow the state’s economy..... 22

V. CONCLUSION..... 29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Culliton v. Chase</i> , 174 Wash. 363, 25 P.2d 81 (1933).....	5
Statutes	
RCW 28A.515.320	11
RCW 82.87.010.....	<i>passim</i>
RCW 82.87.030	10
RCW 82.87.040	3, 4, 9
RCW 82.87.050.....	9
RCW 82.87.050-.080.....	4
RCW 82.87.060	9
RCW 82.87.060-.080.....	9
RCW 83.100.230.....	11
Other Authorities	
ANDY NICHOLAS & KELLI SMITH, WASH. STATE BUDGET & POLICY CTR., WASHINGTON’S TAX CODE IS AN UNTAPPED RESOURCE TO ADVANCE RACIAL JUSTICE 10 fig.6 (2019), https://budgetandpolicy.org/resources- tools/2019/10/2019-Brief-WA-Tax-Code-is- untapped-resource-for-racial-justice.pdf	12

Andy Nicholas and Elena Hernandez, *Washington State’s Upside Down Tax System Takes a Heavy Toll On Communities of Color*, WASH. STATE BUDGET & POLICY CTR. (Jan. 14, 2015), <https://budgetandpolicy.org/schmudget/washington-states-upside-down-tax-system-takes-a-heavy-toll-on-communities-of-color> 7

CHILD CARE AWARE OF AM., DEMANDING CHANGE: REPAIRING OUR CHILD CARE SYSTEM apps. at 6, 8 (2021), <https://info.childcareaware.org/hubfs/DemandingChangeAppendices.pdf>. 17, 18, 19

Chye-Ching Huang, *The Myth That Low Capital Gains Rates Are Very Important to the Economy*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 20, 2012), <https://www.cbpp.org/blog/the-myth-that-low-capital-gains-rates-are-very-important-to-the-economy> 23

Cristobal Young et al., *Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data*, 81 AM. SOC. REV. 421 (2016), http://crisobalyoung.com/development/wp-content/uploads/2018/11/Millionaire_migration_Jun16ASRFeature.pdf 25

Dana Charles McCoy et al., *Impacts of Early Childhood Education on Medium- and Long-Term Educational Outcomes*, 46 EDUC. RESEARCHER 474 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6107077/pdf/nihms984699.pdf> 19

DIANE SCHILDER ET AL., URBAN INST., COMPARING POTENTIAL DEMAND FOR NONTRADITIONAL-HOUR CHILD CARE AND PLANNED POLICIES ACROSS STATES 1 (2021), <https://www.urban.org/sites/default/files/publication/104601/comparing-potential-demand-for-nontraditional-hour-child-care-and-planned-policies-across-states.pdf> 14, 15

Early Childhood Program Has Enduring Benefits, NAT’L INSTS. OF HEALTH (June 20, 2011), <https://www.nih.gov/news-events/nih-research-matters/early-childhood-program-has-enduring-benefits> 20

ECEAP & Head Start, WASH. DEP’T OF CHILDREN, YOUTH & FAMILIES, <https://www.dcyf.wa.gov/services/earlylearning-childcare/eceap-headstart> (last visited Dec. 9, 2022)..... 13

Elizabeth McNichol, *State Taxes on Capital Gains*, CTR. ON BUDGET & POLICY PRIORITIES (June 15, 2021), <https://www.cbpp.org/research/state-budget-and-tax/state-taxes-on-capital-gains> 8, 24

Fiscal Note on ESSB 5096 at 4, WASH. DEP’T OF REVENUE, available at <https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363> (last visited Dec. 8, 2022)..... 9

Gene Balk, *The Very Rich Aren’t Likely to Flee Income-Tax States*, SEATTLE TIMES, June 6, 2020, <https://www.seattletimes.com/seattle-news/data/fyi-guy-the-very-rich-arent-likely-to-flee-income-tax-states/> 26, 27

INST. ON TAXATION & ECON. POLICY, WHO PAYS?
A DISTRIBUTIONAL ANALYSIS OF THE TAX
SYSTEMS IN ALL 50 STATES 2, 7 (6th ed. 2018),
<https://itep.sfo2.digitaloceanspaces.com/whopays-ITEP-2018.pdf>..... 5, 6

Jorge Luis García & James J. Heckman et al.,
*Quantifying the Life-Cycle Benefits of a
Prototypical Early Childhood Program 1* (Nat’l
Bureau of Econ. Research, Working Paper No.
23479, 2019), <https://heckmanequation.org/wp-content/uploads/2017/01/w23479.pdf> 20

MARCO GUZMAN, INST. ON TAXATION & ECON.
POLICY, STATE TAXATION OF CAPITAL GAINS:
THE FOLLY OF TAX CUTS & CASE FOR
PROACTIVE REFORMS 2 (2020),
https://itep.sfo2.digitaloceanspaces.com/092520-State-Taxation-of-Capital-Gains_ITEP.pdf;..... 23

