APPENDIX

TABLE OF APPENDICES

Appendix A

SUPREME COURT OF WASHINGTON

No. 100769-8

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,

Appellants.

Filed: Mar. 24, 2023

En Banc

OPINION

STEPHENS, J.—In 2021, the Washington Legislature enacted a capital gains tax, levied at a rate of seven percent on the sale or exchange of certain long-term capital assets. Ch. 82.87 RCW. Two groups of plaintiffs, the Quinn and Clayton plaintiffs (Plaintiffs), brought suit to facially invalidate the tax on three independent constitutional grounds. They principally claim the tax is a property tax on income, in violation of the uniformity and levy limitations on property taxes imposed by article VII, sections 1 and 2 of the Washington Constitution. They also claim the tax violates the privileges and immunities clause of the Washington Constitution and the dormant commerce clause of the United States Constitution. Wash Const. art. I, § 12; U.S. Const. art. I, § 8, cl. 3. In defending the tax, the State argues that it is a valid excise tax not subject to article VII's uniformity and levy requirements, and that it is consistent with other state and federal constitutional requirements.

The court below concluded the tax is a property tax that violates article VII's uniformity requirement. In light of this ruling, the court did not address Plaintiffs' additional constitutional challenges. We accepted direct review and now reverse. The capital gains tax is appropriately characterized as an excise because it is levied on the sale or exchange of capital assets, not on capital assets or gains themselves. This understanding of the tax is consistent with a long line of precedent recognizing excise taxes as those levied on the exercise of rights associated with property

ownership, such as the power to sell or exchange property, in contrast to property taxes levied on property itself. Because the capital gains tax is an excise tax under Washington law, it is not subject to the uniformity and levy requirements of article VII. We further hold the capital gains tax is consistent with our state constitution's privileges and immunities clause and the federal dormant commerce clause. We therefore reject Plaintiffs' facial challenge to the capital gains tax and remand to the trial court for further proceedings consistent with this opinion.

BACKGROUND AND PROCEDURAL HISTORY

Taxation in Washington is unique. Unlike most other states, we have no state personal or corporate income tax and instead generate revenue primarily through a combination of sales taxes, property taxes, and the business and occupation (B&O) tax—a tax on the privilege of doing business in Washington as measured by gross receipts. *See* Inst. on Tax'n & Econ. Pol'y, Who Pays? A Distributional Analysis of the Tax Systems in All 50 States 127 (6th ed. 2018) (hereinafter ITEP), https://www.itep.sf02.digitaloceanspaces.com/whopays-ITEP-2018.pdf [https://perma.cc/E6GN-U29Z]. Washington's tax system has earned the regrettable title of most regressive in the nation. *Id.* at 7-8; *see also* RCW 82.87.010. The poorest individuals bear the greatest tax burden due in large part to our heavy reliance on sales taxes and the lack of a graduated income tax, with low wage earners paying nearly six times more in state taxes as a percentage of personal income than Washington's wealthiest residents. ITEP, *supra*, at 126. This burden falls disproportionately on Black, Indigenous, and

People of Color (BIPOC), who are overrepresented in low income brackets. *See, e.g.*, Wash. Future Fund Comm., A Report to the Legislature 17 (2022), https://www.tre.wa.gov/wpcontent/uploads/2022-WFF-Committee-Report_Submitted-11.30.22.pdf [https://perma.cc/7QFG-3BNX].

Much of our modern taxation landscape can be traced to the 1930s—an era of rapid socioeconomic change and accompanying tax reform efforts, and related state Supreme Court decisions challenging those efforts. This court's decisions from that era still shape Washington tax law today. The capital gains tax must be understood in the context of history, so we provide a historical overview of taxation in Washington since early statehood before turning to the underlying facts and procedural history of this case.

Background on Washington's Tax System

Beginning in territorial days and through early statehood, Washington relied almost exclusively on ad valorem property taxes to fund the government.[1] Don Burrows, The Economics and Politics of Washington's Taxes From Statehood to 2013, at 82, 87-88 (2013) (in 1891, 95 percent of state and local tax revenues came from property taxes). During this early period, Washington's economy was driven by farming, logging, mining, fishing, and like industries, a

[1] Ad "ad valorem tax" is "imposed proportionally on the value of something (esp[ecially] real property), rather than on its quantity or some other measure." Black's Law Dictionary 1758 (11th ed. 2019); *see also* "property tax," *id*. at 1760 ("A tax levied on the owner of property (esp[ecially] real property), usu[ally] based on the property's value.").

reflection of the state's abundance of land and natural resources. Burrows, *supra*, at 87; *see also Culliton v. Chase*, 174 Wash. 363, 385, 25 P.2d 81 (1933) (Blake, J., dissenting) ("In 1889 the major portion of the wealth of the state lay in its lands and their produce . . . ."). Property taxes proved a fairly equitable and effective way to fund government because "in those days the value of tangible property was great and the cost of government little." *Culliton*, 174 Wash. at 385 (Blake, J., dissenting). Things changed, however, as the population expanded and the state urbanized. Washington's population more than tripled between 1890 and 1910. Burrows, *supra*, at 88. This fueled a greater need for government services and programs, especially education and roads. *Id.* at 88, 90-91. From the 1891-1893 biennium to the 1909-1911 biennium, government expenditures increased by over 600 percent. *Id.* at 88. In that same period, multiple national recessions stalled the Washington economy, causing widespread unemployment and a decrease in property values. *Id.* Population growth combined with declining property values translated to greater real property tax rates in order to meet the burgeoning demand for revenue. *Id.* Rates more than doubled from 1890 to 1912—from 0.7 percent to 1.6 percent—then climbed to 2.5 percent by 1924. *Id.* at 88, 121. Meanwhile, Washington industrialized, and individual wealth increasingly shifted to intangible forms of property like stocks and bonds, which largely evaded taxation because intangibles were easy to hide. *Id.* at 94, 131; *Culliton*, 174 Wash. at 385 (Blake, J. dissenting). Banks also successfully lobbied for a property tax exemption for

intangible personal property, exacerbating existing tax inequities. Burrows, *supra*, at 122, 129.

The increasingly onerous and unfair property tax burden spurred a popular movement for tax reform, which gained steam in the 1920s. *See* Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. Puget Sound L. Rev. 515, 523-28 (1993). The most vocal organization supporting tax reform was the Washington State Grange, a coalition of farmers who felt the acute effects of economic depression and burdensome property taxes. Phil Roberts, A Penny for the Governor, A Dollar for Uncle Sam: Income Taxation in Washington 61, 64 (2002). The Grange became a driving force behind efforts to enact new tax legislation and to reform constitutional provisions governing taxation. *Id.* Washington's 1889 constitution did not limit property tax rates and it contained a strict uniformity clause requiring that property taxes be uniform on all forms of property. Spitzer, *supra*, at 522. Tax reformers sought to liberalize constitutional constraints on taxation and to introduce an income tax. *Id.* at 522-24.

In 1929, the legislature enacted the first state income tax: a five percent corporate "franchise tax" on the net income of banks and financial institutions. Burrows, *supra*, at 130; Roberts, *supra*, at 66-67. The tax included liberal exemptions for large urban commercial banks, and it quickly faced legal challenges. Spitzer, *supra*, at 526. In *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930), this court voided the tax on federal law

grounds.[2] Roberts, *supra*, at 67. Specifically, the court found an equal protection violation because the tax applied to corporate banks but not to unincorporated entities or natural persons engaged in the savings and loan business. *Aberdeen*, 157 Wash. at 364-65.

Even as the franchise tax in *Aberdeen* fell, other tax reforms continued to take shape. In 1929, the legislature proposed constitutional amendment 14, which voters approved the following year. Spitzer, *supra*, at 524. Amendment 14 struck the first four sections of article VII and enacted a new section 1:

> The power of taxation shall never be suspended, surrendered or contracted away. *All taxes shall be uniform upon the same class of property* within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. *The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership*. . . .

Laws of 1929, ch. 191, § 1 (approved Nov. 1930) (emphasis added). This amendment allowed for different rates of taxation between different classes of property and expanded the constitutional definition of "property" to capture intangibles that had previously evaded taxation.

By 1932, the Great Depression was in full swing in Washington. Burrows, *supra*, at 137. Calls for tax relief remained steady as unemployment rates soared,

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[2] *Aberdeen* was the lead of two cases challenging the franchise tax. Its companion case was *Burr, Conrad & Broom, Inc. v. Chase*, 157 Wash. 393, 289 P. 551 (1930).

taxes went unpaid, and citizens lost their homes due to tax delinquency. *Id.* That year, the people took matters into their own hands and overwhelmingly approved two tax-related popular initiatives, I-64 and I-69, each by a vote of 70 percent. *Id.* The first initiative, I-64, imposed a 40-mill property tax rate limit.[3] The second initiative, I-69, enacted a graduated personal and corporate income tax. *Id.* at 138. But before the state collected any income tax revenues, I-69 faced court challenges. *Id.* This legal uncertainty, combined with the new 40-mill limit on property taxes, led the legislature to enact a B&O tax in order to meet the state's short-term fiscal needs. Spitzer, *supra*, at 529.

In 1933, the litigation challenging the I-69 income tax reached this court in the case of *Culliton v. Chase*, 174 Wash. 363. Burrows, *supra*, at 138-39. That term, the court had only eight justices as Justice Parker had fallen ill, and historical records relay that the first vote was deadlocked, four to four. *Id.* at 138. The governor appointed a new justice who appeared to favor the tax, but, as the story is told, one justice

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[3] "Mill rate" is "[a] tax applied to real property whereby each mill represents $1 of tax assessment per $1,000 of the property's assessed value." Black's Law Dictionary, *supra*, at 1190. For example, if the mill rate is 40 mills and a home is valued at $100,000, the owner will pay $4,000 in property taxes. *See id.* The 40-mill limit was later incorporated into the state constitution through amendment 17 in 1944. H.R.J. Res. 1, 28th Leg., Reg. Sess. (Wash), Laws of 1943, at 936 (approved Nov. 1944); *see also* Burrows, *supra*, at 159. Article VII, section 2's maximum levy rate of one percent as we know it today was enacted in 1972 through amendment 55. Engrossed S.J. Res. 1, 42d Leg., Reg. Sess. (Wash.), Laws of 1971, at 1827 (approved Nov. 1972); *see also Belas v. Kiga*, 135 Wn.2d 913, 922, 959 P.2d 1037 (1998).

changed his position while the case was pending, resulting in a five to four vote to void the tax. *Id.* at 138-39. The five justices joining that result agreed that income falls within amendment 14's broad definition of property as everything "subject to ownership," so the graduated features of the tax violated the constitutional requirement that all taxes be uniform on the same class of property. *Culliton*, 174 Wash. at 378 (Holcomb, J., lead opinion), 381-82 (Mitchell, J., concurring), 383-84 (Steinert, J., concurring).

The same day the court decided *Culliton*, it also issued *State ex rel. Stiner v. Yelle*, upholding the B&O tax as a constitutional excise tax on the privilege of engaging in business, and not a property tax. 174 Wash. 402, 407, 25 P.2d 91 (1933). Washington was thus left with the B&O tax but no income tax. "Recognizing that the interim B&O tax measure passed in 1933 would not provide for the total cost of state government operations over the long term, the next legislature thoroughly overhauled the tax system with the Revenue Act of 1935 . . . ." Spitzer, *supra*, at 538. The Revenue Act of 1935 drew various legal challenges, with this court upholding retail sales and use taxes pursuant to *Stiner*, and voiding personal and corporate income taxes (which the legislature had labeled as "privilege" taxes) pursuant to *Culliton*. *Id.* at 538-41. In the years since, various attempts to enact a graduated income tax through legislation or constitutional amendment have all failed. Burrows, *supra*, at 5.

By the end of the 1930s, the voters, legislature, and judiciary had carved the basic state tax structure

that remains today. *See* Spitzer, *supra*, at 538. As noted, we still have no graduated income tax, instead funding the state through a combination of other taxes such as the B&O tax, sales taxes, and real property taxes. Ours has been recognized as a uniquely regressive tax system that "asks those making the least to pay the most as a percentage of their income." RCW 82.87.010; *see also* ITEP, *supra*, at 127. The wealthiest households in Washington are disproportionately white, while the poorest households are disproportionately BIPOC. *See, e.g.*, Wash. Future Fund Comm., *supra*, at 17; *see also* Br. of Amicus Curiae (Equity in Educ. Coal. et al.) at 8-16. As a result, Washington's upside-down tax system perpetuates systemic racism by placing a disproportionate tax burden on BIPOC residents.

The 2021 Legislature Enacts a Capital Gains Tax

Forty-one other states and the District of Columbia tax capital gains. Elizabeth McNichol, *State Taxes on Capital Gains*, Ctr. on Budget & Pol'y Priorities (June 15, 2021), https://www.cbpp.org/research/state-budget-andtax/state-taxes-on-capital-gains. During the 2021 session, the Washington Legislature followed suit and enacted Engrossed Substitute Senate Bill (ESSB) 5096, imposing a seven percent tax on the sale or exchange of certain long-term capital assets beginning January 1, 2022. Laws of 2021, ch. 196 (*codified as* ch. 82.87 RCW); *see also* RCW 82.87.040(1). Washington's capital gains tax was passed by a narrow one-vote majority in the state senate in April 2021, and Governor Inslee signed the tax into law the following month. *See* Laws of 2021, ch. 196.

In enacting the tax, the legislature made specific findings that "it is the paramount duty of the state to amply provide every child in the state with an education" and that "high quality early learning and child care is critical to a child's success in school and life." RCW 82.87.010; *see also* Wash. Const. art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."). The legislature further found that "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. The legislative objective of the tax is thus twofold: "[t]o help meet the state's paramount duty" to amply fund public education, while "making material progress toward rebalancing the state's tax code." *Id.*

All revenues from the capital gains tax are dedicated to public education in Washington. The first $500 million collected from the tax each year will be deposited into the education legacy trust account, which supports K-12 education, expands access to higher education, and provides funding for early learning and child care programs. RCW 82.87.030(1)(a); *see also* RCW 83.100.230 (education legacy trust account). All annual revenue beyond $500 million will be deposited into the common school construction account, which funds the construction of facilities for common schools. RCW 82.87.030(1)(b); *see also* RCW 28A.515.320 (common school construction fund).

In order to meet the legislative goal of raising new revenue without exacerbating existing tax inequities, the capital gains tax contains numerous exemptions and deductions, including for transactions involving real estate, retirement accounts, agriculture, certain family-owned businesses, and charitable donations. RCW 82.87.050, .060(4), .070(1). The tax applies only to individuals, not businesses. RCW 82.87.040(1). And it applies only to the sale or exchange of long-term capital assets, meaning the taxpayer has held the asset for longer than one year. *Id.*; RCW 82.87.020(6). The legislature also included a standard deduction of $250,000, so the tax applies only to nonexempt long-term capital gains that exceed $250,000 beginning January 1, 2022. RCW 82.87.060(1). For example, if a Washington resident made $260,000 from selling stocks in 2022, that person would owe the seven percent tax on $10,000 of that amount, or $700.

The legislature established an allocation process in order to avoid taxing capital gains attributable to another state. The statute allocates to Washington only those gains from the sale or exchange of tangible personal property located in-state and intangible property owned by individuals domiciled in-state. RCW 82.87.100(1)(a)-(b). The statute also identifies circumstances when tangible personal property located out-of-state at the time of sale is allocated to Washington, for example, if the owner is a Washington resident at the time of sale. RCW 82.87.100(1)(a). To further avoid the risk of taxation by multiple states, the statute offers a tax credit "equal 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).

To calculate the total amount owed in a given tax year, taxpayers must identify their "Washington capital gains," using federal tax reporting as a starting point. RCW 82.87.020(1), (13). Then, specific adjustments are made to account for statutory exemptions, deductions, and allocations before arriving at the Washington taxable amount. The first payments are due from taxpayers on April 18, 2023. *See* RCW 82.87.110(1) (tax due on or before federal tax day). The Department of Revenue anticipates approximately 7,000 individuals will pay the tax in its first year. Over its first six years, the tax is projected to generate nearly $2.5 billion in revenue.

