

**IN THE
SUPREME COURT OF THE UNITED STATES**

No. _____

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

Applicants,

v.

STATE OF WASHINGTON; DEPARTMENT OF REVENUE;
and VIKKI SMITH, Director of the Department of Revenue,

Respondents.

**APPLICATION TO THE HON. JUSTICE ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON**

Pursuant to Supreme Court Rule 13(5), the above-captioned Applicants hereby move for an extension of time of 30 days, up to and including July 24, 2023, for the filing of a petition for a writ of certiorari.

In support of this request, Applicants state as follows:

1. The Washington Supreme Court issued its opinion on March 24, 2023 (Exhibit 1), and issued its mandate on April 17, 2023. Unless an extension is granted, the deadline for filing a petition for certiorari will be June 22, 2023. Applicants are filing this application at least ten days before that date, in accordance with Supreme Court Rule 13.5. This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case concerns the constitutionality of a novel capital gains tax, enacted by the Washington legislature in 2021, that extends far beyond the state's borders. Wash. Laws of 2021, 67th Leg., ch. 196 (Engrossed Substitute Senate Bill ("ESSB") 5096). It is the first excise tax in the state targeted at individuals. The tax liability is calculated by taking an individual's federal capital gains, backing out certain excluded amounts, and subtracting long-term capital gains not allocated to Washington, to reach what is deemed an individual's "Washington capital gains." *Id.* §4. Long-term capital gains derived from transactions involving personal property are allocated to the state if (1) the property was located in the state at the time of sale or exchange, or (2) the property was located in Washington at some time during the tax year and the taxpayer was a resident of Washington at the time of the sale or exchange. Long-term capital gains derived from transactions involving intangible personal property are subject to the state capital gains tax if the taxpayer was domiciled in Washington at the time of the sale, regardless of whether the transaction that created the gain took place in another jurisdiction. *Id.* §11(1). "Washington capital gains" in excess of \$250,000 are then taxed at 7%. *Id.* §5.

3. Applicants, a group of individuals subject to the new tax, filed suit challenging the tax as (among other defects) incompatible with the Commerce Clause of the United States Constitution because it taxes transactions that occur wholly outside of Washington, discriminates against interstate commerce, and is not fairly apportioned. The Washington Superior Court granted summary judgment for Applicants, holding that the tax was properly characterized as a property tax because

it was based on receipt of income and that, as a result, it violated the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution. *See* Ex. 1 at 15. Specifically, the court held that the tax violated the state constitution’s uniformity requirement by imposing a 7% tax on an individual’s long-term capital gains exceeding \$250,000, but no tax on capital gains below that threshold, and that the tax exceeded the 1% maximum annual property tax levy in the state constitution. The court accordingly did not reach the federal Commerce Clause issue.

4. The Washington Supreme Court reversed, holding that the tax is actually an *excise* tax, and thus is not subject to the uniformity and levy requirements in the state constitution. According to the Washington Supreme Court, the tax does not tax property—i.e., the capital gains themselves—but rather taxes only an individual’s exercise of property rights—i.e., the exercise of the privilege to sell or transfer capital assets. In other words, the court held that the capital gains tax is a tax on *transactions* involving capital assets, “not the assets themselves or the income they generate.” Ex. 1 at 20.

5. Notwithstanding the fact that it construed the tax as an excise tax, and that the tax reaches transactions that occur wholly outside the state, the court also held that the tax is consistent with the Commerce Clause, Ex. 1 at 3-4, 42-52. Applying the four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which requires a tax to be “applied to an activity with a substantial nexus with the taxing State,” “fairly apportioned,” “nondiscriminatory” with respect to

“interstate commerce,” and “fairly related to the services provided by the State,” *id.* at 279, 284, the Washington Supreme Court concluded that each prong was met, including as to transactions occurring wholly outside the state. Ex. 1 at 44.

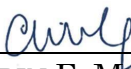
6. The Washington Supreme Court’s analysis cannot be reconciled with this Court’s jurisprudence, as it far exceeds permissible bounds. It imposes an excise tax on transactions that occur wholly outside the state simply because one party is a resident of or domiciled in Washington. *See* ESSB 5096 §11(1). And it allocates those out-of-state transactions entirely to Washington, again based solely on a taxpayer’s domicile. *See id.* Both allocations disregard the constitutionally determinative fact that “in the case of a tax on an *activity*, there must be a connection to the *activity* itself, rather than a connection only to the actor the State seeks to tax.” *Allied-Signal, Inc. v. Dir., Div. of Tax’n*, 504 U.S. 768, 778 (1992) (emphasis added).

7. Applicants’ counsel, Erin E. Murphy, was not involved in the proceedings below and requires additional time to familiarize herself with the record and research the legal issues presented in this case. Ms. Murphy also has substantial briefing obligations between now and the due date of the petition, including reply briefs in *Banta v. Ferguson*, No.2:23-cv-112 (E.D. Wash) (due June 15, 2023), and *National Shooting Sports Found. v. Ferguson*, No.2:23-cv-113 (E.D. Wash.) (due June 15, 2023); and a response brief in *Barnett v. Raoul*, No. 23-1825 (7th Cir.) (due June 19, 2023).

8. Applicants therefore request a thirty-day extension to allow for the preparation of a petition that fully addresses the important and far-reaching issues raised by the decision below.

WHEREFORE, for the foregoing reasons, Applicants request that an extension of time up to and including July 24, 2023, be granted within which Applicants may file a petition for a writ of certiorari.

Respectfully submitted,



ERIN E. MURPHY
Counsel of Record
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com
Counsel for Applicants

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