Margaret Babayan, *Washington State’s Upside-
Down Tax Code Is Even More Racist Than You
Think*, WASH. STATE BUDGET & POLICY CTR.
(Feb. 10, 2021),
<https://budgetandpolicy.org/schmudget/washington-states-upside-down-tax-code-is-even-more-racist-than-you-think/> 7

MICHAEL MAZEROV, CTR. ON BUDGET & POLICY
PRIORITIES, STATE TAXES HAVE A NEGLIGIBLE
IMPACT ON AMERICANS’ INTERSTATE MOVES 3
(2014),
<https://www.cbpp.org/sites/default/files/atoms/files/5-8-14sfp.pdf> 25, 26, 27

RICHARD S. CONWAY, JR., WASHINGTON STATE
AND LOCAL TAX SYSTEM: DYSFUNCTION &
REFORM 1 (Rev. 2017),
[https://seattlebusinessmag.com/sites/default/files/Washington Tax System Dysfunction and Reform \(2017\).pdf](https://seattlebusinessmag.com/sites/default/files/Washington%20Tax%20System%20Dysfunction%20and%20Reform%20(2017).pdf)..... 5, 6, 12

TAX STRUCTURE WORK GRP., PRELIMINARY
REPORT: RESULTS OF ECONOMIC ANALYSES 34
(2020),
<https://dor.wa.gov/sites/default/files/2022-02/TaxStructureWorkGroupPrelimReport2020.pdf>..... 23

Taylor Soper, *Controversial Capital Gains Tax Spooks Wealthy Washington Residents as Some Unload Their Stocks*, GEEKWIRE (Dec. 9, 2021, 8:32 AM),
<https://www.geekwire.com/2021/controversial-capital-gains-tax-spooks-wealthy-washington-residents-as-some-unload-their-stocks/>..... 28

WASH. CONST. art. IX, § 1..... 11

WASH. CONST. art. IX, § 3..... 11

WASH. STATE DEP’T OF COMMERCE, WASHINGTON
STATE CHILD CARE ACCESS STRATEGY 11
(2021), <https://www.commerce.wa.gov/wp-content/uploads/2021/08/FINAL-June-2021-C3TF-Legislative-Report.pdf>..... 16

WASH. STATE DEP’T OF COMMERCE, WASHINGTON
STATE CHILD CARE INDUSTRY ASSESSMENT 3
(2020), <https://www.commerce.wa.gov/wp-content/uploads/2020/08/Child-Care-Collaborative-Task-Force-Industry-Assessment-Report.pdf> *passim*

WASH. STUDENT ACHIEVEMENT COUNCIL, 10-YEAR ROADMAP ISSUE BRIEFING: STUDENT READINESS: EARLY LEARNING 8 (2013), <https://wsac.wa.gov/sites/default/files/EarlyLearning-IssueBriefing.pdf> 20

Washington: Access 2020, CHILD CARE AWARE OF AM., <https://www.childcareaware.org/our-issues/research/ccdc/state/wa/> (last visited Dec. 9, 2022)..... 15

Washington: Affordability 2020, CHILD CARE AWARE OF AM., <https://www.childcareaware.org/our-issues/research/ccdc/state/wa/> (last visited Dec. 9, 2022)..... 19

I. IDENTITY AND INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington State Labor Council (WSLC), SEIU Washington State Council (SEIU Washington), MomsRising, Balance Our Tax Code (BOTC), Progress Alliance of Washington, and Civic Ventures are fully set forth in the Motion for Leave to File Brief of *Amici Curiae* filed herewith. *Amici* submit this brief in support of the State and Intervenors' arguments that the capital-gains tax is a valid and constitutional excise tax. The tax will make substantial improvements to Washington's upside-down tax structure, reduce inequity, and provide badly needed funding for education, early learning, and child care, benefiting all Washingtonians, including those most likely to pay the tax.

II. INTRODUCTION

Washington State has long held the ignominious title of having the most regressive tax structure in the nation as a result of its heavy reliance on sales taxes to generate revenue, requiring those with the lowest incomes to pay the most in state and local

taxes, while those with the highest incomes pay the least. This tax structure is an impediment to fully funding and improving Washington's high-quality public education system. Washington is also one of the most expensive states in the country for child care and early learning programs for children. Washington's overreliance on sales taxes, inadequate education funding, and lack of access to and high cost of child care disproportionately harm the state's lowest-income residents, women, and people of color.

In an effort to remedy these problems, the Legislature passed a modest 7% excise tax on the sale or exchange of long-term capital assets like stocks and bonds, with generous exclusions and deductions to ensure that only the wealthiest residents will be likely to pay the tax. The revenue generated by the tax will provide badly needed funding for public education, early learning, and child care. And the tax will improve the regressive nature of the state's tax code by asking those with the

greatest means to pay what they owe toward the State's provision of vital public goods like education.