Procedural History

Plaintiffs separately filed suit in Douglas County Superior Court, seeking to facially invalidate the capital gains tax. All plaintiffs are individuals who own, or are entities whose members own, capital assets, the gains on which are potentially subject to the tax. They alleged the tax is a property tax, not an excise tax, and that it violates the uniformity and levy limitations on property taxes set forth in article VII, sections 1 and 2 of the Washington Constitution, as well as the privileges and immunities clause of the Washington Constitution. They further alleged the tax violates the dormant commerce clause of the United States Constitution.[4] The superior court

[4] The Quinn Plaintiffs also pleaded a claim under article I, section 7 of the Washington Constitution (right of privacy), but

consolidated the two cases and granted a motion by the "Education Parties"[5] (Intervenors) to intervene to defend the constitutionality of the tax.

Plaintiffs and the State filed cross motions for summary judgment on the facial constitutionality of the capital gains tax. The superior court denied the State's motion and granted summary judgment to Plaintiffs. The court characterized the tax as a property tax on income pursuant to *Culliton*, listing eight features of the tax it viewed as "hallmarks" of an income tax. Am. Clerk's Papers (ACP) at 869-72. It voided the tax as unconstitutional under article VII, sections 1 and 2 because (1) the $250,000 deduction violates the uniformity requirement and (2) the seven percent rate exceeds the constitutional maximum of one percent for property taxes. The court declined to address Plaintiffs' remaining claims.

Intervenors sought direct review under RAP 4.2(a)(2) because this case pertains to the constitutionality of a tax. They also sought direct review under RAP 4.2(a)(4), arguing the case raises fundamental and urgent issues of broad public import, including the viability of the *Culliton* decision. We granted review and accepted amici curiae briefs from various groups: four supporting the State in favor of

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they did not move for summary judgment on that claim and it is not before the court of appeal.

[5] The "Education Parties" include the Edmonds School District, Tamara Grubb (a teacher), Mary Curry (an early learning and childcare provider), and the Washington Education Association.

the capital gains tax[6] and three supporting Plaintiffs in opposing the tax.[7]

ANALYSIS

This challenge to the capital gains tax is before the court on cross motions for summary judgment. We review summary judgment decisions de novo, viewing all facts in the light most favorable to the nonmoving party. *Wash. Bankers Ass'n v. Dep't of Revenue*, 198 Wn.2d 418, 427, 495 P.3d 808 (2021), *cert. denied*, 142 S. Ct. 2828 (2022).

Plaintiffs seek to facially invalidate the capital gains tax on three separate grounds. They first argue that the tax is a property tax on income pursuant to *Culliton* and that it violates the uniformity and levy limitations on property taxes set forth in article VII, sections 1 and 2 of the Washington Constitution. They also argue the tax violates our state constitution's privileges and immunities clause and the federal constitution's dormant commerce clause. The State maintains that the capital gains tax is an excise tax, not a property tax, and that each of Plaintiffs' constitutional challenges fails. Separately, Intervenors challenge the wisdom of *Culliton*. If the court were to hold the capital gains tax comes within the purview of *Culliton*'s holding that an income tax is a property tax subject to article VII, sections 1 and 2, Intervenors urge the court to overturn *Culliton* as

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[6] Br. of Amicus Curiae (Equity in Educ. Coal. et al.); Amicus Curiae Br. of Law Professors; Amici Curiae Br. of Mary Ann Warren et al.; Wash. State Lab. Council et al. Br. of Amici Curiae.

[7] Br. of Amici Curiae Ass'n of Wash. Bus. et al.; Br. of Amici Bldg. Indus. Ass'n of Wash. et al.; Br. of Amici Curiae Nat'l Taxpayers Union Found. et al.

incorrect and harmful or because its legal underpinnings have eroded.[8]

We hold the capital gains tax is an excise tax under Washington law. We decline to reexamine *Culliton* because article VII's uniformity and levy limitations on property taxes do not apply. We further conclude the capital gains tax survives constitutional scrutiny under our state privileges and immunities clause and the federal dormant commerce clause. We

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[8] We will overrule precedent only upon a showing that (1) an established rule is incorrect and harmful or (2) the legal underpinnings of our precedent have changed or disappeared. *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (plurality opinion). We have treated these standards as independent of each other, so satisfying one may provide justification to overrule a prior case. *See id.* (both standards met); *State v. Crossguns*, 199 Wn.2d 282, 290, 505 P.3d 529 (2022) (incorrect and harmful); *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014) (legal underpinnings). Our decisions to date have not explained why no showing of harm is required to overturn a precedent whose legal underpinnings have eroded, but our reasoning demonstrates this is a historically driven inquiry, as opposed to a reassessment that a precedent is legally incorrect. To determine if the legal underpinnings of a precedent have eroded, we generally look to whether the foundation of the legal principle at issue no longer exists, such as when a United States Supreme Court opinion we relied on is overturned. Requiring an additional showing of social harm in such circumstances would seem unnecessary, given that the very foundation of the rule we announced has eroded. In contrast, a determination that a precedent is legally incorrect generally involves a critical reassessment of the principles on which it rests. As an added protection against a later majority second-guessing the wisdom of a prior majority of the court and thereby creating instability in the rule of law, we require an additional showing that the prior court's interpretation has resulted in demonstrable harm.

therefore reverse the superior court's grant of summary judgment to Plaintiffs and remand to the superior court for further proceedings consistent with this opinion.

I. The Capital Gains Tax Is a Valid Excise Tax Not Subject to the Requirements of Article VII, Sections 1 and 2

"The Legislature possesses a plenary power in matters of taxation except as limited by the Constitution." *Belas v. Kiga*, 135 Wn.2d 913, 919, 959 P.2d 1037 (1998). The burden to prove a legislative act is unconstitutional rests on the statute's challenger—here, Plaintiffs—and is sometimes expressed as requiring proof beyond a reasonable doubt.[9] *Id.* at 920.

Plaintiffs' first constitutional argument is that the capital gains tax is a property tax that violates the uniformity and levy limitations imposed by article VII of the Washington Constitution. Article VII, section 1 requires that "[a]ll taxes shall be uniform upon the same class of property." Section 2 provides that "the aggregate of all tax levies upon real and personal property . . . shall not in any year exceed one percentum of the true and fair value of such property in money." These uniformity and levy requirements apply only to property taxes, not to excise taxes. *See,*

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[9] As used in this context, "'beyond a reasonable doubt'" is not an evidentiary standard but a reflection of "respect for the legislature." *Sch. Dists.' All. for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 606, 244 P.3d 1 (2010). It signifies that we will not invalidate a statute unless the challenger, "by argument and research, convince[s] the court that there is no reasonable doubt that the statute violates the constitution." *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

e.g., *Harbour Vill. Apts. v. City of Mukilteo*, 139 Wn.2d 604, 605, 608, 989 P.2d 542 (1999) (municipal tax on rental property was not an excise, but a property tax violative of article VII, sections 1 and 2). The central question we must answer is whether the capital gains tax constitutes a property tax within the meaning of our state constitution.

As the superior court correctly observed, this inquiry is "'guided by nearly a century of case law.'" ACP at 867 (internal quotation marks omitted) (quoting *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 216, 444 P.3d 1235 (2019), *review denied*, 195 Wn.2d 1013 (2020)). However, the superior court erred in its application of our precedent, which firmly indicates this tax is an excise. A steady line of cases beginning with *Culliton* defines a "property tax" as a tax on the mere ownership of property, while an "excise tax" applies to the exercise of rights in and to property or the exercise of a privilege. The capital gains tax is an excise tax because taxpayers do not owe the capital gains tax merely by virtue of owning capital assets or capital gains, like a property tax. Instead, the tax relates to the exercise of rights "in and to property"—namely, the power to sell or transfer capital assets—like an excise. *Mahler v. Tremper*, 40 Wn.2d 405, 410, 243 P.2d 627 (1952). And the "'incidents'" of this tax do not make it a property tax, as the superior court concluded, but rather confirm that it is an excise. ACP at 869. Because the capital gains tax is appropriately characterized as an excise under our precedent, the tax is not subject to the uniformity and levy requirements of article VII.

A. Background on Property and Excise Tax Precedent

This court once remarked there is no "precise line" separating property and excise taxes. *Morrow v. Henneford*, 182 Wash. 625, 628, 47 P.2d 1016 (1935). But over the course of decades, that line has sharpened. A survey of our cases reveals we have articulated and consistently applied certain key principles for distinguishing property taxes from excise taxes. Applying those principles here, the capital gains tax falls squarely on the excise side of the line because it taxes transactions involving capital assets—not the assets themselves or the income they generate.

As noted above, much of Washington's modern taxation landscape stems from reform efforts and related court decisions challenging those efforts in the early twentieth century. In 1930, this court ruled in *Aberdeen* that a corporate income tax violated federal equal protection guaranties. 157 Wash. at 365. Three years later, the court issued its landmark decision in *Culliton*, addressing the constitutionality of a newly enacted graduated personal income tax passed by voters through popular initiative. Relying in part on *Aberdeen*, the court held that income is "property" within the meaning of our state constitution, so an income tax must comply with the uniformity and levy requirements of article VII, sections 1 and 2 of the Washington Constitution. *Culliton*, 174 Wash. at 376 (invalidating graduated personal income tax for lack of uniformity). Since *Culliton*, Washington appellate courts have reaffirmed that holding, consistently striking down graduated net income taxes as

unconstitutional, nonuniform property taxes. *See Jensen v. Henneford*, 185 Wash. 209, 211, 215, 53 P.2d 607 (1936) (plurality decision) (personal net income tax); *Petrol. Navigation Co. v. Henneford*, 185 Wash. 495, 495-96, 55 P.2d 1056 (1936) (corporate net income tax); *Power, Inc. v. Huntley*, 39 Wn.2d 191, 193-95, 235 P.2d 173 (1951) (corporate net income tax); *Kunath*, 10 Wn. App. 2d at 211, 232 (personal net income tax). What all of these taxes had in common was that they imposed a broad-based net income tax, capturing "almost any income from almost every source." *Power, Inc.*, 39 Wn.2d at 197.

The same day this court decided *Culliton*, it also issued *Stiner*. 174 Wash. 402. That decision upheld Washington's first B&O tax, which assessed a tax on "'the privilege of engaging in business activities'" in this state, as measured by "'gross proceeds of sales, or gross income, as the case may be.'" *Id.* at 404 (quoting Laws of 1933, ch. 191). The *Stiner* court held the B&O tax is an excise, reasoning it "does not concern itself with income which has been acquired" and instead relates to the privilege of citizens to pursue "gainful occupation with the expectation that [they] will be by the state fully protected and made secure . . . in [their] gains therefrom." *Id.* at 406-07. "[T]hat the amount of the tax is measured by the amount of the income in no way affects the purpose of the act or the principle involved." *Id.* at 407. *Stiner* therefore distinguished between a property tax *on* income and an excise tax on a particular activity or privilege, which tax is *measured by* income.

Just two years later, in 1935, this court had an opportunity to apply the distinction drawn in *Culliton*

and *Stiner* in a case challenging the constitutionality of a retail sales tax. We first noted that a tax's true character "'must be determined by its incidents,'" not by its name. *Morrow*, 182 Wash. at 628 (quoting *Wiseman v. Phillips*, 84 S.W.2d 91, 96 (Ark. 1935)). A property tax is "'a tax which falls upon the owner merely because [they are an] owner, regardless of the use or disposition made of [their] property.'" *Id.* at 631 (quoting *Bromley v. McCaughn*, 280 U.S. 124, 137, 50 S. Ct. 46, 74 L. Ed. 226 (1929)). In contrast, an excise tax is levied "upon licenses to pursue certain occupations, and upon corporate privileges," like the B&O tax. *Id.* at 627 (citing 1 Thomas M. Cooley, A Treatise on the Law of Taxation § 42 (4th ed. 1924)). And relevant to the present case, "'a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise.'" *Id.* at 630 (quoting *Bromley*, 280 U.S. at 136). The *Morrow* court upheld the retail sales tax as an excise, emphasizing it applies "'only to a limited exercise of property rights'" and is "'clearly distinguishable from a tax which falls upon the owner merely because [they are an] owner.'" *Id.* at 631 (quoting *Bromley*, 280 U.S. at 137).

In the decades since, this court has continued to apply the principles set forth in *Culliton*, *Stiner*, and *Morrow* to determine whether a tax constitutes an excise or property tax. For example, in *Mahler* this court upheld the real estate sales tax as an excise. 40 Wn.2d at 406-07. Though that tax clearly concerned property, we held it is a valid excise because it taxes the *sale* of property. *Id.* at 409-10. Imposition of the tax is "not upon each and every owner merely because [they are] the owner of the property involved" but

instead "relates to an exercise of one of several rights in and to property." *Id.* ("[a] sales tax . . . is a tax upon the act or incidence of transfer" and "not a tax upon the subject matter of that sale"); *accord Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) (excise on the transaction of leasing personal property); *High Tide Seafoods v. State*, 106 Wn.2d 695, 700, 725 P.2d 411 (1986) (excise on the use, possession, and transfer of food fish for commercial purposes); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 652, 62 P.3d 462 (2003) (excise on the transaction of leasing public property); *Covell v. City of Seattle*, 127 Wn.2d 874, 889-91, 905 P.2d 324 (1995) (property tax labeled a "street utility charge" but levied solely based on one's status as a residential homeowner), *abrogated on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019); *Harbour Vill. Apts.* 139 Wn.2d at 608 (property tax on all residential properties offered for rent, regardless of whether they were rented). Most recently, we applied these principles in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014). There, we unanimously upheld the estate tax as an excise "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.'" *Id.* at 832 (quoting *West v. Okla. Tax Comm'n*, 334 U.S. 717, 727, 68 S. Ct. 1223, 92 L. Ed. 1676 (1948)).

Amidst this collection of precedent, there is one case reflecting a narrow expansion of *Culliton* and a limited departure from *Stiner*, *Morrow*, *Mahler*, and similar excise tax cases. In *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, this court considered a

challenge to a state tax imposed "'[u]pon every person engaging within this state in the business of . . . the renting or leasing of real property.'" 56 Wn.2d 46, 47, 351 P.2d 124 (1960) (quoting Laws of 1959, ch. 5, § 4). The tax was measured by gross rental business income exceeding $300 per month. *Id.* At the time of *Apartment Operators*, the "right to levy an excise tax on the privilege of doing business or exercising corporate franchises and to base that tax on income" was well established. *Power, Inc.*, 39 Wn.2d at 197; *see also, e.g.*, *Stiner*, 174 Wash. at 407 (B&O tax is a valid excise measured by income). Nonetheless, in a brief per curiam opinion, the court invalidated the rental tax as an unconstitutional, nonuniform property tax under *Culliton*. *Apt. Operators*, 56 Wn.2d at 47 (stating "a tax on rental income is a tax on property, and not an excise tax").[10]

Importantly, our subsequent cases concerning taxation of rental profits appear to recognize *Apartment Operators* was flawed, and we expressly limited the holding in that case to its facts. For example, just five years later the court examined a retail sales tax as applied to the lease of a ship used as a floating hotel. *Black*, 67 Wn.2d at 98. Citing both *Morrow* and *Mahler*, the court upheld the tax as an

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[10] The sum total of the court's reasoning is captured in the following passage: "[A] tax on rental income is a tax on property, and not an excise tax. Furthermore, a tax upon rents from real estate is a tax upon the real estate itself, and is, thus, a second tax upon real estate. There is no tax levied by the act upon unrented real estate. For such reasons (the exclusion of gross income of under three hundred dollars and the second tax upon rental realty), the instant tax lacks the uniformity required by [article VII]." *Apt. Operators*, 56 Wn.2d at 47.

excise "on the transaction of leasing tangible personal property." *Id.* at 99-100. It further noted, "To the extent that the per curiam opinion in *Apartment Operators may seem* to make statements inconsistent with the above outlined principles, it is hereby deemed not controlling in the instant case." *Id.* at 100 (citation omitted). When the case was cited nearly 40 years later, we again found *Apartment Operators* "not controlling" and upheld the leasehold excise tax (LET), concluding the LET is an excise because it applies to rental transactions for the use and occupancy of public property. *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 650-52. This retreat from *Apartment Operators* evidences a recognition that it is out of step with the well-established rule that a tax measured by income remains an excise so long as it relates to the exercise of a privilege granted by the State or rights "in and to property," such as the power to lease or sell. *Mahler*, 40 Wn.2d at 410. Such excise taxes stand in contrast to taxes assessed on property by virtue of ownership itself. *See Harbour Vill. Apts.*, 139 Wn.2d at 607-08 (municipal per-unit "residential dwelling unit" fee was an unconstitutional property tax because it applied to every property offered for rent regardless of whether property was actually rented, and thus "it is not the rental transaction which is taxed . . . it is the fact of ownership of rental *property* which is taxed"); *Covell*, 127 Wn.2d at 889-91 (municipal "street utility charge" levied on all residential property owners was an unconstitutional property tax because "liability for the charge ar[ose] from [the taxpayers]' status as property owners and not from their use of a city service").