The capital-gains excise tax is good for the state and good for children, parents, child care providers, educators, and all Washingtonians, even the wealthy few who are most likely to pay the tax. The tax will not harm the state's economy, nor will it cause large numbers of wealthy residents to flee to the last few remaining states that do not tax incomes or capital gains. On the contrary, the capital-gains excise tax is an overdue improvement to how Washington funds public services like education, and an investment in the future of the state that will benefit all Washingtonians for generations to come.

III. STATEMENT OF THE CASE

In 2021, the Washington State Legislature adopted Engrossed Substitute Senate Bill 5096, creating a 7% excise tax on the sale or exchange of long-term capital assets. Laws of 2021, ch. 196, § 5 (codified at RCW 82.87.040) [hereinafter ESSB 5096]; CP Vol. I at 327. The capital-gains tax applies only

to “Washington capital gains,” and provides for numerous exclusions and deductions. *Id.*; RCW 82.87.050–.080. The tax is intended to provide funding for education, early learning, and child care, and to “mak[e] material progress toward rebalancing the state’s tax code.” RCW 82.87.010.

The Respondents filed two lawsuits that were then consolidated, CP Vol. I at 107, both alleging that the capital-gains tax is facially unconstitutional, and specifically, that it violates article VII, sections 1 and 2 (uniformity and limits on property taxes), and article I, section 12 (privileges and immunities) of the Washington Constitution, as well as the Commerce Clause of the U.S. Constitution. *See* CP Vol. I at 5–8; CP Vol. II at 15–16. The trial court allowed the Edmonds School District and other education parties to intervene as defendants. CP Vol. I at 136.

On cross-motions for summary judgment, the trial court granted judgment to the Respondents on the basis that the tax is an unconstitutional “income tax rather than an excise tax” under

Culliton v. Chase, 174 Wash. 363, 25 P.2d 81 (1933), and its progeny, and article VII, sections 1 and 2, of the Washington Constitution. CP Vol. I at 867–72. This appeal followed.

IV. ARGUMENT

A. Washington State has the most regressive tax structure in the nation, which disproportionately harms people of color, but the capital-gains tax is well-targeted to ensure a more equitable generation of revenue.

“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.” RCW 82.87.010.¹ This is due in large part to the State’s “extreme reliance on sales tax” to generate revenue, because everyone pays these taxes at the same rates, regardless of income.²

¹ *Accord* INST. ON TAXATION & ECON. POLICY, WHO PAYS? A DISTRIBUTIONAL ANALYSIS OF THE TAX SYSTEMS IN ALL 50 STATES 2, 7 (6th ed. 2018) [hereinafter WHO PAYS?], <https://itep.sfo2.digitaloceanspaces.com/whopays-ITEP-2018.pdf>; RICHARD S. CONWAY, JR., WASHINGTON STATE AND LOCAL TAX SYSTEM: DYSFUNCTION & REFORM 1 (Rev. 2017), [https://seattlebusinessmag.com/sites/default/files/Washington Tax System Dysfunction and Reform \(2017\).pdf](https://seattlebusinessmag.com/sites/default/files/Washington Tax System Dysfunction and Reform (2017).pdf).

² CONWAY, JR., *supra* note 1, at iv, 1, 7–9; WHO PAYS?, *supra* note 1, at 127 (identifying the lack of personal income taxes,

The Washington Tax Structure Study Committee calculated the tax burden of retail sales, excise, and property taxes, and concluded that the lowest-income households (up to \$20,000 per year) paid an effective tax rate of 15.7% of their income in taxes, while the highest-income households (\$130,000 or more per year) paid only 4.4% of their income in taxes.³ The Institute on Taxation & Economic Policy (ITEP) similarly found that the poorest 20% pay 17.8% of their incomes in taxes, while middle income families pay 11%, and the top 1% pay just 3% of their income in taxes.⁴ ITEP estimates that the poorest 20% of Washington residents pay up to six times as much in state and local taxes as the wealthy.⁵ The Legislature recognized these

the use of a gross receipts tax in lieu of a corporate profits tax, a failure to provide funding for the Earned Income Tax Credit, and a high reliance on sales taxes as “regressive” features of Washington’s tax structure).

³ CONWAY, JR., *supra* note 1, at 7.

⁴ WHO PAYS?, *supra* note 1, at 126.

⁵ *Id.* at 7.

disparities specifically when adopting the capital-gains tax. RCW 82.87.010.

These disparities also disproportionately harm people of color. “Washingtonians from communities of color are far more likely to be among the poorest fifth of the population, which faces the highest effective state and local tax rates, than among the richest fifth of the population that enjoys considerably lower effective tax rates.”⁶ As a result, Black households and other people of color in Washington pay a higher average effective tax rate than white residents.⁷

⁶ Andy Nicholas and Elena Hernandez, *Washington State’s Upside Down Tax System Takes a Heavy Toll On Communities of Color*, WASH. STATE BUDGET & POLICY CTR. (Jan. 14, 2015), <https://budgetandpolicy.org/schmudget/washington-states-upside-down-tax-system-takes-a-heavy-toll-on-communities-of-color>.

⁷ Margaret Babayan, *Washington State’s Upside-Down Tax Code Is Even More Racist Than You Think*, WASH. STATE BUDGET & POLICY CTR. (Feb. 10, 2021), <https://budgetandpolicy.org/schmudget/washington-states-upside-down-tax-code-is-even-more-racist-than-you-think/>.

The Legislature adopted the capital-gains tax, in part, to “mak[e] material progress toward rebalancing the state’s tax code.” RCW 82.87.010. The capital-gains tax achieves this by narrowly targeting only those with the greatest ability to pay—the wealthy few most likely to recognize significant capital gains. Capital gains are highly concentrated among the wealthiest households. As the Center on Budget and Policy Priorities has explained, nationally, “[a]bout 85 percent of capital gains go to the wealthiest 5 percent of taxpayers; 75 percent go to the top 1 percent of taxpayers.”⁸

Washington’s capital-gains tax further narrows who is most likely to pay by providing reasoned exemptions and deductions for a wide range of transactions and activity, meaning

⁸ Elizabeth McNichol, *State Taxes on Capital Gains*, CTR. ON BUDGET & POLICY PRIORITIES (June 15, 2021), <https://www.cbpp.org/research/state-budget-and-tax/state-taxes-on-capital-gains>. The wealthiest households are also disproportionately white—“white families are three times likelier than families of color to be in the top 1 percent [of taxpayers].” *Id.*

only a small number of taxpayers will be affected by the 7% tax “on the sale or exchange of long-term capital assets,” and only for those sales of capital assets (such as stocks and bonds) fairly traceable to Washington. RCW 82.87.040 (tax imposed), –.100 (allocation of capital gains to Washington). Sales of real estate are exempt from the tax, as are assets held in retirement savings accounts, and sales of livestock and timber, among other exemptions. RCW 82.87.050. The law also provides taxpayers with a \$250,000 standard deduction, meaning that taxpayers may recognize up to \$250,000-worth of capital gains tax-free each year. RCW 82.87.060. Other deductions apply for the sale of a “family-owned small business” and charitable donations, among others. RCW 82.87.060–.080.

The Washington Department of Revenue estimates that just 7,000 Washingtonians will pay any capital-gains tax in the first year.⁹ Nonetheless, the Department of Revenue estimates

⁹ See Fiscal Note on ESSB 5096 at 4, WASH. DEP’T OF REVENUE, available at

that the tax will generate approximately \$2.5 billion in additional revenue for K-12 education, early learning, and child care over five years.¹⁰

B. The capital-gains tax will provide badly needed funding for education, early learning, and child care, which will improve the lives of children, women, and people of color, in particular.

Recognizing “that it is the paramount duty of the state to amply provide every child in the state with an education, creating the opportunity for the child to succeed in school and thrive in life,” the Legislature dedicated the revenue from the capital-gains tax “to the education legacy trust account and the common school construction account.” RCW 82.87.010. “The first \$500,000,000 collected each fiscal year shall be deposited into the education legacy trust account,” and the remainder “shall be deposited into the common school construction account.” RCW

<https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363> (last visited Dec. 8, 2022) (The Department of Revenue Fiscal Note begins on page 18 of the combined PDF).

¹⁰ *Id.* at 6.

82.87.030.¹¹ The Legislature also added “early learning and child care programs” to the list of purposes for which funds in the education legacy trust account may be used, enabling revenue from the capital-gains tax to be spent on improving access to child care and early learning. ESSB 5096 § 3 (amending RCW 83.100.230).¹²

This funding is badly needed. The State Constitution declares that: “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.” WASH. CONST. art. IX, § 1. But the State’s efforts to meet this directive are impeded by its inability to

¹¹ The “common school construction account” exists to “finance[e] the construction of facilities for the common schools.” RCW 28A.515.320; *see also* WASH. CONST. art. IX, § 3 (establishing the common school construction fund).

¹² Funds held in the education legacy trust account “may be used only for support of the common schools, and for expanding access to higher education through funding for new enrollments and financial aid, early learning and child care programs, and other educational improvement efforts.” RCW 83.100.230.

generate revenue through means other than increased consumption taxes. State tax revenue as a share of total personal income has shrunk steadily for over two decades.¹³ And by 2014, “only eight states spent less on K-12 education than Washington.”¹⁴

Students of color are disproportionately harmed by inadequate education funding. “Despite Washington’s progressive reputation, our state is the second-worst in the country behind Arizona when it comes to inequitable funding for poor school districts, where the difference between non-white and white districts is *42% less funding per student.*”¹⁵

¹³ ANDY NICHOLAS & KELLI SMITH, WASH. STATE BUDGET & POLICY CTR., WASHINGTON’S TAX CODE IS AN UNTAPPED RESOURCE TO ADVANCE RACIAL JUSTICE 10, 12 fig.6 (2019), <https://budgetandpolicy.org/resources-tools/2019/10/2019-Brief-WA-Tax-Code-is-untapped-resource-for-racial-justice.pdf>.

¹⁴ CONWAY, JR., *supra* note 1, at v, 5, 13.