This background on excise and property taxes establishes the foundation for our conclusion that the

capital gains tax is properly considered an excise tax under Washington law and is therefore not subject to the strictures of article VII, sections 1 and 2.

B. The Capital Gains Tax Is an Excise Because It Relates to the Exercise of Rights in and to Property

The capital gains tax is an excise levied on capital transactions. Indeed, Plaintiffs concede the tax does not apply unless "assets are sold or exchanged for gain." Quinn Resp'ts' Resp. to State of Wash. Opening Br. (Quinn Br.) at 17; *see also* RCW 82.87.040(1) (tax "imposed on the sale or exchange of long-term capital assets"). No one owes the tax merely by virtue of asset ownership, as is characteristic of property taxes. *Morrow*, 182 Wash. at 631 (a property tax "falls upon the owner merely because [they are an] owner"). One can own capital assets without ever owing the tax. One owes the tax only when they sell or exchange qualifying long-term capital assets, as is characteristic of an excise. *Mahler*, 40 Wn.2d at 409-10 ("a tax upon the sale of property is not a tax upon the subject matter of that sale" and is instead an excise). It is well established that a tax relating to rights "in and to property," such as the power to sell capital assets, constitutes an excise. *Id.* at 410.

This tax is wholly unlike the broad-based net income taxes we previously invalidated under *Culliton*. Those taxes applied to the taxpayer's aggregate net income and were untethered to any specific taxable activity; rather, the taxable incident was the receipt of income itself. *See, e.g.*, *Jensen*, 185 Wash. at 218-19 (net income tax purporting to tax "'the privilege of receiving income'" was an

unconstitutional property tax because taxing "the right to receive . . . income" is functionally equivalent to taxing income ownership (quoting Laws of 1935, ch. 178)); *Kunath*, 10 Wn. App. 2d at 222-24 (municipal tax on aggregate of net income sources amounted to an unconstitutional property tax under *Culliton*). Here, the capital gains tax does not capture net income sources but instead narrowly applies to capital transactions resulting in realized gains. Unlike the taxes considered in *Culliton*, *Jensen*, and similar cases involving net income taxes, this tax specifically targets an activity long recognized as subject to excise taxation—the sale or exchange of property.

The tax here is comparable to the real estate and rental excises we upheld in *Mahler*, *Black*, and *Washington Public Ports Ass'n*. Each of those cases involved taxes that were *measured* by income derived from real estate sales or rentals, but we recognized those taxes were excises because they applied to real estate *transactions*. The taxable incident is the transaction. The same is true here: the capital gains tax is measured by gains (income) stemming from capital transactions—and it applies when "assets are sold or exchanged for gain." Quinn Br. at 17. *Mahler*, *Black*, and *Washington Public Ports Ass'n* are controlling. To the extent *Apartment Operators* supports a contrary conclusion, our later cases have limited *Apartment Operators* to its facts, and we decline to expand it now.

Plaintiffs vigorously argue the taxable incident is not the transaction but the realization of capital gains beyond $250,000. Plaintiffs confuse the tax's subject

matter with its measure. The tax is not levied on capital gains; rather, it is measured by capital gains. Our cases unequivocally hold that excise taxes levied on a particular privilege or incident of property ownership may be measured by income, and this does not transform the fundamental nature of the tax. *E.g.*, *Stiner*, 174 Wash. at 407 (measuring an excise tax by income "in no way affects the purpose of the act or the principle involved"). We have upheld many excise taxes measured by income. *See generally, e.g.*, *Mahler*, 40 Wn.2d 405 (real estate sales excise measured as percentage of sale price); *Wash. Pub. Ports Ass'n*, 148 Wn.2d 637 (LET measured as percentage of rent); *Hambleton*, 181 Wn.2d 802 (estate excise measured as percentage of estate value). That this tax applies only when one realizes gains beyond $250,000 speaks to the legislative choice to create certain deductions establishing a threshold at which the tax applies—it does not change the taxable incident, which remains the transaction, not the ownership of property. Indeed, many valid excise taxes contain similar features. *See, e.g.*, RCW 82.32.045(5)(a) (B&O tax exempts businesses that gross $125,000 or less annually); *Estate Tax Tables*, Wash. State Dep't of Revenue (2023) (under RCW 83.100.020(1)(a)(iii), estate tax exempts estates worth $2,193,000 or less), https://dor.wa.gov/taxesrates/ other-taxes/estate-tax-tables [https://perma.cc/LX6G-VNXL]; RCW 82.08.0293(1) (retail sales tax exempts transactions for sale of food). Exemptions and deductions are pervasive features of excise and property taxes alike. None of our cases appear to suggest the presence of these features bears on the subject or nature of the

tax, which, again, relates to rights "in and to property," as an excise. *Mahler*, 40 Wn.2d at 410.[11]

Plaintiffs argue the capital gains tax cannot be an excise because it lacks certain distinctive features of a classic excise tax, but they are incorrect. First, Plaintiffs misconstrue prior cases indicating that excise taxes apply only to purely "voluntary" conduct. They maintain a true "excise tax is 'imposed upon a voluntary act *of the taxpayer*, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event' . . . ." Quinn Br. at 15 (quoting *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005)); *see also id.* at 18-19 (identifying possible scenarios where "individuals will be subject to the capital gains tax even if they do not deliberately, intentionally, or voluntarily take any action to cause the sale or exchange of long-term capital assets"). In Plaintiffs' view, the capital gains tax is not an excise because one owes the tax even in circumstances where the taxpayer does not "voluntarily" sell an asset, for example, where a trust sells capital assets on behalf of

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[11] Like Plaintiffs, the dissent misses this point with respect to the $250,000 deduction. The dissent views the taxable incident here as the realization of gains beyond $250,000, stating that "the financial outcome of the capital transaction *determines* whether the tax applies." Dissent at 14. But the same is true of the B&O excise, which exempts businesses whose profits fall below a certain dollar threshold. In those circumstances, the financial outcome similarly determines whether the tax applies—but the B&O tax is still an excise. The legislature may permissibly establish exemptions or deductions fixing a particular threshold that triggers the tax, and the choice to do so does not alter the fact that the transaction is the taxable incident.

trust beneficiaries. To be sure, voluntariness is a distinctive feature of excise taxes, but Plaintiffs take too narrow a view. The State correctly notes that most transactions subject to this tax will have been voluntarily made by the taxpayer, and we are unpersuaded that the nature of the tax changes under the circumstances proffered by Plaintiffs, where the taxpayer does not personally undertake the transaction from which they realize a gain. Plaintiffs' logic falters when considered in the context of other taxes we have held to be valid excises based on voluntary transfers of property. For example, we unanimously upheld the estate tax as a valid excise though it is triggered by death—an event not usually associated with individual voluntary choice. *Hambleton*, 181 Wn.2d at 831-33 ("taxing [qualified terminable interest property] assets upon the death of a surviving spouse qualifies as an excise tax"). And in the context of real estate transactions, a minority owner of property would still owe the real estate excise even if they personally objected to the majority owner's decision to sell jointly held property. "Voluntariness" in this context is best understood as pertaining to some action that results in a sale or transfer of property as the taxable event, whether or not reflecting the individual will of the taxpayer. That there may not be a personal, deliberate decision to engage in a transaction by the taxpayer in some situations does not transform this tax from an excise into a property tax.

Next, Plaintiffs argue the capital gains tax cannot be an excise because it does not rest on the exercise of any taxable privilege, as with the B&O tax. Moreover, they argue, the tax is not measured by the extent that

an individual engages with any privilege. As to the first point, the State is not always required to identify a taxable privilege in order for a tax to constitute an excise. While that was the case with the B&O tax at issue in *Stiner*, there are different flavors of excise taxes under our precedent. Some regulate a particular privilege granted by the State, whereas others relate "to an exercise of one of several rights in and to property," such as purchases, sales, and use. *Mahler*, 40 Wn.2d at 409-10; *see also, e.g.*, *P. Lorillard Co. v. City of Seattle*, 83 Wn.2d 586, 588-90, 521 P.2d 208 (1974) (holding municipal privilege tax on business of wholesaling cigarettes and state tax on "sale, use, [and] consumption" of cigarette products "are not of the same nature" for preemption purposes, though both are excise taxes related to cigarettes). We have upheld many taxes relating to the exercise of property rights as excise taxes without specifying a particular privilege that is being taxed. *See generally, e.g.*, *Morrow*, 182 Wash. 625 (retail sales excise); *Mahler*, 40 Wn.2d 405 (real estate sales excise); *Black*, 67 Wn.2d 97 (retail sales excise applied to lease of floating hotel); *High Tide Seafoods*, 106 Wn.2d 695 (excise on transfer and possession of enhanced food fish for commercial purposes). The capital gains tax belongs to this distinct category of excise taxes relating to incidents of property ownership, so the lack of any taxable privilege is immaterial. As to the second point, Plaintiffs are correct that excise taxes typically have some degree of connection between the subject matter and the measure of the tax. *See, e.g.*, *Sheehan*, 155 Wn.2d at 801 (excise taxes require a "nexus between the privilege and the taxation method," though the state constitution does not demand an

entirely precise fit). But when the capital gains tax is properly viewed as a tax on the exercise of rights in and to property, there is an obvious nexus between the subject of the tax (transactions involving capital assets) and the measure of the tax (gains realized from capital transactions).

More broadly considered, Plaintiffs' arguments concerning the ways in which the capital gains tax differs from other excise taxes rests on their view of the "incidents" of the tax. The superior court accepted these arguments, concluding that the capital gains tax bears certain "hallmarks" of property taxes. We take this opportunity to more specifically address the superior court's analysis and to provide clarity on our precedent concerning tax "incidents."

C. The Superior Court Misapplied Our Precedent Concerning Tax "Incidents," Which Confirm the Tax Is an Excise

In concluding the capital gains tax is a property tax on income, the superior court relied almost exclusively on the principle that courts determine the true nature of a tax based on "'its incidents, not by its name.'" *Harbour Vill. Apts.* 139 Wn.2d at 607 (quoting *Jensen*, 185 Wash. at 217); *see also* ACP at 869-71. The superior court listed eight "incidents" it viewed as "hallmarks" of an income tax, then it voided the tax for violating the uniformity and levy requirements of article VII, sections 1 and 2.

This approach is flawed because it treats the term "incidents" as encompassing all the various facets of a tax, ranging from exemptions and deductions, to reliance on federal reporting mechanisms, calculation methods, and more. Though it is true that we look

beyond legislative labels and characterize a tax based on its "incidents," *Jensen*, 185 Wash. at 217, the plural term "incidents" as used in our cases describes specific elements of a tax. We have explained that any tax statute has three basic elements: (1) the "taxable incident," or the activity that triggers the tax, (2) the tax measure, or the "base that represents the value of the taxable incident," (3) and the tax rate, which, "when multiplied by the tax measure, determines 'the amount of tax due.'" *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 39, 156 P.3d 185 (2007) (quoting 1B Kelly Kunsch et al., Washington Practice: Methods of Practice § 72.3, at 449 (1997)). When we determine the nature of a tax, we examine the first two elements: the subject of the tax (the "taxable incident") and the measure. *P. Lorillard Co.*, 83 Wn.2d at 589 ("We approve of and adopt the criteria for determining the incidence of a tax . . . that is, the subject matter and measure of the tax."); *Harbour Vill. Apts*. 139 Wn.2d at 607 n.1 ("The nature of a tax is revealed by examining the subject matter of the tax and . . . 'the measure of the tax.'" (quoting *Reed v. City of New Orleans*, 593 So. 2d 368, 371 (La. 1992)). Here the taxable incident is the sale or exchange of qualifying capital assets. The measure is the resulting gain. Consistent with our case law, the incidents of this tax confirm it is an excise. *See generally*, *e.g.*, *Mahler*, 40 Wn.2d 405 (excise on sale of real property measured by sale proceeds).

Rather than focusing on these elements, the superior court appears to have analogized between the capital gains tax and the federal individual income tax, drawing comparisons between the two. This is the wrong constitutional lens. Because the federal

individual income tax is considered an *excise tax* under federal law, comparing various facets of the federal income tax and the capital gains tax does not support characterizing the capital gains tax as a *property tax* under article VII. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 16-17, 36 S. Ct. 236, 60 L. Ed. 493 (1916) (income taxes do not come "within the class of direct taxes on property," and "taxation on income [is] in its nature an excise entitled to be enforced as such"). To determine whether a tax is a property tax within the meaning of the Washington Constitution, we must look to Washington cases, which have articulated clear principles for distinguishing property and excise taxes. The superior court erred in its application of those principles here, instead identifying several "hallmarks" that find little or no support in our precedent delineating quintessential features of a property tax and that can be found in taxes we have upheld as excises.

The first such "hallmark" states the capital gains tax "relies upon federal IRS income tax returns that Washington residents must file and is thus derived from a taxpayer's annual federal income tax reporting." ACP at 869 (citing *Kunath*, 10 Wn. App. 2d at 215). A related "hallmark" states the tax "is based on an *aggregate* calculation of an individual's capital gains over the course of a year from all sources, taking into consideration various deductions and exclusions, to arrive at a single annual taxable dollar figure." *Id.* at 870. Reliance on federal tax reporting mechanisms does not transform the capital gains tax into a property tax. For example, we unanimously upheld the estate tax as an excise despite our express acknowledgement that Washington's Estate and

Transfer Tax Act, ch. 83.100 RCW, "is based" on "federal estate tax law." *Hambleton*, 181 Wn.2d at 832. As with the estate tax, there are legitimate administrative reasons why the legislature would implement aspects of federal tax law to collect the capital gains tax, including the use of federal forms and an aggregate calculation method. *See In re Est. of Bracken*, 175 Wn.2d 549, 583, 290 P.3d 99 (2012) (Madsen, J., concurring/dissenting) (by relying on federal estate tax law, our "legislature avoided having to duplicate congressional effort" in establishing an effective reporting system and "also helped to avoid the complication and confusion that a different set of state rules might create").

Reliance specifically on federal *income tax* reporting makes no difference here, either. *Power* is this court's sole case suggesting that reliance on federal income tax reporting may be relevant to the question whether a tax is an excise or property tax on income. 39 Wn.2d 191. But federal reporting alone was not determinative in *Power*, nor is it here. *Power* involved a corporate net income tax the legislature levied on every bank and corporation purportedly for "'the privilege of exercising its corporate franchise'" in Washington. *Id.* at 193 (quoting LAWS OF 1951, ch. 10). In ruling this tax was an unconstitutional, nonuniform property tax on income, the *Power* court noted, "It is geared throughout to the Federal income tax legislation as it relates to corporations." *Id.* at 196. But equally if not more important was that the tax had "no reference to income from the various business activities on which the [B&O] tax, a true excise tax, is based" but instead taxed "almost any income from almost every source." *Id.* at 196-97. The tax plainly

was not an excise because it was a broad-based levy on net income, lacking any nexus to a taxable privilege or incident of property ownership. *See id.*; *see also Jensen*, 185 Wash. at 218-19 (privilege of receiving income is not a taxable privilege). In contrast, the capital gains tax targets an activity long recognized as subject to excise taxation (the sale or exchange of property), and the clear nexus between the tax's subject matter (capital transactions) and its measure (capital gains) distinguishes it from the unconstitutional income tax in *Power*.