¹⁵ NICHOLAS & SMITH, *supra* note 13, at 10–11.

Access to affordable child care and early learning¹⁶ is also a major problem for Washington families, and particularly for single parents, women, and families of color. The Washington State Department of Commerce and the Child Care Collaborative Task Force found that “although 61% of young children live in households where all parents work, our state has sufficient licensed child care capacity for only 41% of young children and 5% of school-age children.”¹⁷ Put differently, while

¹⁶ “Early learning” or “early childhood education” is “child care,” but with a particular emphasis on education, learning, and school readiness. In Washington, for example, the Early Childhood Education and Assistance Program (ECEAP), funded by the State, and Head Start, funded by the federal government, provide “[f]ree early learning child care” for children between three and five years old from families that meet certain income and other eligibility criteria. *See ECEAP & Head Start*, WASH. DEP’T OF CHILDREN, YOUTH & FAMILIES, <https://www.dcyf.wa.gov/services/earlylearning-childcare/eceap-headstart> (last visited Dec. 9, 2022). In some communities, Early ECEAP and Early Head Start programs are available to provide care for children younger than three years old, as well. *Id.*

¹⁷ WASH. STATE DEP’T OF COMMERCE, WASHINGTON STATE CHILD CARE INDUSTRY ASSESSMENT 3 (2020) [hereinafter INDUSTRY ASSESSMENT], <https://www.commerce.wa.gov/wp-content/uploads/2020/08/Child-Care-Collaborative-Task-Force->

approximately 736,880 children ages 0–12 need non-parental child care, there are only 187,535 spaces in licensed child care programs available, leaving a gap of 549,345 children without access to licensed child care.¹⁸ Approximately 118,000 families with children four years-old or younger live in “child care deserts,” areas with inadequate child care supply.¹⁹ In 15 Washington counties, over half of families with children four years-old or younger live in a child care desert.²⁰

Access to child care and early learning is more limited for parents who work non-standard hours—in the early morning, at night, and on weekends.²¹ In Washington, only 24 out of every

Industry-Assessment-Report.pdf. The Task Force included early learning programs like ECEAP and Head Start in its calculation of the supply of licensed child care in the state. *Id.* at 13–14.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9.

²⁰ *Id.*

²¹ “Non-standard hours” can be defined generally as anytime outside 7:00 A.M. to 6:00 P.M. on weekdays. *See* DIANE SCHILDER ET AL., URBAN INST., COMPARING POTENTIAL DEMAND FOR NONTRADITIONAL-HOUR CHILD CARE AND PLANNED POLICIES ACROSS STATES 1 (2021),

100 child care providers offer care during non-standard hours.²² This disproportionately impacts low-income families, Black and Latinx parents, and single-parents, all of whom are more likely to work non-standard hours. 44% of Washington children under age six in low-income families have parents who work non-standard hours.²³ 47% of young Black children and 44% of young Latinx children have parents who work non-standard hours, compared to 30% of White children.²⁴ For nearly two-thirds (65%) of young children with a working, single parent, the parent works non-standard hours.²⁵

The supply of licensed child care and early learning providers is further diminished by an unstable workforce—high

<https://www.urban.org/sites/default/files/publication/104601/comparing-potential-demand-for-nontraditional-hour-child-care-and-planned-policies-across-states.pdf>.

²² *Washington: Access 2020*, CHILD CARE AWARE OF AM., <https://www.childcareaware.org/our-issues/research/ccdc/state/wa/> (last visited Dec. 9, 2022).

²³ SCHILDER ET AL., *supra* note 21, at 3.

²⁴ *Id.* at 4–6.

²⁵ *Id.* at 8.

operating costs and low wages contribute to high turnover rates for providers. Child care providers can charge only what parents in the surrounding area can afford to pay, which may not meet the provider's total costs.²⁶ Consequently, wages for child care providers are low, with the average provider making less than \$15 per hour.²⁷ Low wages contribute to a high turnover rate of 43% for child care providers, 94% of whom are women, and 50% of whom are people of color.²⁸

For those Washington families able to access child care and early learning, the costs of such care can be prohibitive. Washington was ranked the *third least* affordable state for center-based infant child care and *the least* affordable state for

²⁶ WASH. STATE DEP'T OF COMMERCE, WASHINGTON STATE CHILD CARE ACCESS STRATEGY 11 (2021), <https://www.commerce.wa.gov/wp-content/uploads/2021/08/FINAL-June-2021-C3TF-Legislative-Report.pdf>.

²⁷ *Id.*

²⁸ *Id.* at 10–11.

family child care for infants in 2020.²⁹ Washington fares no better in affordability for child care for toddlers—it was the *second least* affordable state for center-based care and *the least* affordable state for family child care for toddlers in 2020.³⁰ Washington was also ranked in the top 10 least affordable states for both center-based and family child care for four-year-old and school-aged children.³¹ In Washington, a family with one infant and one four-year-old in full-time center-based child care could be expected to spend *twice* as much on child care as rent in 2020.³² Child care for a single child in 2020 was 25% more

²⁹ CHILD CARE AWARE OF AM., DEMANDING CHANGE: REPAIRING OUR CHILD CARE SYSTEM apps. at 6, 8 (2021) [hereinafter DEMANDING CHANGE], [https://info.childcareaware.org/hubfs/Demanding Change Appendices.pdf](https://info.childcareaware.org/hubfs/Demanding%20Change%20Appendices.pdf). The main body of the report is available at [https://info.childcareaware.org/hubfs/2022-03-FallReport-FINAL \(1\).pdf](https://info.childcareaware.org/hubfs/2022-03-FallReport-FINAL%20(1).pdf).

³⁰ DEMANDING CHANGE, *supra* note 29, at 10, 12.

³¹ *Id.* at 14–16, 18–20.

³² *Id.* at 23.

expensive than the average tuition and fees at a four-year, public university.³³

It is no surprise, then, that 34% of Washington parents reported experiencing financial hardships as a result of child care costs.³⁴ At median prices and incomes, two-parent families with just one infant or preschooler in licensed child care spend between 9% and 15% of their income on child care.³⁵ Two-parent families with one infant and one preschooler in licensed child care spend up to 35% of their income on child care.³⁶ Child care costs for single mothers are far worse. Single mothers at median incomes spend between 13% and 65% of their income on child care for just one infant or preschooler, depending on the county in which they live.³⁷ The cost for licensed child care for one infant and one preschooler can be more than 150% of a single

³³ *Id.* at 25.

³⁴ INDUSTRY ASSESSMENT, *supra* note 17, at 9.

³⁵ *Id.* at 11.

³⁶ *Id.*

³⁷ *Id.*

mother's income.³⁸ And child care costs as a percentage of income are higher for both two-parent and single-parent Black families and other families of color.³⁹

Clearly, Washingtonians face a critical lack of access to affordable child care and early learning. By providing funding to improve access to child care and early learning, the capital-gains tax will yield significant benefits for children, parents, and providers. A meta-analysis of 22 studies of early childhood education programs conducted between 1960 and 2016 found that children who participate in such programs are less likely to be placed in special education, less likely to be retained in grade, and more likely to graduate high school.⁴⁰ Studies of other child

³⁸ *Id.*

³⁹ *Washington: Affordability 2020*, CHILD CARE AWARE OF AM., <https://www.childcareaware.org/our-issues/research/ccdc/state/wa/> (last visited Dec. 9, 2022).

⁴⁰ Dana Charles McCoy et al., *Impacts of Early Childhood Education on Medium- and Long-Term Educational Outcomes*, 46 EDUC. RESEARCHER 474 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6107077/pdf/nihms984699.pdf>.

care and early learning programs have shown lifelong benefits to children who participate, including significantly lower rates of arrest, incarceration, and substance abuse, and significantly improved socioeconomic status.⁴¹ As the Washington Student Achievement Council has explained: “Investing in early education has a greater payback over time than investing in remedial programs for school-age children or job training for disadvantaged adults.”⁴² Estimates of early learning’s “return on investment” vary, but in Washington, every dollar invested in early learning programs has been found to yield a \$12 return.⁴³

⁴¹ *Early Childhood Program Has Enduring Benefits*, NAT’L INSTS. OF HEALTH (June 20, 2011), <https://www.nih.gov/news-events/nih-research-matters/early-childhood-program-has-enduring-benefits>.

⁴² WASH. STUDENT ACHIEVEMENT COUNCIL, 10-YEAR ROADMAP ISSUE BRIEFING: STUDENT READINESS: EARLY LEARNING 8 (2013), <https://wsac.wa.gov/sites/default/files/EarlyLearning-IssueBriefing.pdf>.

⁴³ *Id.*; see also Jorge Luis García & James J. Heckman et al., *Quantifying the Life-Cycle Benefits of a Prototypical Early Childhood Program 1* (Nat’l Bureau of Econ. Research, Working Paper No. 23479, 2019),

Increasing affordability and availability of child care and early learning will also benefit Washington parents, enabling many to return to the workforce or to seek better-paying work. The Department of Commerce found that nearly one in five (18.3%) parents “turned down a job offer or promotion due to child care issues.”⁴⁴ Black and Native American parents turned down job offers and promotions because of child care issues more frequently.⁴⁵ And nearly half (47%) of unemployed parents considered child care issues to be a barrier to employment.⁴⁶ The number of female job-seekers who found child care to be a barrier to employment was also higher (51%) than among male job-seekers (41%).⁴⁷ The lack of accessible, affordable child care costs Washington families approximately \$16.9 billion in

<https://heckmanequation.org/wp-content/uploads/2017/01/w23479.pdf> (finding a 13.7% annual, tax-adjusted rate of return on investment in early childhood program).

⁴⁴ INDUSTRY ASSESSMENT, *supra* note 17, at 3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

foregone personal income per year, and costs the State approximately \$1.03 billion in foregone revenue each year.⁴⁸

C. The capital-gains tax will not cause wealthy Washingtonians or business to flee; rather, the tax will help stabilize budgets and grow the state's economy.