Another putative "hallmark" states the capital gains tax "is levied annually (like an income tax), not at the time of each transaction (like an excise tax)." ACP at 870. But an annual or periodic levy is not a "hallmark" of a property tax under our precedent. Many valid excise taxes are levied in this same way. *See, e.g.*, *Sheehan*, 155 Wn.2d at 795 (motor vehicle excise tax due annually); RCW 82.32.045(1)-(3) (excise taxes under chapters 82.04 (B&O), 82.08 (retail sales), 82.14 (local retail sales and use), and 82.16 (public utility) RCW can be reported and paid on monthly, quarterly, or annual basis). An additional "hallmark" is that the tax "includes a deduction for certain charitable donations the taxpayer has made during the tax year." ACP at 870. But Washington's estate tax, which we unanimously upheld as an excise in *Hambleton*, also contains deductions for charitable donations. WAC 458-57-115(2)(c). These features tell us nothing about whether the tax is an excise or property tax.

The superior court also distinguished the measure of the capital gains tax from the real estate excise tax.

ACP at 870 (identifying "hallmark" that the tax "is levied not on the gross value of the property sold in a transaction (like an excise tax . . .), but on an individual's net capital gain (like an income tax))." We find no authority for the proposition that an excise tax on property transactions must be measured by gross property value, or that a property tax must be measured by net gain. Indeed, property taxes, not excises, are quintessentially measured on an ad valorem basis. And we have upheld other transaction-related excises measured in some other manner than by gross property value. *See, e.g.*, *Wash. Pub. Ports Ass'n*, 148 Wn.2d at 650-52 (LET assessed against amount of taxable rent). This measure of the tax does not constitute a hallmark that defines the capital gains tax as a property tax.

As with the Plaintiffs' analysis of taxable "incidents," the superior court's reliance on certain "hallmarks" of the capital gains tax drifts from the relevant distinctions drawn in our precedent. The principles developed in the line of cases from *Culliton* and *Stiner* through *Hambleton* support the conclusion that the capital gains tax is in the nature of an excise tax, not a property tax subject to the strictures of article VII, sections 1 and 2. In light of this holding, we need not address the uniformity and levy limitations of article VII, and we decline to reexamine the *Culliton* decision, as the capital gains excise tax falls outside the scope of *Culliton*'s holding related to property taxes on income. We next turn to Plaintiffs' remaining challenges to the tax under the state privileges and immunities clause and the federal dormant commerce clause.

II. Plaintiffs' Remaining Constitutional Challenges Fail

Separate from their article VII claim, Plaintiffs seek to facially invalidate the capital gains tax on two additional constitutional grounds. They argue the tax violates (1) the privileges and immunities clause of the state constitution and (2) the dormant commerce clause of the federal constitution. We hold the capital gains tax does not violate either constitutional provision.

A. The Capital Gains Tax Does Not Violate the Privileges and Immunities Clause of the Washington Constitution

As the party challenging the constitutionality of the capital gains tax, Plaintiffs bear the burden of proving a privileges and immunities violation. *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 239, 481 P.3d 1060 (2021). Plaintiffs' privileges and immunities claim fails because they have not established that the capital gains tax implicates a fundamental right of state citizenship, and even if it did, reasonable grounds support the tax.

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. art. I, § 12. In some contexts, the Washington Constitution's privileges and immunities clause provides substantially similar protections to the federal equal protection clause. *Schroeder v. Weighall*, 179 Wn.2d 566, 571, 316 P.3d 482 (2014); U.S. Const. amend. XIV. However, we conduct an independent state constitutional analysis

where a challenged law implicates a fundamental right of state citizenship, which rights are well defined in our cases. *Id.* at 572. We first ask whether the challenged law grants a "privilege" or "immunity" and, if so, whether there is a "reasonable ground" for granting that immunity. *Id.* at 573.

Plaintiffs' claim fails at both steps of the analysis. They first claim the capital gains tax implicates the fundamental right to be exempt from taxes from which other Washingtonians are exempt. Quinn Br. at 33 (quoting *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004)). But we have never recognized such a right. Plaintiffs root their argument in a misreading of *Grant County* and *State v. Vance*, 29 Wash. 435, 70 P. 34 (1902). In those cases, we listed examples of fundamental rights recognized under the *federal* privileges and immunities clause, which included the right "to be exempt . . . from taxes or burdens which . . . citizens of *some other state* are exempt from." *Grant County*, 150 Wn.2d at 813 (emphasis added) (quoting *Vance*, 29 Wash. at 458). This privilege relates to the federal right of nonresidents to enter a state, compete for business, and pay taxes on equal footing with residents of that state. *See Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296, 118 S. Ct. 766, 139 L. Ed. 2d 717 (1998) (federal privileges and immunities clause protects "the right of a citizen of any State to 'remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter State are subjected to'" (quoting *Shaffer v. Carter*, 252 U.S. 37, 56, 40 S. Ct. 221, 64 L. Ed. 445 (1920))). Neither *Grant County* nor *Vance* recognized a

fundamental right of Washington residents to enjoy the same tax exemptions enjoyed by all other Washington residents.

Even assuming the capital gains tax grants a privilege or immunity implicating a fundamental right, Plaintiffs' claim still fails because reasonable grounds support the legislature's classification choices. We have recognized that "the level of scrutiny applied when determining whether a 'reasonable ground' exists in distinguishing between classifications has differed depending on the issues involved." *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731-32, 42 P.3d 394 (2002), *vacated in part on other grounds*, 150 Wn.2d 791. Because the legislature has broad discretion when making classifications for taxation purposes, we will not void a tax under article I, section 12 if "'any state of facts can reasonably be conceived that would sustain the classification.'" *Id.* at 732 (quoting *United Parcel Serv., Inc. v. State*, 102 Wn.2d 355, 369, 687 P.2d 186 (1984)).

The capital gains tax meets this standard. We have previously recognized that "the equalization of the burdens of taxation" is a "lawful taxing policy of the state." *Tex. Co. v. Cohn*, 8 Wn.2d 360, 387, 112 P.2d 522 (1941). And the funding of public education is plainly a lawful taxing purpose, indeed it is the State's "paramount duty." Wash. Const. art. IX, § 1; *see also McCleary v. State*, 173 Wn.2d 477, 529, 269 P.3d 227 (2012) (holding State failed in its affirmative constitutional duty to amply fund K-12 education). The legislature's express purpose in enacting the capital gains tax is to help meet the State's paramount

duty to amply fund public education and to make "material progress toward rebalancing the state's tax code." RCW 82.87.010. Through targeted exemptions, this tax will generate substantial new revenue for public education without exacerbating existing inequities as between individuals by requiring Washington's wealthiest to pay a greater share of their overall income in state taxes. Plaintiffs may disagree with the legislative policy behind the capital gains tax, but they fall short of demonstrating that policy is unreasonable under article I, section 12. The State is therefore entitled to summary judgment on Plaintiffs' privileges and immunities claim.

B. The Capital Gains Tax Does Not Violate the Dormant Commerce Clause of the United States Constitution

Finally, we hold that Plaintiffs' dormant commerce clause claim fails because the capital gains tax satisfies federal constitutional requirements. The commerce clause grants Congress the power to "regulate commerce . . . among the several states." U.S. Const. art. I, § 8, cl. 3. Implicit in this affirmative grant lies "a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995). Over the decades, the United States Supreme Court has construed the dormant commerce clause to protect the flow of interstate commerce and to prevent states from "retreating into economic isolation or jeopardizing the welfare of the Nation as a whole." *Id.* at 180. The Court's dormant commerce

clause jurisprudence has evolved over the years, rejecting a formalistic approach in favor of a practical one. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278-79, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) (rejecting formalistic *Spector Motor Serv. Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508, 95 L. Ed. 573 (1951), rule that believed "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation"); *see also Goldberg v. Sweet*, 488 U.S. 252, 259-60, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989) (noting that *Complete Auto* sought to resolve tension by "specifically rejecting the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce"); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615-16, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) (holding that courts must apply a "'consistent and rational method of inquiry,'" which we get from *Complete Auto* (quoting *Mobil Oil Corp. v. Comm'r of Texas*, 495 U.S. 425, 100 S. Ct. 1223, 63 L. Ed. 2d 510 (1980)).

Since *Complete Auto*, courts have consistently applied a four-part test to determine whether a state tax violates the dormant commerce clause. *See, e.g.*, *Wash. Bankers Ass'n*, 198 Wn.2d at 429. The *Complete Auto* test "requires a tax to be (1) 'applied to an activity with a substantial nexus with the taxing State,' (2) 'fairly apportioned,' (3) nondiscriminatory with respect to interstate commerce, and (4) 'fairly related to the services provided by the State.'" *Id.* (quoting *Complete Auto*, 430 U.S. at 279). "If a tax fails any one of these requirements, it is invalid." *Id.* (citing *Ford Motor Co.*, 160 Wn.2d at 48). The State urges us to abandon the *Complete Auto* test and instead reject

Plaintiffs' dormant commerce clause claim "if there are any circumstances where the statute can constitutionally be applied." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). Because the State has cited no authority explaining why we should abandon the *Complete Auto* test, and we can see no basis to depart from it now, we adhere to *Complete Auto*.

The parties agree that the capital gains tax meets the fourth prong of the *Complete Auto* test and that Washington may tax capital gains derived from the sale or exchange of tangible property within its borders without violating the dormant commerce clause. We must therefore determine whether the statute's two other allocation methods—capital gains derived from the sale or exchange of (a) intangible property or (b) tangible property located out-of-state at the time of the transaction but owned by a taxpayer domiciled in-state—violate the first, second, or third prong of the *Complete Auto* test. *See* RCW 82.87.100(1).

The first prong of the *Complete Auto* test asks whether there is a substantial nexus between the taxing state and the taxable event. *South Dakota v. Wayfair, Inc.*, 585 U.S. __,138 S. Ct. 2080, 2099, 201 L. Ed. 2d 403 (2018). A nexus exists when taxpayers avail themselves of "[t]he substantial privilege of carrying on business in [the State]." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444-45, 61 S. Ct. 246, 85 L. Ed. 267 (1940); *see also Commonwealth Edison Co.*, 453 U.S. at 626 ("[I]t is the activities *or presence* of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.'" (emphasis

added) (quoting *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S. Ct. 546, 82 L. Ed. 823 (1938))). Long-standing precedent holds the taxpayer's domicile state has tax jurisdiction over the sale or exchange of intangible goods. *Curry v. McCanless*, 307 U.S. 357, 368-69, 59 S. Ct. 900, 83 L. Ed. 1339 (1939).

A substantial nexus exists to support Washington's taxation of capital gains derived from the sale or exchange of tangible property located out-of-state. Plaintiffs argue a taxpayer's Washington residency cannot satisfy the nexus requirement. We reject this argument because it erroneously assumes that the capital gains tax is levied on the property rather than on the incidents and rights associated with the property. As explained, the capital gains tax is levied on capital *transactions*—not mere ownership of capital assets or gains—and the taxable incident is the taxpayer's exercise of their power to dispose of capital assets. That power is exercised in the state where the taxpayer is domiciled. *Curry* is illustrative. There, the Supreme Court determined a decedent's domicile state (Tennessee) had jurisdiction to tax the transfer of an interest in stocks and bonds held in trust by an Alabama trustee. *Curry*, 307 U.S. at 370-71. It concluded Tennessee could tax the transaction because

> [t]he decedent's power to dispose of the intangibles was a potential source of wealth which was property in her hands from which she was under the highest obligation, in common with her fellow citizens of Tennessee, to contribute to the support of the government whose protection she enjoyed.

> Exercise of that power, which was in her complete and exclusive control in Tennessee, was made a taxable event by the statutes of the state.

Id. Like the inheritance tax in *Curry*, the capital gains tax relates to the taxpayer's exercise of rights in and to property, including the power to dispose of that property.

Washington also has a nexus to the taxpayer's intangible property. The Supreme Court has held that a domicile state can tax intangibles even when the intangibles exist outside the state or when the taxpayer expands their activities outside of their domicile state. Specifically, the Court stated:

> [I]t is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax [intangibles], and consequently that there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles.

Curry, 307 U.S. at 368; *see also In re Est. of Plasterer*, 49 Wn.2d 339, 341-42, 301 P.2d 539 (1956) (domicile state had jurisdiction to impose inheritance tax on the heirs' right to receive payments from the sale of the decedent's real property located in another state because "[i]ntangible personal property has its situs at the domicile of the owner at the time of [their] death"). We hold that the taxpayer's in-state domicile provides a sufficient nexus between Washington and capital gains derived from the sale or exchange of intangible property.

The second question in the *Complete Auto* test asks whether a tax is fairly apportioned "to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61. To assess any threat of malapportionment, we must ask whether the tax is internally consistent, and, if so, whether it is externally consistent as well. *Jefferson Lines*, 514 U.S. at 185. A tax is internally consistent when it is "structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. Internal consistency looks to the structure of the tax, not its economic reality. *Jefferson Lines*, 514 U.S. at 185. "The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262. External consistency pertains to "the economic justification for the State's claim upon the value taxed." *Jefferson Lines*, 514 U.S. at 185. "[T]he threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching." *Id.*

We hold the capital gains tax is internally consistent. The statute allocates to Washington long-term capital gains or losses from the sale or exchange of (1) tangible personal property located in-state, (2) tangible personal property located out-of-state if (i) the property was in-state any time during the present or previous taxable year, (ii) the taxpayer was a resident at the time of sale, or (iii) another jurisdiction does not subject the taxpayer to payment of an income or excise tax on those capital gains, and (3) intangible property if the taxpayer was domiciled in Washington.

RCW 82.87.100(1). The statute also includes a tax credit to prevent any possible multiple taxation. RCW 82.87.100(2)(a) (tax credit allowed "equal 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"). The United States Supreme Court has repeatedly held that a tax credit is an acceptable method of avoiding dormant commerce clause infirmity. *See, e.g.*, *Comptroller of Treasury v. Wynne*, 575 U.S. 542, 567-68, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015) (suggesting "Maryland could remedy the infirmity in its tax scheme by offering" tax credit); *Goldberg*, 488 U.S. at 264 ("To the extent that other States' [taxing schemes] pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation."); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988) (Louisiana taxing scheme fairly apportioned because it provides tax credit).[12]

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[12] Plaintiffs claim the tax credit cannot save the capital gains tax because it extends only "to capital gains paid by the taxpayer to another state 'from capital assets *within* the other taxing jurisdiction.'" Quinn Br. at 56-57 (quoting ESSB 5096, § 11(2)(a)); *see also* RCW 82.87.100(2)(a). They offer a hypothetical where a taxpayer with multiple residencies, such as Washington and California, could experience multiple taxation. *Id*. But the statutory definition of "residency" ensures that an individual can have only one residency. RCW 82.87.020(10) (residency relates to domicile). Moreover, it appears Washington's capital gains tax would not apply in Plaintiffs' example because California taxes capital gains as income. RCW 82.87.100(1)(a)(iii) (gains allocated to Washington if "[t]he taxpayer is not subject to the payment of

In addition, we reject Plaintiffs' argument that the tax fails internal consistency merely because another taxing jurisdiction *could* tax the capital transaction. The "limited possibility of multiple taxation . . . is not sufficient to invalidate" an entire tax scheme. *Goldberg*, 488 U.S. at 264. Multiple states may have an interest in taxing an activity related to intangible property without raising apportionment concerns. *See Mobil Oil Corp.*, 445 U.S. at 444-45. Plaintiffs have failed to demonstrate how the statute would result in multiple taxation if all states adopted the same tax. Hypotheticals are not sufficient to facially invalidate the tax, and an as-applied challenge is the best remedy for a taxpayer if any of those hypothetical circumstances materialize and in fact result in multiple taxation. *Goldberg*, 488 U.S. at 264 (remote possibility of multiple taxation insufficient to facially invalidate tax).

We also hold the capital gains tax is externally consistent. Plaintiffs complain that a taxpayer's residency does not give Washington an economic justification for taxing capital gains derived from the sale or exchange of intangible property or personal property located out-of-state. But, as explained, Washington does have a valid interest in taxing these gains. Plaintiffs also argue the capital gains tax lacks "any principles of apportionment" and potentially subjects individuals to multiple taxation. Quinn Br. at 60 (emphasis omitted). Plaintiffs have "exaggerated the extent to which the [capital gains tax] creates a risk of multiple taxation." *Goldberg*, 488 U.S. at 262-

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an *income* or excise *tax legally imposed on the long-term capital gains or losses* by another taxing jurisdiction" (emphasis added)).

63. The allocations found in RCW 82.87.100 detail when capital gains are attributed to Washington, and the tax credit prevents any real risk of multiple taxation. RCW 82.87.100(2)(a); *D.H. Holmes*, 486 U.S. at 31. The statute also permits taxpayers to deduct from their Washington capital gains "[a]mounts that the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States." RCW 82.87.060(2). Because the tax is internally and externally consistent, it satisfies *Complete Auto*'s second prong requiring fair apportionment.

As to *Complete Auto*'s third prong, we hold the capital gains tax does not discriminate against interstate commerce. "A tax may be discriminatory on its face, in purpose, or by having the effect of unduly burdening interstate commerce." *Wash. Banker's Ass'n*, 198 Wn.2d at 429. "A facially discriminatory law textually identifies out-of-state persons or entities and grants them unfavorable treatment." *Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 809, 357 P.3d 1040 (2015) (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 568 & n.2, 117 S. Ct. 1590, 137 L. Ed. 2d 852 (1997)). A tax has a discriminatory effect if it subjects "'interstate commerce to the burden of 'multiple taxation.'" *Wynne*, 575 U.S. at 549-50 (internal quotation marks omitted) (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959)). In this respect, "the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171, 103 S. Ct. 2933, 77 L. Ed.

2d 545 (1983). The capital gains tax is not facially discriminatory because the plain text of the statute does not treat out-of-state individuals unfavorably. And as discussed, the capital gains tax does not subject an individual to multiple taxation because it provides a method for allocating capital gains to Washington and the tax credit removes any risk of actual multiple taxation.

Because the capital gains tax satisfies all four elements of the *Complete Auto* test, Plaintiffs have failed to demonstrate a dormant commerce clause violation and the State is entitled to summary judgment on this claim. While Plaintiffs' facial challenge fails, we note that our holding today does not foreclose future as-applied challenges under the dormant commerce clause should factual circumstances arise in which the tax cannot be constitutionally applied.

CONCLUSION

The capital gains tax is a valid excise tax under Washington law. Because it is not a property tax, it is not subject to the uniformity and levy requirements of article VII, sections 1 and 2 of the Washington Constitution. In light of this holding, we decline to interpret article VII or to reconsider our decision in *Culliton*. We further hold the tax is consistent with our state constitution's privileges and immunities clause and the federal dormant commerce clause. We reverse the superior court order invalidating the capital gains tax and remand for further proceedings consistent with this opinion.

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Stephens, J.

WE CONCUR:

[handwritten: signature] Gonzalez, C.J.	_____
_____	[handwritten: signature] Yu, J.
[handwritten: signature] Madsen, J.	[handwritten: signature] Montoya-Lewis, J.
[handwritten: signature] Owens, J.	[handwritten: signature] Whitener, J.

GORDON McCLOUD, J. (dissenting)—"Capital gains" are income.[1]

In Washington, income is property.[2]

A Washington "capital gains tax"[3] is therefore a property tax.

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[1] A "capital gain" is "[t]he profit realized when a capital asset is sold or exchanged." Black's Law Dictionary 259 (11th ed. 2019); *see also* U.S. Internal Revenue Serv. (IRS), *Tax Topic No. 409: Capital Gains and Losses*, https://www.irs.gov/taxtopics/tc409 (last updated Jan. 26, 2023). A "capital-gains tax" is therefore "[a] tax on income derived from the sale of a capital asset." Black's Law Dictionary, *supra*, at 1758. All 41 other states that tax capital gains treat such a tax as an income tax. *See* Elizabeth McNichol, *State Taxes on Capital Gains*, Ctr. on Budget & Pol'y Priorities (June 15, 2021), https://www.cbpp.org/ research/state-budget-and-tax/state-taxes-on-capital-gains [https://perma.cc/TN7N-7EPR]. So does the IRS. IRS, *Tax Topic No. 409*, *supra*.

[2] As the United States Supreme Court has said, state law defines property rights: "'[p]roperty interests . . . are not created by the [United States] Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (most alterations in original) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972)). Washington Constitution article VII, section 1 has one of the broadest definitions of "property" in this country: "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." Since "income" is obviously "subject to ownership" (as recognized by states defining everything from "theft" to "forfeiture" recognize), income obviously constitutes property.

[3] The code reviser creates the titles for new chapters of the Revised Code of Washington "without changing the meaning of any such law." RCW 1.08.015(2)(*l*). The title the code reviser gave to this law is "Capital Gains Tax." *See* ch. 82.87 RCW.

The problem is that in Washington, our constitution limits any such property tax to one percent annually.[4] The Washington Legislature nevertheless enacted a new law, Engrossed Substitute Senate Bill (ESSB) 5096, 67th Leg., Reg. Sess. (Wash. 2021), codified at ch. 82.87 RCW, which taxes "capital gains" at seven percent annually. That's more than one percent. This new "capital gains" tax therefore constitutes a property tax that violates the Washington Constitution's "one percent" annual limit on such a "property" tax.

In a contest between a Washington statute and the plain language of the Washington Constitution, the judicial branch has the duty to uphold the constitution.

I therefore respectfully dissent.

FACTUAL AND PROCEDURAL HISTORY

The history and the language of this new law show that it taxes the net income received from capital gains.

The 2021 legislature enacted ESSB 5096. It imposes a seven percent annual tax on an individual's "Washington capital gains" beginning January 1, 2022. Laws of 2021, ch. 196 (*codified as* ch. 82.87 RCW). The new statute defines the term "Washington capital gains" as "an individual's adjusted capital gain." RCW 82.87.020(13). It then defines "an individual's adjusted capital gain" as the individual's

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[4] Wash. Const. art. VII, § 2 ("the aggregate of all tax levies upon real and personal property by the state and all taxing districts . . . shall not in any year exceed one percent of the true and fair value of such property in money").

"net long-term capital gain reportable for federal income tax purposes," with some exceptions for losses carried forward or back. RCW 82.87.020(1), (3). The statute exempts certain long-term capital gains[5] and gains not attributable to Washington from the reach of this new tax. RCW 82.87.020(1)(d), (e). Thus, the resulting "adjusted capital gain" represents the net income realized by the taxpayer from the sale of qualifying long-term capital assets.

After determining the amount of "Washington capital gains," the taxpayer may take a standard deduction of $250,000, or a total of $250,000 for spouses and domestic partners; an adjusted deduction for gains derived from the sale or transfer of certain family-owned small businesses; and a $100,000 deduction for charitable donations over $250,000 made to certain Washington-based nonprofit organizations. RCW 82.87.060. The final amount of "Washington capital gains" is multiplied by seven percent to determine the total tax liability. RCW 82.87.040(1).

"The tax applies when the Washington capital gains are *recognized* by the taxpayer in accordance with this chapter." RCW 82.87.040(4)(a) (emphasis added). "If an individual's Washington capital gains

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[5] RCW 82.87.050 exempts certain categories of long-term capital gains, including real estate transactions, assets held in retirement accounts, assets pursuant to or under imminent threat of condemnation proceedings, certain depreciable property, certain livestock, timber and timberland, commercial fishing privileges, and goodwill received from the sales of auto dealerships.

are less than zero for a taxable year, no tax is due under this section." RCW 82.87.040(3).

As detailed by the majority, the Quinn and Clayton Plaintiffs separately filed suit in Douglas County Superior Court, challenging the new tax. *See* majority at 14-16. They argued (among other things) that the new tax constitutes a property tax and that it therefore violates the state constitution's one percent and uniformity limits on property taxes. WASH. Const. art. VII, §§ 1, 2. After consolidating the cases and granting a motion to intervene by Edmonds School District, Tamara Grubb, Mary Curry, and the Washington Education Association ("Intervenors"), the trial court ruled in favor of the plaintiffs on cross motions for summary judgment. Majority at 15; Clerk's Papers at 862. We granted direct review of the case and accepted amicus briefing from numerous parties.

STANDARD OF REVIEW

This case asks us to interpret both a statute and the constitution. We review issues of statutory interpretation de novo. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). When interpreting a statute, we begin with "the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Lenander v. Dep't of Ret. Sys.*, 186 Wn.2d 393, 403, 377 P.3d 199 (2016) (citing *Campbell & Gwinn*, 146 Wn.2d at 10-11). If a statute is ambiguous, we may turn to other tools of statutory

interpretation, such as legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12.

We also review issues of constitutional interpretation de novo. *Wash. State Legislature v. Inslee*, 198 Wn.2d 561, 569, 498 P.3d 496 (2021). "The ultimate power to interpret, construe and enforce the constitution of this State belongs to the judiciary." *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (citing cases); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). "When interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation." *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004) (citing *Anderson v. Chapman*, 86 Wn.2d 189, 191, 543 P.2d 229 (1975)). "In construing constitutional language, words are given their ordinary meaning unless otherwise defined." *Zachman v. Whirlpool Fin. Corp.*, 123 Wn.2d 667, 670, 869 P.2d 1078 (1994) (citing *State ex rel. O'Connell v. Slavin,* 75 Wn.2d 554, 557, 452 P.2d 943 (1969) (citing *State ex rel. Albright v. Spokane,* 64 Wn.2d 767, 394 P.2d 231 (1964))). If a constitutional provision is ambiguous, we may "rely on principles of statutory construction" to determine meaning. *Id.* at 671. Such principles may include examining the historical context of the constitutional provision. *Id.*; *Wash. Water Jet Workers Ass'n*, 151 Wn.2d at 477 (citing *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959)).

ANALYSIS

I. The Washington constitution contains an extremely broad definition of "property" as anything capable of "ownership"—and that includes income

We begin with the language of our state constitution. Article VII, sections 1 and 2 provide, in relevant part:

> *All taxes shall be uniform on the same class of property* within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. T*he word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership*. . . .
>
> . . . Except as hereinafter provided . . . the aggregate of all tax levies upon real and personal property by the state and all taxing districts . . . *shall not in any year exceed one percent of the true and fair value of such property* in money.

(Emphasis added.)

In sum, the state constitution says that the word "property," as used in the property tax limitation provision, means "everything . . . subject to ownership." That's pretty broad. It does not limit that definition—instead, it provides enlarging examples: "everything, whether tangible or intangible." Again, that's pretty broad.

The only possible limiting factor is that the piece of "everything" being considered must be "subject to ownership." The parties do not seriously deny that

income is subject to ownership. Income is certainly treated as something that is capable of ownership by the law, in every context from criminal statutes to civil forfeiture statutes.

We therefore start with the axiom that income is subject to ownership and, hence, subject to article VII, sections 1 and 2 of the Washington Constitution.

II. The new "capital gains tax" taxes income; since income is a species of property, the new capital gains tax constitutes a property tax—not an excise tax

The key question in this case is whether the capital gains tax taxes capital gains or taxes something else.

As discussed above, every state that taxes "capital gains" treats such gains as income. In Washington, income is property. It necessarily follows that a Washington "capital gains tax" constitutes a property tax that is subject to our constitution's article VII, section 1 one percent limit.

The majority tries to avoid this conclusion by advancing one main argument: that the new "capital gains tax" is really a "capital transactions" tax that just coincidentally happens to be measured by the amount of income it generates. One way the majority does this is by calling the taxable incident of the new law the capital transaction, rather than the "recognized" gain from the transaction, as the text of the statute says. Majority at 20. Another way the majority does this is by describing this new law as an "excise tax" exempt from the state constitutional limit on property taxes—despite the fact that this court has

never before treated a tax on *net income* as an excise tax. *Id.* at 19-20.

I agree with the majority's starting point: the character of a tax is "'determined by its incidents,'" not by the label the legislature uses. Majority at 22 (internal quotation marks omitted) (quoting *Morrow v. Henneford*, 182 Wash. 625, 628, 47 P.2d 1016 (1935)). And I agree with the majority that an excise tax is one that "tax[es] '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.'"[6]

The majority takes these rules and concludes that the capital gains tax constitutes an excise tax because "it taxes transactions involving capital assets— not the assets themselves or the income they generate." Majority at 20.

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[6] *In re Est. of Hambleton*, 181 Wn.2d 802, 811, 335 P.3d 398 (2014) (quoting *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945)); *see also Morrow*, 182 Wash. at 627, 630 (defining excise tax as a tax imposed "upon licenses to pursue certain occupations, and upon corporate privileges" or "'upon a particular use of property or the exercise of a single power over property incidental to ownership'" (quoting *Bromley v. McCaughn*, 280 U.S. 124, 136, 50 S. Ct. 46, 74 L. Ed. 226 (1929))); *Jensen v. Henneford*, 185 Wash. 209, 218, 53 P.2d 607 (1936) (plurality opinion) ("When a tax is, in truth, levied for the exercise of a substantive privilege granted or permitted by the state, the tax may be considered as an excise tax and sustained as such."); Black's Law Dictionary, *supra*, at 1759 (defining "excise tax" as a tax "imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)").

But that's not what the statute says. The plain language, context, and practical impact of the statute all compel the opposite conclusion: RCW 82.87.040 taxes the "gains" or income "recognized" by the transferrer of a qualifying capital asset. The statute does not tax the transfer itself.

First, let's define some terms. As outlined above, the statute imposes a tax on certain long-term capital gains. The statute says the starting point for calculating the tax is the "net long-term capital gain reportable for federal income tax purposes." RCW 82.87.020(3). Federal law defines "net long-term capital gain" as "the excess of long-term capital gains for the taxable year over the long-term capital losses for such year." 26 U.S.C. § 1222. In other words, a "capital gain" is "[t]he profit realized when a capital asset is sold or exchanged." Black's Law Dictionary, *supra*, at 259; *see also* U.S. Internal Revenue Serv. (IRS): *Tax Topic No. 409: Capital Gains and Losses*, https://www.irs.gov/taxtopics/tc409 (last updated Jan. 26, 2023). A "capital-gains tax," then, is "[a] tax on income derived from the sale of a capital asset." Black's Law Dictionary, *supra*, at 1758. Though not dispositive of this issue of state statutory interpretation, it is worth noting that the IRS and all 41 states that tax capital gains treat such gains as income and a tax on them as an income tax.[7]

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[7] McNichol, *supra*; IRS, *Tax Topic No. 409*, *supra*; *see also, e.g.*, *Capital Gains and Losses*, State of Cal. Franchise Tax Bd. ("All capital gains are taxed as ordinary income."), https://www.ftb.ca.gov/file/personal/income-types/capital-gains-and-losses. html; *Capital Gains*, Idaho State Tax Comm'n ("A capital gain can be short-term (one year or less) or long-term (more than one year), and you must report it on your income tax

What *is* dispositive in determining the nature of the tax is the plain language of the tax statute. *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 40, 156 P.3d 185 (2007). I agree with the majority that to determine the nature of the tax, we look at the "'taxable incident,'" or "the activity that triggers the tax," and the measure of the tax, or the "'base that represents the value of the taxable incident.'" Majority at 33-34 (quoting *Ford Motor Co*, 160 Wn.2d at 39).

But I disagree with the majority's analysis of what constitutes the taxable incident in this case. The plain language of the statute shows that taxable incident is not the sale or transfer of the capital asset itself. Rather, the taxable incident is the *realization of income* derived from the sale of qualifying capital assets. Because the taxable incident or event is the realization of income—*not* the mere transfer of the asset—the tax is an income tax, regardless of the label placed on it by the legislature. *Jensen v. Henneford*, 185 Wash. 209, 217, 53 P.2d 607 (1936) (plurality opinion). The measure of the tax is indisputably the amount of income gained from the transaction. The fact that the tax is measured by the amount of net

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return."), https://tax.idaho.gov/taxes/income-tax/individual-income/filing/capital-gains/; Mich. Dep't of Treasury, 2022 Tax Text 122, https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/MISC/Tax-Professionals/2022_Tax_Text.pdf#page=122; *Individual Income Tax FAQs: What Is the Mississippi Tax Treatment of Long-Term Capital Gains?*, Miss. Dep't of Revenue, https://www.dor.ms.gov/individual/ individual-income-tax-faqs; *Capital Gains*, N.J. Div. of Tax'n, N.J. Treasury, https://www.state.nj.us/treasury/taxation/njit9.shtml#:~:text=If%20you%20are%20a%20New,your%20basis%20in%20the%20property.

income only reinforces the conclusion that the taxable incident is receipt of income and that the capital gains tax is an income tax.