The capital-gains tax will not just benefit Washington families with children, however—the tax will benefit all Washingtonians, including the very wealthy few likely to pay the tax. The revenue generated by the tax will improve access to early learning and child care programs, which have the effect of improving educational and socioeconomic outcomes for the children who participate, leading to a more educated workforce with higher lifetime earnings, benefitting both Washington employers and the State through an increased taxbase. Improving access to affordable child care will also make it possible for Washington parents to improve their own socioeconomic standing by returning to the workforce, accepting higher-paying jobs, or by obtaining additional education and training. And early

⁴⁸ *Id.* at 9.

learning has been shown to reduce rates of arrest and incarceration in adulthood, a benefit to all Washingtonians.

Moreover, taxing capital gains will not reduce the competitiveness of Washington’s economy. A research team at Western Washington University found “that there is no robust relationship between taxes and economic competitiveness,” however competitiveness is measured.⁴⁹ Rather, “the indication is that more tax revenue can lead to more employment.”⁵⁰ The same is true for capital-gains taxes, specifically—higher taxes on capital gains do not inhibit economic growth.⁵¹ On the contrary,

⁴⁹ TAX STRUCTURE WORK GRP., PRELIMINARY REPORT: RESULTS OF ECONOMIC ANALYSES 34 (2020), <https://dor.wa.gov/sites/default/files/2022-02/TaxStructureWorkGroupPrelimReport2020.pdf>.

⁵⁰ *Id.*

⁵¹ See MARCO GUZMAN, INST. ON TAXATION & ECON. POLICY, STATE TAXATION OF CAPITAL GAINS: THE FOLLY OF TAX CUTS & CASE FOR PROACTIVE REFORMS 2 (2020), https://itep.sfo2.digitaloceanspaces.com/092520-State-Taxation-of-Capital-Gains_ITEP.pdf; Chye-Ching Huang, *The Myth That Low Capital Gains Rates Are Very Important to the Economy*, CTR. ON BUDGET & POLICY PRIORITIES (Sept. 20, 2012), <https://www.cbpp.org/blog/the-myth-that-low-capital-gains-rates-are-very-important-to-the-economy> (noting that

taxing capital gains “increase[es] the share of state revenues paid by the wealthy,” which allow[s] states to keep taxes lower on people with moderate incomes, who spend (rather than save) a larger share of their incomes to boost local economies.”⁵²

Contrary to the Clayton Respondents’ arguments, the wealthiest Washingtonians most likely to pay the capital-gains tax are unlikely to leave the state because of the tax. *See* Clayton Resp’ts Br. at 3–4, 50–52, 59. As an initial matter, there are few other states without income and capital-gains taxes. Forty-one states and the District of Columbia tax both income and capital gains.⁵³ Of these, all but nine tax capital gains at the same rate as income.⁵⁴ Wealthy Washingtonians are also, statistically, highly unlikely to move to one of the remaining eight states that do not tax capital gains for that reason alone.

“there is no obvious connection between tax rates on capital gains and economic growth”).

⁵² McNichol, *supra* note 8.

⁵³ McNichol, *supra* note 8.

⁵⁴ *Id.*

A study of every income-tax return filed by millionaires between 1999 and 2011 concluded that, “outside of Florida, differences in tax rates between states have no effect on elite migration.”⁵⁵ “Other low-tax states, such as Texas, Tennessee, and New Hampshire, do not draw away millionaires from high-tax states.”⁵⁶ In general, the wealthy are less likely to move to a new state than the general population and *far less likely* to move than low-income earners.⁵⁷ “Overall, higher-income earners show greater residential stability and geographic embeddedness

⁵⁵ Cristobal Young et al., *Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data*, 81 AM. SOC. REV. 421, 431 (2016), http://cristobalyoung.com/development/wp-content/uploads/2018/11/Millionaire_migration_Jun16ASRFeature.pdf. Migration to Florida may be explained by other factors beside the state’s lack of an income tax, such as climate and coastal geography. *Id.*; see also MICHAEL MAZEROV, CTR. ON BUDGET & POLICY PRIORITIES, STATE TAXES HAVE A NEGLIGIBLE IMPACT ON AMERICANS’ INTERSTATE MOVES 3 (2014), <https://www.cbpp.org/sites/default/files/atoms/files/5-8-14sfp.pdf> (explaining that climate is a major factor in interstate migration and may outweigh tax advantages).

⁵⁶ Young et al., *supra* note 55, at 431.

⁵⁷ *Id.* at 427.

than do low-income earners.”⁵⁸ There is “a strong place-specific component” to high incomes “that ties millionaires to their home states,” making the wealthy less likely to leave in pursuit of greater tax advantages.⁵⁹ As this study concludes:

Millionaires do not use their higher income to achieve greater mobility across states, but rather are more grounded in their states. The rich *are* different from the general population. They more often have family responsibilities—spouses and school-age children that embed them in place. They own businesses that tie them to place. And their elite income itself embeds them in place: millionaires are not searching for economic opportunity—they have found it.⁶⁰

Data do not support the proposition that wealthy people moved to Washington because it lacks an income tax and did not previously tax capital gains. Roughly the same number of millionaires move into the state as move out each year.⁶¹ When

⁵⁸ *Id.*

⁵⁹ *Id.* at 433.