A. The taxable incident is the realization of profit following the transfer of a qualifying capital asset—not the transfer itself

The first step in determining the nature of the tax is determining the "taxable incident," or the activity that triggers the tax. *Ford Motor Co.*, 160 Wn.2d at 40. The State and the majority repeatedly assert that the taxable incident is the sale or exchange of a qualifying capital asset. But the language of the statute makes clear that that assertion is not accurate—or at least that it is incomplete.

The statute's plain language provides that "[t]he tax applies when the Washington capital gains *are recognized by the taxpayer* in accordance with this chapter." ESSB 5096, § 5(4)(a) (emphasis added). That is quite different from saying that the transfer itself is the taxable incident. If there's no recognized gain, there's no tax: "If an individual's Washington capital gains are less than zero for a taxable year, no tax is due under this section." ESSB 5096, § 5(3). Thus, the taxable incident is the sale or transfer of a qualifying asset *only if* that transaction results in a "capital gain." The taxable incident is the recognition of income.

The majority appears to concede this at times. For instance, the majority must acknowledge that the capital gains tax "narrowly applies to *capital transactions resulting in realized gains*." Majority at 27 (emphasis added). But the majority fails to

acknowledge that a tax triggered by a "capital transaction" is not the same as a tax triggered by a capital transaction resulting in profit. That is a critical distinction showing that the incident of this tax is the receipt of income.

Indeed, we previously emphasized the importance of this distinction when analyzing a "net corporate income tax" in 1951. In *Power, Inc. v. Huntley*, a statute purported to impose an excise tax on corporations for "'the privilege of doing business in this state.'" 39 Wn.2d 191, 193, 235 P.2d 173 (1951) (quoting Laws of 1951, 1st Ex. Sess., ch. 10, § 7). After examining the statute, we concluded that the tax was "a mere property tax 'masquerading as an excise.'" *Id.* at 196. We came to this conclusion because the tax applied *only if the corporation realized net income*—in other words, only if the corporation realized a gain. We explained that "the tax is levied because the corporation has net income, not because it does any business in this state or exercises its corporate franchise; conversely, if it has done a million dollars['] worth of business in this state but has no net income, it would not be subject to taxation under this act." *Id.* at 196-97.

We have the exact same situation with the new capital gains tax. If an individual engages in a million dollars' worth of qualifying capital asset transactions but realizes no gain, they are not subject to the tax. That weighs heavily in favor of concluding that the incident of this tax is not really "capital transactions" but rather realization of gain—income. *See also Jensen*, 185 Wash. 209 (holding that personal net income tax purportedly levied upon "the privilege of

receiving income" was actually levied on the *property* (income) on which the amount of the tax was to be calculated, not on the abstract privilege of receiving income).

When we compare the capital gains tax with taxes we've previously found to be excise taxes, the same conclusion applies: the capital gains tax is not an excise because the incident of the tax is something more than a transaction *per se*. Consider, for example, retail sales taxes, which we have repeatedly upheld as excise taxes. The incident of a retail sales tax is a transaction involving the relevant good or service, regardless of whether the transaction resulted in net income or profit to the seller. *See, e.g.*, *Morrow*, 182 Wash. 625; *Vancouver Oil Co. v. Henneford*, 183 Wash. 317, 49 P.2d 14 (1935); *Klickitat County v. Jenner*, 15 Wn.2d 373, 130 P.2d 880 (1942); *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952). That makes sense. If the real incident of the tax is the transaction—if the state is truly taxing the exercise of a privilege or the specific use of property—then the financial outcome of that transaction should not logically determine whether the tax applies. The tax applies to all relevant transactions.

But that's not what we have here. Here, the financial outcome of the capital transaction *determines* whether the tax applies. The capital gains tax applies only when the seller realizes a profit. Thus, there is no sense in which the "activity that triggers the tax" is a capital transaction *per se*. *Contra* majority at 33.

Under our controlling cases, the taxable incident of this capital gains tax is the capital gain, meaning

the income (or property) realized by the transferrer—not the transaction itself.

B. The measure of the tax is the net income received following the transfer of the asset—not the gross income or value of the transaction, as is typical of excise taxes

The majority recognizes—as it must—that the measure of the capital gains tax is income. Majority at 28. This obviously militates in favor of considering this new capital gains tax to be a tax on capital gains.

But the majority counters that "[o]ur cases unequivocally hold that excise taxes levied on a particular privilege or incident of property ownership may be measured by income, and this does not transform the fundamental nature of the tax." *Id.* (citing *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933)).

I agree that our cases have held that an excise tax may be measured by some kind of income. But in every case where this court upheld an excise tax that was measured by income, the tax was measured by *gross* income—not by *net* income, such as capital gains. *E.g.*, *Stiner*, 174 Wash. at 404 (excise tax measured by "'values, gross proceeds of sales, or gross income'" (quoting LAWS OF 1933, ch. 191, § 2); *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 34 P.2d 363 (1934) (same); *Morrow*, 182 Wash. 625 (excise tax measured by gross sale price of tangible personal property); *Vancouver Oil Co.*, 183 Wash. 317 (same); *P. Lorillard Co. v. City of Seattle*, 83 Wn.2d 586, 521 P.2d 208 (1974) (excise taxes measured by gross

proceeds of wholesale cigarette sales and by set price per cigarette, respectively).

Similarly, this court has upheld excise taxes measured by the *gross value* of a transaction, item, or contract, not by the value of net income such as capital gains. *State ex rel. Hansen v. Salter*, 190 Wash. 703, 70 P.2d 1056 (1937) (excise tax measured by fair market value of vehicle); *Mahler*, 40 Wn.2d 405 (excise tax measured by gross sales price of real estate); *St. Paul & Tacoma Lumber Co. v. State*, 40 Wn.2d 347, 243 P.2d 474 (1952) (excise tax on certain products measured by value of product); *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965) (excise tax measured by contract price of lease); *High Tide Seafoods v. State*, 106 Wn.2d 695, 725 P.2d 411 (1986) (excise tax measured by value of enhanced food fish at the point of landing); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003) (excise tax measured by contract price of lease); *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 123 P.3d 88 (2005) (excise tax measured by fair market value of motor vehicle); *In re Est. of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014) (excise tax measured by total value of estate).

I can find no Washington case upholding a tax as an excise where the measure of the tax was *net* income or gain. Instead, such taxes have consistently been invalidated as nonuniform property taxes. *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) (plurality opinion) (tax on net income was property tax); *Petrol. Navigation Co. v. Henneford*, 185 Wash. 495, 55 P.2d 1056 (1936) (same); *Jensen*, 185 Wash. 209 (same); *Power, Inc.*, 39 Wn.2d 191 (same); *Kunath v. City of*

Seattle, 10 Wn. App. 2d 205, 221, 444 P.3d 1235 (2019) (same).

All of this makes sense when considering the nature of an excise. An excise tax is supposed to be a tax on the privilege of undertaking certain transactions or exercising certain rights in property. There is a logical nexus between exercising the privilege of engaging in that entire transaction (or exercising that entire property right) and using the value of that entire transaction (or the full value of the property) to measure the tax on that privilege. As we recently explained, an excise tax is "directly imposed based upon the extent to which the taxpayer enjoys the taxable privilege." *Sheehan*, 155 Wn.2d at 800 (citing *Harbour Vill. Apts. v. City of Mukilteo*, 139 Wn.2d 604, 611, 989 P.2d 542 (1999) (Talmadge, J., dissenting)); *Black*, 67 Wn.2d at 99 (if a tax is "'measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise'" (quoting 103 A.L.R. 18 (1936))). Gross income or value is a reasonable proxy for the amount of business done or the extent to which a taxpayer has enjoyed a privilege.

But the new capital gains tax statute taxes only net income or gain. It therefore looks much more similar to the taxes we've invalidated as property taxes that fail to comply with article VII, sections 1 and 2.

To summarize, "capital gains" means income. This capital gains tax is not triggered by each and every sale of a qualifying capital asset, as one might

expect of an excise tax. And this capital gains tax is not measured by gross income or by the full value of the asset, as one might expect of an excise tax. Rather, the new capital gains tax is triggered *only* if the taxpayer realizes a gain from the sale of the asset, and the measure of the tax is the amount of gain realized. Under our controlling cases, the new capital gains tax is an income tax—not an excise tax.

III. The capital gains tax violates the constitutional limitations on property taxes

To repeat, our constitution states that the term "property" "shall mean and include *everything, whether tangible or intangible, subject to ownership*." Wash. Const. art. VII, § 1 (emphasis added). Our previous cases interpreting this provision, beginning with *Culliton*, consistently hold that "income" falls within the category of property as defined in article VII. 174 Wash. at 381. In *Culliton*, we noted the "comprehensive" nature of the constitutional definition of "property" and held that an income tax is a property tax. *Id.* at 374. We reasoned that "[i]ncome is either property under our fourteenth amendment, or no one owns it." *Id.* Since *Culliton*, this court has consistently held that income is property for purposes of article VII, section 1. *E.g.*, *Jensen*, 185 Wash. at 217; *Power, Inc.*, 39 Wn.2d at 194.

As the majority notes, we will overrule precedent only upon a showing that (1) an established rule is incorrect and harmful or (2) the legal underpinnings of our precedent have changed or disappeared. Majority at 17 n. 8 (citing *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (plurality opinion)). The Intervenors, but not the parties, argue that we should

overrule *Culliton* on both of these bases. Intervenors' Opening Br. at 16-18. To be sure, I agree with the Intervenors that some of *Culliton*'s factual assertions were incorrect. Specifically, *Culliton* incorrectly asserted that *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930), had already decided the issue whether an income tax is a property tax under the state constitution. 174 Wash. at 376; *see* Intervenors' Opening Br. at 25-27. *Culliton* also stated that "[t]he overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property," a statement that appears to have been inaccurate or at least overbroad at the time. 174 Wash. at 374; *see* Intervenors' Opening Br. at 31-34.

But these errors don't undermine *Culliton*'s interpretation of article VII, section 1's uniquely broad definition of "property." That language is plain and unambiguous: "property" "mean[s] and include[s] *everything*, whether tangible or intangible, subject to ownership." Wash. Const. art. VII, § 1 (emphasis added); *see also* Black's Law Dictionary, *supra*, at 1470. "Income" is "[t]he money or other form of payment that one receives, usu[ally] periodically, from employment, business, investments, royalties, gifts, and the like." Black's Law Dictionary, *supra*, at 912. Whether tangible or intangible, "money or other form of payment" is clearly capable of ownership. Therefore, income is property under article VII's broad definition.[8]

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[8] I disagree with Intervenors' argument that *Culliton*'s legal underpinnings have eroded for the same reason: the constitutional language that the *Culliton* court considered has not changed since *Culliton* was decided.

To be sure, this court has clearly held that the constitution was "not intended to be a static document incapable of coping with changing times. It was meant to be, and is, a living document with current effectiveness." *Seattle Sch. Dist.*, 90 Wn.2d at 517. When we deal with broad, general constitutional rights and values (such as "due process" or "equal protection"), we have a duty to interpret and apply those rights and values in a way that will protect all Washingtonians, not just the few whom the framers might have had in mind when drafting them. But in this case, we are not interpreting such a broad, general term, right, or value. Instead, we are interpreting a narrow definitional phrase comprising words whose meaning and context have not drastically changed in the past century. Article VII, section 1 explicitly defines "property" so broadly that it includes income. There is just no room to say it doesn't.

Since the capital gains tax is a property tax, it is subject to the one percent levy cap contained in article VII, section 2. This tax clearly violates that provision because it imposes a seven percent levy on a taxpayer's Washington capital gains. I would affirm the trial court's decision that the tax is unconstitutional on that ground and decline to reach the other constitutional issues raised by the petitioners.

CONCLUSION

A tax is determined by its incidents, not by its legislative label. The structure of the capital gains tax shows that it is a tax on income resulting from certain transactions—not a tax on a transaction *per se*. Therefore, the tax is an income tax, not an excise tax.

Under our constitution and case law, an income tax is a property tax. As enacted, this income tax or "capital gains tax" violates the one percent levy limitation of article VII, section 2.

Deciding whether to retain our regressive tax structure or to replace it with a more equitable one is up to the legislature through legislation and the people through constitutional amendment. The duty of the judiciary when faced with a direct conflict between a statute and the constitution is to uphold the constitution. The new capital gains tax violates article VII, section 2 of the Washington Constitution. I would therefore affirm the trial court.

I respectfully dissent from the majority's contrary conclusion.

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Gordon McCloud, J.

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Johnson, J

Appendix B

SUPREME COURT OF WASHINGTON

No. 100769-8

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,

Appellants.

Filed: Apr. 17, 2023

MANDATE

The opinion of the Supreme Court of the State of Washington was filed on March 24, 2023, and became the decision terminating review of this Court in the above entitled case on April 14, 2023. This case is mandated to the superior court from which the appellate review was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule of Appellate Procedure 14.6(c), costs will be awarded in a supplemental judgment at such time as the Clerk's Ruling on Costs is final.

IN TESTIMONY WEREOF,
I have hereunto set my hand
and affixed the seal of this
Court at Olympia,
Washington, on
April 17, 2023.

[handwritten: signature]

SARAH R. PENDLETON

Deputy Clerk of the
Supreme Court

State of Washington

Appendix C

WASHINGTON SUPERIOR COURT FOR DOUGLAS COUNTY

Nos. 21-2-00075-09, 21-2-00087-09

CHRIS QUINN, et al.,
Plaintiffs,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,
Defendants,
EDMONDS SCHOOL DISTRICT, et al.,
Intervenors.

APRIL CLAYTON, et al.,
Plaintiffs,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,
Defendants,
EDMONDS SCHOOL DISTRICT, et al.,
Intervenors.

Filed: Mar. 22, 2022

ORDER

THIS MATTER came before the Court on Defendants' Motion for Summary Judgment filed December 2, 2021, and Plaintiffs' Motion for Summary Judgment filed December 6, 2021.

The Court considered the following pleadings and documents:

- Defendants' Motion for Summary Judgment, filed December 2, 2021;
- Declaration of Kathy L. Oline in Support of Defendants' Motion for Summary Judgment, filed December 2. 2021;
- Intervenor Education Parties' Joinder in Defendants' Motion for Summary Judgment and Supplement Brief, filed December 6. 2021;
- Plaintiffs' Motion for Summary Judgment, filed December 6, 2021;
- Declaration of Jason Mercier in Support of Plaintiffs' Motion for Summary Judgment, filed December 6, 2021;
- *Amici Curiae* Brief of The Building Industry Association of Washington and Washington Cattlemen's Association in Support of Plaintiffs' Motion for Summary Judgment, filed December 20, 2021;
- Brief of *Amici Curiae* Mrs. Mary Ann Warren, Meliesa Tigard, Kristen Cameron, and Dr. Katherine Baird, filed December 20, 2021;
- *Amici Curiae* Brief of National Taxpayers Union Foundation, Washington Policy Center, Adam Hoffer, Randall G. Holcombe,

Jeremy Horpedahl, Todd Nesbit; Justin M. Ross, William F. Shughart II, and Jared Walezak ("Tax Economists and Policy Analysts") in Support of Plaintiffs, filed December 20, 2021;

- Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, filed January 7, 2022;
- Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of Chris Quinn, filed January 7, 2022;
- Declaration of Christopher Senske in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of Craig Leuthold, filed January 7, 2022;
- Declaration of Joanna Cable in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of John McKenna in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of Kerry Cox, filed January 7, 2022;
- Declaration of Kevin Bouchey in Support of Plaintiffs' Opposition to Defendants' Motion

for Summary Judgment, filed January 7, 2022;

- Declaration of Larry King, filed January 7, 2022;
- Declaration of Lewis E. Randall, filed January 7, 2022;
- Declaration of Neil Allen Muller, filed January 7, 2022;
- Declaration of Rick Glenn, filed January 7, 2022;
- Declaration of Suzie Burke, filed January 7, 2022;
- Declaration of Matthew Sonderen in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of Washington State Tree Fruit Association in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Declaration of Washington Farm Bureau in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 7, 2022;
- Amended Declaration of Joanna Cable in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, filed January 14, 2022;
- Defendants' Reply in Support of Summary Judgment, filed January 21, 2022;

- Intervenor Education Parties' Joinder in Defendants' Reply in Support of Motion for Summary Judgment and Supplemental Brief, field January 21, 2022; and
- Plaintiffs' Reply in Support of Motion for Summary Judgment, filed January 21, 2022.

In addition to consideration of the filed materials, on February 4, 2022, the Court heard oral argument on the parties' respective motions from all parties and from interested *amici*.

THE COURT FINDS that there are no genuine issues of material fact in dispute and that the Plaintiffs are entitled to judgment as a matter of law. The Court's letter ruling dated March 1, 2022, is attached and incorporated into this Order by reference.

NOW THEREFORE, it is ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is GRANTED.
2. Defendants' and Intervenors' Motion for Summary Judgment is DENIED.
3. ESSB 5096 is declared unconstitutional and invalid and, therefore, is void and inoperable as a matter of law.

Dated this [handwritten: 22] of March, 2022.

[handwritten: signature]
HONORABLE BRIAN C. HUBER
SUPERIOR COURT JUDGE

Appendix D

WASHINGTON SUPERIOR COURT FOR DOUGLAS COUNTY

Nos. 21-2-00075-09, 21-2-00087-09

CHRIS QUINN, et al.,
Plaintiffs,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,
Defendants,
EDMONDS SCHOOL DISTRICT, et al.,
Intervenors.

APRIL CLAYTON, et al.,
Plaintiffs,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE, et al.,
Defendants,
EDMONDS SCHOOL DISTRICT, et al.,
Intervenors.

Filed: Mar. 1, 2022

LETTER RULING

Dear Counsel,

This letter sets forth the Court's rulings on the parties' Cross Motions for Summary Judgment which were argued at the February 4, 2022 hearing.

In this letter the Court will start by discussing its analysis and rulings on the State's Motion to Strike the Declaration of Jason Mercier. Then the Court will address the State's argument that the Plaintiffs lack standing to bring this lawsuit. Finally, the Court will outline its rulings on the parties' Cross Motions for Summary Judgment.

STATE'S MOTION TO STRIKE MERCIER DECLARATION

The State and the Plaintiffs have each filed a Motion for Summary Judgment under CR 56. That rule states that affidavits or declarations must set forth facts showing that the affiant is competent to testify as a witness, and must be limited to "such facts as would be admissible in evidence." *Billings v. Town of Steilacoom*, 2 Wash. App. 2d 1 (Div. 2 2017). Factual matters that would be inadmissible if offered at trial will be disregarded by the court in a summary judgment proceeding. See, e.g., *Germain v. Pullman Baptist Church*, 96 Wash. App. 826 (Div. 3 1999) (trial court properly refused to consider affidavit from unqualified expert). If a declaration or affidavit contains both admissible and inadmissible portions, only the inadmissible portions should be stricken. See, e.g., *Simmons v. City of Othello*, 199 Wash. App. 384 (Div. 3 2017) (irrelevant statements and legal conclusions in summary judgment affidavit properly stricken).

The State has moved to strike the Declaration of Jason Mercier from the record, arguing that it is inadmissible and cannot be considered under CR 56. The State's argument is that Mr. Mercier's statements, as well as the declaration exhibits, constitute inadmissible hearsay. State's Opp. Brief filed 1-10-22 at n. 4 on p. 18.

> The Plaintiffs counter by arguing as follows:
>
> Mr. Mercier testifies as an expert on tax policy. Mercier Decl. ¶ 2. His opinions on taxing capital gains are based on a state-by-state survey he conducted. See id. ¶¶ 1, 4-5. The survey results are "'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject.'" See *State v. Mohamed*, 186 Wn.2d 235, 242, 375 P.3d 1068 (2016) (quoting ER 703). His general opinion is admissible even if the underlying correspondence is not. Additionally, Exhibit c to the Mercier declaration is a report on ESSB 5096 prepared by the Department of Revenue that is an admission of a party-opponent. ER 801 (d)(2).

Plaintiffs' Reply filed 1-21-22, at n. 9 on p. 11.

The Motion to Strike is granted in part and denied in part. The following portions of the Mercier declaration are hereby deemed to be inadmissible hearsay and will be stricken:

- The last two sentences of paragraph 4 ("A true and correct copy of all written responses I received is attached as **Exhibit B.** The

responses for every state are summarized in the table below:")

- The table that follows paragraph 4 at page 2 line 1 through page 4 line 22.
- Paragraph 7 and the referenced **Exhibit D** (letter from IRS to U.S. Congressman Dan Newhouse).

Paragraphs 1 and 2 contain no inadmissible hearsay. Nor does paragraph 3 which merely attaches a copy of ESSB 5096. The first two sentences of paragraph 4 contain no inadmissible hearsay, although they describe how Mr. Mercier gathered the data underlying his expert testimony under ER 702. This Court deems paragraphs 1 through 3 and the first two sentences of paragraph 4 to be admissible.

The last two sentences of paragraph 4, as well as the table that follows paragraph 4, are deemed to be inadmissible and will be stricken even though Mr. Mercier appears to have considered the various states' survey responses as a basis for his testimony in paragraph 5. See ER 703 (providing in part that "[i]f reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, the facts or data [upon which the expert bases his/her opinion or inference] need not be admissible in evidence.") In other words, this Court may consider any properly admitted expert testimony from Mr. Mercier, but the data underlying that testimony need not be admissible.

In Paragraph 5 Mr. Mercier testifies that while some states responded that they did not tax capital gains at all, no state that was surveyed taxed capital gains through an excise tax or in any way other than

through an income tax. This Court deems Paragraph 5 to be admissible expert testimony under ER 702 which provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. This Court finds that paragraph 5 sets forth "scientific, technical, or other specialized knowledge" that satisfies the requirements of ER 702. To the extent the State argues paragraph 5 should be disregarded because Washington's tax statutes may be different from the tax statutes in those other states, such objection goes to the weight of the evidence rather than to its admissibility.

Paragraph 6 and the referenced **Exhibit c** are both deemed to be admissible. The Washington State Department of Revenue's (DOR's) analysis of ESSB 5096 provides in pertinent part as follows:

> Another issue with the charitable deduction [set forth in Section 9 of ESSB 5096] is that, because it is a common feature of income taxes, it may increase the chance that the courts will determine that the Washington capital gains tax is an income tax. At least one lawsuit has already been filed seeking to invalidate the capital gains tax on several grounds, including that the tax is an income tax and, as such, violates article VII, sections 1 and 2 of the Washington Constitution,

> because the tax is nonuniform and the tax rate exceeds the 1% aggregate limit.
>
> It is impossible to quantify the extent to which the charitable deduction may strengthen the argument that the capital gains tax is an income tax. All we can say is that the charitable deduction likely incrementally strengthens the argument that the capital gains tax is an income tax. The charitable deduction is not the only provision in the bill that opponents of the capital gains tax can point to in support of their argument that the capital gains tax is an income tax.

DOR Bill Report on ESSB 5096, at pp. 5-6, attached as **Exhibit c** to Mercier declaration. This Court deems the DOR Bill Report to be admissible as an admission of a party-opponent under ER 801 (d)(2).

As mentioned above, paragraph 7 and the referenced **Exhibit D** (the letter from the IRS to Rep. Newhouse stating, *inter alia,* that under federal law "capital gains are treated as income under the tax code and taxed as such") is inadmissible hearsay and will be stricken. Mr. Mercier's declaration merely attaches a copy of **Exhibit D** without providing any testimony or other information relating to it, other than a statement that it was obtained through a public records request. This Court finds no basis to deem paragraph 7 or **Exhibit D** to be admissible.

CROSS MOTIONS FOR SUMMARY JUDGMENT

1. The State's Objection Re: Plaintiffs' Standing.

This Court once again rejects the State's argument that none of the Plaintiffs have standing to bring this facial challenge to the constitutionality of ESSB 5096. The Court previously rejected the State's arguments on standing that were asserted as part of the State's Rule 12 Motion to Dismiss.

It is true that the pending Cross Motions for Summary Judgment have been brought under CR 56 rather than under CR 12. However, under CR 56 the Court must still view the evidence in a light most favorable to the non-moving party for purposes of the motion. See, e.g., *Afoa v. Port of Seattle*, 176 Wn.2d 460 (2013).

The Court incorporates by this reference its analysis as set forth in its letter ruling dated September 10, 2021 in which it rejected the State's prior arguments and objections regarding Plaintiffs' standing to bring this lawsuit. The Court also notes that multiple additional sworn declarations filed since this Court issued that letter ruling only further support this Court's finding that the Plaintiffs have standing.

2. The Scope of Matters Considered by this Court.

The Court has reviewed a wealth of material filed in connection with the pending motions. Much of the information and argument, particularly in some of the

amicus briefs but also in the State's filings,[1] centered around discussions involving policy considerations such as whether schools are appropriately funded and whether the new tax statute makes Washington's tax structure more fair.

This Court is not permitted to consider such policy considerations when ruling on the constitutionality of ESSB 5096.

> It is not the function of [the courts] . . . to consider the propriety of the tax, or to seek for the motives or to criticize the public policy which may have prompted adoption of the legislation. [Citation omitted.]

State ex rel Namer Inv. Corp. v. Williams, 73 Wn.2d 1, 7 (1968). Accordingly, this Court's sole function in these consolidated cases is to provide a ruling, at the trial court level, whether ESSB 5096 is unconstitutional pursuant to established Washington caselaw, without any regard to any motives or public policy considerations that may have led to the adoption of ESSB 5096.

3. Analysis of Cross Motions for Summary Judgment.

Under Washington law, it is up to the courts to decide whether a tax law is constitutional. *Kunath v. City of Seattle*, 10 Wn.App.2d 205 (2019) involved a challenge to a city ordinance that imposed a graduated income tax on high-income residents. Division I of the Washington State Court of Appeals stated in *Kunath*:

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[1] See, e.g., State's MSJ filed 12-6-21, at 2-6.

> Before addressing the tax's statutory and constitutional validity, we must address [plaintiff] Shack's threshold contention that these issues are nonjusticiable political questions. Shock contends: "The City's request that this Court reverse nearly a century of case law holding that income is personal property, and therefore subject to the Constitution's uniformity requirement, is not appropriate for judicial determination." *But it is well settled that Washington courts have the power to hear constitutional challenges to tax laws, which is why we are guided by "nearly a century of case law" on these issues. The issues raised in this case are justiciable.* [Emphasis supplied; internal citations omitted.]

Kunath, at 216. See also Wash. Const. art. IV § 6 and RCW 2.08.010 (both of which provide that superior courts have original jurisdiction over "the legality of any tax").

This Court has reviewed the "nearly a century of case law" as referenced by the *Kunath* court, see list of appellate decisions recited in *Kunath* at p. 213-16. That caselaw makes clear that the starting point for this Court's analysis is certain language that was added to the Washington State Constitution by a constitutional amendment adopted in 1930. The *Kunath* court stated:

> Since 1930, article VII, section 1 of our state constitution has required that "[a]II taxes shall be uniform upon the same class of property within the territorial limits of the

> authority levying the tax and shall be levied and collected for public purposes only. The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership."

Kunath, at 213. See also article VII, section 2 of the Washington State Constitution (placing 1 % annual limit on the aggregate of all tax levied on real and personal property).

Three years after article VII, section 1 was adopted, Washington voters passed a statewide initiative levying a graduated tax on net income. Taxpayers challenged the new graduated tax statute, arguing it was unconstitutional because it taxed property and therefore violated the uniformity requirement set forth in article VII, section 1. In *Culliton v. Chase*, 174 Wash. 363 (1933), the Washington Supreme Court declared the statute to be unconstitutional. In so doing, the *Culliton* court made clear that income taxes are different from excise taxes inasmuch as excise taxes are levied on an activity (e.g., the sale, consumption or manufacture of goods) rather than on income generated by an activity. *Culliton*, at 377. Next the *Culliton* court characterized income as within the broad definition of "property" and ruled the new statute to be unconstitutional because the graduated income tax was not uniform as required by article VII, section 1. *Culliton*, at 378-79.

The Washington Supreme Court's decision in *Jensen v. Henneford*, 185 Wash. 209 (1936) was issued only three years after *Culliton*. Jensen involved a challenge to a 1935 tax statute that levied a graduated income tax on every Washington resident "for the

privilege of receiving income therein while enjoying the protection of its laws." *Jensen*, at 212 (quoting Laws of 1935, ch. 178, Sec. 2). As in the instant case, the State in *Jensen* argued that the new tax statute should be deemed an excise tax (which would be constitutional) and not an income tax (which would be unconstitutional). The *Jensen* court rejected the State's argument, stating that "[t]he character of a tax is determined by its incidents, not by its name." *Jensen*, at 217. Because the new statute taxed income below $4,000 at three percent and income above $4,000 at four percent, and because *Culliton* had established that income constitutes property for purposes of Article VII, Section 1, the *Jensen* court ruled the 1935 tax statute to be an unconstitutional non-uniform tax on property. Jensen, at 220.

These principles were revisited in 1951 when the Washington Supreme Court decided the case of *Power, Inc. v. Huntley*. 39 Wn.2d 191 (1951). In 2019 the *Kunath* court summarized *Power* as follows:

> In 1951, *Power, Inc. v. Huntley* evaluated a statewide "corporation excise tax" that levied a four percent tax on a corporation's net income "for the privilege of exercising its corporate franchise in this state or for the privilege of doing business in this state." The tax did not apply to sole proprietorships or partnerships. The central question before the court was whether the tax fell on income rather than being a true excise. If a tax on income, then it violated the uniformity clause of article VII, section 1 by affecting only certain forms of corporations and not other

> companies in competition with them. The *Power* court set aside the language of the tax, analyzed its incidents, and concluded it was "a mere property tax masquerading as an excise." Under the taxing scheme, a Washington corporation with zero net income would not pay any income tax, while a foreign corporation doing business in Washington would pay taxes on activities unconnected to the privilege of conducting business in Washington. Also, the scheme hewed closely to federal corporate income tax law, illustrating its true nature as an income tax. The court concluded the tax was a nonuniform property tax and therefore unconstitutional. [Citations omitted.]

Kunath, at 215. One way to summarize *Power* would be to say that when deciding a challenge as to the facial constitutionality of a tax statute (specifically including where the State argues it is an excise tax and not an income tax), the court must look through any labels the State has used to describe the statute, analyze the "incidents" of the statute, and determine whether it is a "property tax masquerading as an excise." Id.

As *Power* makes clear, rather than merely relying upon whatever label or characterization the State has used to describe a tax statute, it is the State's choices about "who is being taxed, what is being taxed, and how the tax is measured" that determine its "incidents" and whether it should be deemed a tax on income as opposed to an excise. See *Kunath*, at 221. In the instant case, some of the most significant

"incidents" of ESSB 5096 show the hallmarks of an income tax rather than an excise tax. They include the following:

- It relies upon federal IRS income tax returns that Washington residents must file and is thus derived from a taxpayer's annual federal income tax reporting. See *Kunath*, at 215 ("scheme [that] hewed closely to federal corporate income tax law" held to be an unconstitutional property tax).
- It levies a tax on the same long-term capital gains that the IRS characterizes as "income" under federal law.
- It is levied annually (like an income tax), not at the time of each transaction (like an excise tax).
- It is levied not on the gross value of the property sold in a transaction (like an excise tax as demonstrated by the examples cited by the State[2]), but on an individual's net capital gain (like an income tax).