⁶⁰ *Id.* at 440.

⁶¹ Gene Balk, *The Very Rich Aren't Likely to Flee Income-Tax States*, SEATTLE TIMES, June 6, 2020, <https://www.seattletimes.com/seattle-news/data/fyi-guy-the-very-rich-arent-likely-to-flee-income-tax-states/>.

wealthy Washingtonians leave the state, most of them move to Arizona, a state that taxes both income and capital gains.⁶² And between 1993 and 2011, more people moved from California to Oregon, which also taxes income, than from California to Washington.⁶³ During this same period, Washington also lost more residents to Idaho than it gained, despite Idaho's income tax.⁶⁴ One prediction of the number of millionaires who would leave the state if it taxed the wealthiest residents' income at one percent estimated that just nineteen (19) millionaires would move.⁶⁵ The capital-gains tax is thus extremely unlikely to affect wealthy Washingtonians' choices about where to live.

Recognizing that they have benefited from Washington's investment in public education and infrastructure, and that they will also experience the downstream benefits likely to flow from the capital-gains tax, many wealthy Washingtonians, such as

⁶² *Id.*

⁶³ MAZEROV, *supra* note 55, at 12.

⁶⁴ *Id.*

⁶⁵ Balk, *supra* note 61.

those represented by Progress Alliance here, affirmatively *want* the tax to take effect. As one likely capital-gains taxpayer has stated: “We need to build toward a future together, and paying an extra 7% on huge capital gains—which is still better than almost everywhere else all things considered—is a small price to pay for the long-term health of our region”⁶⁶ The simple fact is that the capital-gains tax will not harm or drive away the relatively small number of wealthy Washingtonians who are likely to pay it, but it represents a significant investment in Washington’s future, one paid for equitably by those who can most afford to pay and who have benefited most from living, working, and prospering in Washington.

⁶⁶ Taylor Soper, *Controversial Capital Gains Tax Spooks Wealthy Washington Residents as Some Unload Their Stocks*, GEEKWIRE (Dec. 9, 2021, 8:32 AM), <https://www.geekwire.com/2021/controversial-capital-gains-tax-spooks-wealthy-washington-residents-as-some-unload-their-stocks/> (comments of Aviel Ginzburg).

v. CONCLUSION

By passing a capital-gains excise tax, Washington has joined the vast majority of states that tax capital gains. It is a small but important step on the path to improving Washington's regressive tax system, so that all Washingtonians pay no more and no less than what they justifiably owe toward the State's provision of the basic services that benefit all Washingtonians. The revenue generated by the tax will be used to improve public education, and to increase access to and affordability of child care and early learning, programs with lifelong benefits for children and parents and an extraordinary return on investment for the State and all its residents. The tax imposes a modest burden on those taxpayers who can most afford it, and it is entirely implausible that it will cause Washington's wealthiest residents to flee to another state without income or capital-gains taxes. In short, it is a common-sense measure that benefits all Washingtonians while harming none, and the Court should uphold it as a proper excise tax under Washington law.

I hereby certify this document contains 4,721 words, in compliance with RAP 18.17.

Respectfully submitted this 12th day of December, 2022.



Dmitri Iglitzin, WSBA No. 17673
Jacob Harsen, MN Bar No. 0400097
BARNARD IGLITZIN & LAVITT, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119
(206) 257-6003
iglitzin@workerlaw.com
harsen@workerlaw.com

Attorneys for Amici Curiae

DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on the date noted below I caused the foregoing document to be filed with the Washington State Supreme Court via the appellate e filing system, which will automatically provide notice of such filing to all required parties.

Signed in Seattle, WA, this 12th day of December, 2022.


Jennifer Woodward, Paralegal

BARNARD IGLITZIN & LAVITT

December 12, 2022 - 4:50 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_20221212164510SC633746_0698.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was 2022 12 12_BRF_Amicus_Final.pdf
- 1007698_Motion_20221212164510SC633746_0794.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was 2022 12 12_MOT_Amicus_Final.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@pacificlawgroup.com
- craiga@lanepowell.com
- dawn.taylor@pacificlawgroup.com
- ddunne@orrick.com
- drubens@orrick.com
- edwardss@lanepowell.com
- engle@workerlaw.com
- fernando@workerlaw.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: Jennifer Woodward - Email: woodward@workerlaw.com

Filing on Behalf of: Dmitri L. Iglitzin - Email: iglitzin@workerlaw.com (Alternate Email: woodward@workerlaw.com)

Address:

18 W. Mercer St., Ste. 400

Seattle, WA, 98119

Phone: (206) 257-6016

Note: The Filing Id is 20221212164510SC633746