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[2] See, e.g., State's MSJ filed 12-6-21, at pp. 11-16, discussing *inter alia*, *Morrow v. Henneford*, 182 Wash. 625, 631 (1935) (upholding business and occupation tax imposed on the privilege of engaging in business activity in the state and measured by the total gross income earned from business activity in Washington); *Mahler v. Tremper*, 40 Wn.2d 405 (1952) (upholding real estate excise tax measured by selling price of the property); *Black v. State*, 67 Wn.2d 97, 98 (1965) (upholding sales tax imposed on lease and measured by total cost of the lease); *Wash. Pub. Ports Ass'n v. Dept of Revenue*, 148 Wn.2d 637, 642-43 (2003) (upholding leasehold excise tax measured by total taxable rent); *High Tide Seafoods v. State*, 106 Wn.2d 695, 700 (1986) (measure of tax on enhanced fish food was total value of the fish at first

- Like an income tax, it is based on an aggregate calculation of an individual's capital gains over the course of a year from all sources, taking into consideration various deductions and exclusions, to arrive at a single annual taxable dollar figure.
- Like an income tax, it is levied on all long-term capital gains of an individual, regardless whether those gains were earned within Washington and thus without concern whether the State conferred any right or privilege to facilitate the underlying transfer that would entitle the State to charge an excise. See, e.g., *Jensen*, at 218 ("When a tax is, in truth, levied for the exercise of a substantive privilege granted or permitted by the state, the tax may be considered as an excise tax.")
- Like an income tax and unlike an excise tax, the new tax statute includes a deduction for certain charitable donations the taxpayer has made during the tax year.[3]

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possession); *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 800 (2005) (measure of motor vehicle excise tax was value of the vehicle at registration); *In re Estate of Hambleton*, 181 Wn.2d 802 (2014) (upholding estate tax that was measured by the value of the property at the time of decedent's death and is apportioned to the extent any of the property was located outside Washington).

[3] See Section 9 of ESSB 5096, entitled "Additional Deduction for Charitable Donations." See also, Washington State Department of Revenue (DOR) bill report on ESSB 5096, at 5-6, attached at **Exhibit c** to Declaration of Jason Mercier, which as explained earlier, the Court deems to be admissible as an

- If the legal owner of the asset who transfers title or ownership is not an individual, then the legal owner is not liable for the tax generated in connection with the transaction, unlike the excise taxes identified by the State.

The State characterizes the new tax statute as a "tax that applies on the sale or transfer of property" and argues that such taxes are excise taxes. State's MSJ filed 12-6-21, at 1. But as noted above, the new tax is not levied upon "the sale or transfer" of capital assets. Instead, the new tax statute levies a tax on receipt, and thus ownership, of capital gains. See *Jensen v. Henneford*, 185 Wash. 209, 219 (1936) ("The right to receive" is an incident of property ownership).

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admission of a party opponent under ER 801 (d)(2). The DOR bill report states in part:

> Another issue with the charitable deduction is that, because it is a common feature of income taxes, it may increase the chance that the courts will determine that the Washington capital gains tax is an income tax. At least one lawsuit has already been filed seeking to invalidate the capital gains tax on several grounds, including that the tax is an income tax and, as such, violates articles VII, sections 1 and 2 of the Washington Constitution, because the tax is non-uniform and the tax rate exceeds the 1% aggregate rate limit.
>
> It is impossible to quantify the extent to which the charitable deduction may strengthen the argument that the capital gains tax is an income tax. All we can say is that the charitable deduction likely incrementally strengthens the argument that the capital gains tax is an income tax. The charitable donation deduction is not the only provision in the bill that opponents of the capital gains tax can poin1 to in support of their argument that the capital gains tax is an income tax.

In attempting to label the new tax as an excise and not an income tax, the State also argues that the tax "applies only upon the voluntary sale of a long-term asset." State's MSJ filed 12-6-21 at 9-10. However, the new tax would be levied not only upon capital gains from voluntary transactions, but also in a number of scenarios where the sale or transfer of a capital asset would occur without any voluntary act by the transfer, e.g., transactions involving a minority shareholder, non-managing member of a limited liability company, or trust beneficiary. To the extent the new tax is unavoidable—at least for some taxpayers—it constitutes an "absolute and unavoidable" tax that meets the definition of a property tax, see authorities cited in Plaintiff's MSJ filed 12-6-21 at 9-10, that is subject to the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution.

ESSB 5096 is properly characterized as an income tax pursuant to *Culliton*, *Jensen*, *Power* and other applicable Washington caselaw, rather than as an excise tax as argued by the State. As a tax on the receipt of income, ESSB 5096 is also properly characterized as a tax on property pursuant to that same caselaw.

This Court concludes that ESSB 5096 violates the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution. It violates the uniformity requirement by imposing a 7% tax on an individual's long-term capital gains exceeding $250,000 but imposing zero tax on capital gains below that $250,000 threshold. It violates the

limitation requirement because the 7% tax exceeds the 1% maximum annual property tax rate of 1%.

CONCLUSION

For the reasons set forth above, this Court grants Plaintiffs' Motion for Summary Judgment and denies the State's Motion for Summary Judgment. Having ruled that ESSB 5096 is invalid because it violates the uniformity and limitation requirements of article VII, sections 1 and 2 of the Washington State Constitution, this Court does not reach the additional arguments raised by the parties.

It is hoped that the parties will seek to agree upon the form of the written orders that will memorialize the Court's rulings set forth in this letter. If a presentment hearing is needed, it may be scheduled as a special set hearing by emailing the Court Administrator.

Sincerely,

[handwritten: signature]

Brian C. Huber
Judge of the Superior Court

Appendix E

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, §8, cl. 3

The Congress shall have Power … To regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes;

…

Wash. Const. art VII, §1

Section 1 Taxation. The power of taxation shall never be suspended, surrendered or contracted away. All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. All real estate shall constitute one class: *Provided,* That the legislature may tax mines and mineral resources and lands devoted to reforestation by either a yield tax or an ad valorem tax at such rate as it may fix, or by both. Such property as the legislature may by general laws provide shall be exempt from taxation. Property of the United States and of the state, counties, school districts and other municipal corporations, and credits secured by property actually taxed in this state, not exceeding in value the value of such property, shall be exempt from taxation. The legislature shall have power, by appropriate legislation, to exempt personal property to the amount of fifteen thousand ($15,000.00) dollars for each head of a family liable to assessment and taxation under the provisions of the

laws of this state of which the individual is the actual bona fide owner.

Wash. Const. art VII, §2

Section 2 Limitation on Levies. Except as hereinafter provided and notwithstanding any other provision of this Constitution, the aggregate of all tax levies upon real and personal property by the state and all taxing districts now existing or hereafter created, shall not in any year exceed one percent of the true and fair value of such property in money. Nothing herein shall prevent levies at the rates now provided by law by or for any port or public utility district. The term "taxing district" for the purposes of this section shall mean any political subdivision, municipal corporation, district, or other governmental agency authorized by law to levy, or have levied for it, ad valorem taxes on property, other than a port or public utility district. Such aggregate limitation or any specific limitation imposed by law in conformity therewith may be exceeded only as follows:

(a) By any taxing district when specifically authorized so to do by a majority of at least three-fifths of the voters of the taxing district voting on the proposition to levy such additional tax submitted not more than twelve months prior to the date on which the proposed initial levy is to be made and not oftener than twice in such twelve month period, either at a special election or at the regular election of such taxing district, at which election the number of voters voting "yes" on the proposition shall constitute three-fifths of a number equal to forty percent of the total number of voters voting in such taxing district at the last preceding general election when the number of

voters voting on the proposition does not exceed forty percent of the total number of voters voting in such taxing district in the last preceding general election; or by a majority of at least three-fifths of the voters of the taxing district voting on the proposition to levy when the number of voters voting on the proposition exceeds forty percent of the number of voters voting in such taxing district in the last preceding general election. Notwithstanding any other provision of this Constitution, any proposition pursuant to this subsection to levy additional tax for the support of the common schools or fire protection districts may provide such support for a period of up to four years and any proposition to levy an additional tax to support the construction, modernization, or remodelling of school facilities or fire facilities may provide such support for a period not exceeding six years. Notwithstanding any other provision of this subsection, a proposition under this subsection to levy an additional tax for a school district shall be authorized by a majority of the voters voting on the proposition, regardless of the number of voters voting on the proposition;

(b) By any taxing district otherwise authorized by law to issue general obligation bonds for capital purposes, for the sole purpose of making the required payments of principal and interest on general obligation bonds issued solely for capital purposes, other than the replacement of equipment, when authorized so to do by majority of at least three-fifths of the voters of the taxing district voting on the proposition to issue such bonds and to pay the principal and interest thereon by annual tax levies in excess of the limitation herein provided during the

term of such bonds, submitted not oftener than twice in any calendar year, at an election held in the manner provided by law for bond elections in such taxing district, at which election the total number of voters voting on the proposition shall constitute not less than forty percent of the total number of voters voting in such taxing district at the last preceding general election. Any such taxing district shall have the right by vote of its governing body to refund any general obligation bonds of said district issued for capital purposes only, and to provide for the interest thereon and amortization thereof by annual levies in excess of the tax limitation provided for herein. The provisions of this section shall also be subject to the limitations contained in Article VIII, Section 6, of this Constitution;

(c) By the state or any taxing district for the purpose of preventing the impairment of the obligation of a contract when ordered so to do by a court of last resort.

RCW 82.87. CAPITAL GAINS TAX.

RCW 82.87.010 Findings—Intent—2021 c 196. The legislature finds 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 further finds that high quality early learning and child care is critical to a child's success in school and life, as it supports the development of the child's social-emotional, physical, cognitive, and language skills. Therefore, the legislature will invest in the ongoing support of K-12 education and early learning and child care by dedicating revenues from chapter 196, Laws of

2021 to the education legacy trust account and the common school construction account [fund].

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

To help meet the state's paramount duty, the legislature intends to levy a seven percent tax on the voluntary sale or exchange of stocks, bonds, and other capital assets where the profit is in excess of $250,000 annually to fund K-12 education, early learning, and child care, and advance our paramount duty to amply provide an education to every child in the state. The legislature recognizes that levying this tax will have the additional effect of making material progress toward rebalancing the state's tax code.

The legislature further intends to exempt certain assets from the tax including, but not limited to, qualified family-owned small businesses, all residential and other real property, and retirement accounts. [2021 c 196 § 1.]

RCW 82.87.020 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Adjusted capital gain" means federal net long-term capital gain:

(a) Plus any amount of long-term capital loss from a sale or exchange that is exempt from the tax imposed in this chapter, to the extent such loss was included in calculating federal net long-term capital gain;

(b) Plus any amount of long-term capital loss from a sale or exchange that is not allocated to Washington under RCW 82.87.100, to the extent such loss was included in calculating federal net long-term capital gain;

(c) Plus any amount of loss carryforward from a sale or exchange that is not allocated to Washington under RCW 82.87.100, to the extent such loss was included in calculating federal net long-term capital gain;

(d) Less any amount of long-term capital gain from a sale or exchange that is not allocated to Washington under RCW 82.87.100, to the extent such gain was included in calculating federal net long-term capital gain; and

(e) Less any amount of long-term capital gain from a sale or exchange that is exempt from the tax imposed in this chapter, to the extent such gain was included in calculating federal net long-term capital gain.

(2) "Capital asset" has the same meaning as provided by Title 26 U.S.C. Sec. 1221 of the internal revenue code and also includes any other property if the sale or exchange of the property results in a gain that is treated as a long-term capital gain under Title 26 U.S.C. Sec. 1231 or any other provision of the internal revenue code.

(3) "Federal net long-term capital gain" means the net long-term capital gain reportable for federal income tax purposes determined as if Title 26 U.S.C. Secs. 55 through 59, 1400Z-1, and 1400Z-2 of the internal revenue code did not exist.

(4) "Individual" means a natural person.

(5) "Internal revenue code" means the United States internal revenue code of 1986, as amended, as of July 25, 2021, or such subsequent date as the department may provide by rule consistent with the purpose of this chapter.

(6) "Long-term capital asset" means a capital asset that is held for more than one year.

(7) "Long-term capital gain" means gain from the sale or exchange of a long-term capital asset.

(8) "Long-term capital loss" means a loss from the sale or exchange of a long-term capital asset.

(9) "Real estate" means land and fixtures affixed to land. "Real estate" also includes used mobile homes, used park model trailers, used floating homes, and improvements constructed upon leased land.

(10)(a) "Resident" means an individual:

(i) Who is domiciled in this state during the taxable year, unless the individual (A) maintained no permanent place of abode in this state during the entire taxable year, (B) maintained a permanent place of abode outside of this state during the entire taxable year, and (C) spent in the aggregate not more than

30 days of the taxable year in this state; or

(ii) Who is not domiciled in this state during the taxable year, but maintained a place of abode and was physically present in this state for more than 183 days during the taxable year.

(b) For purposes of this subsection, "day" means a calendar day or any portion of a calendar day.

(c) An individual who is a resident under (a) of this subsection is a resident for that portion of a taxable year in which the individual was domiciled in this state or maintained a place of abode in this state.

(11) "Taxable year" means the taxpayer's taxable year as determined under the internal revenue code.

(12) "Taxpayer" means an individual subject to tax under this chapter.

(13) "Washington capital gains" means an individual's adjusted capital gain, as modified in RCW 82.87.060, for each return filed under this chapter. [2021 c 196 § 4.]

RCW 82.87.030 Distribution of revenues. (1) All taxes, interest, and penalties collected under this chapter shall be distributed as follows:

(a) The first $500,000,000 collected each fiscal year shall be deposited into the education legacy trust account created in RCW 83.100.230; and

(b) Any remainder collected each fiscal year shall be deposited into the common school construction account [fund].

(2) The amounts specified under subsection (1)(a) of this section shall be adjusted annually as provided under RCW 82.87.150. [2021 c 196 § 2.]

RCW 82.87.040 Tax imposed—Long-term capital assets. (1) Beginning January 1, 2022, an excise tax is imposed on the sale or exchange of long-term capital assets. Only individuals are subject to payment of the tax, which equals seven percent multiplied by an individual's Washington capital gains.

(2) The tax levied in subsection (1) of this section is necessary for the support of the state government and its existing public institutions.

(3) If an individual's Washington capital gains are less than zero for a taxable year, no tax is due under this section and no such amount is allowed as a carryover for use in the calculation of that individual's adjusted capital gain, as defined in RCW 82.87.020(1), for any taxable year. To the extent that a loss carryforward is included in the calculation of an individual's federal net long-term capital gain and that loss carryforward is directly attributable to losses from sales or exchanges allocated to this state under RCW 82.87.100, the loss carryforward is included in the calculation of that individual's adjusted capital gain for the purposes of this chapter. An individual may not include any losses carried back for federal income tax purposes in the

calculation of that individual's adjusted capital gain for any taxable year.

(4)(a) The tax imposed in this section applies to the sale or exchange of long-term capital assets owned by the taxpayer, whether the taxpayer was the legal or beneficial owner of such assets at the time of the sale or exchange. The tax applies when the Washington capital gains are recognized by the taxpayer in accordance with this chapter.

(b) For purposes of this chapter:

(i) An individual is considered to be a beneficial owner of long-term capital assets held by an entity that is a pass-through or disregarded entity for federal tax purposes, such as a partnership, limited liability company, S corporation, or grantor trust, to the extent of the individual's ownership interest in the entity as reported for federal income tax purposes.

(ii) A nongrantor trust is deemed to be a grantor trust if the trust does not qualify as a grantor trust for federal tax purposes, and the grantor's transfer of assets to the trust is treated as an incomplete gift under Title 26 U.S.C. Sec. 2511 of the internal revenue code and its accompanying regulations. A grantor of such trust is considered the beneficial owner of the capital assets of the trust for purposes of the tax imposed in this section and must include any long-term

capital gain or loss from the sale or exchange of a capital asset by the trust in the calculation of that individual's adjusted capital gain, if such gain or loss is allocated to this state under RCW 82.87.100. [2021 c 196 § 5.]

RCW 82.87.050 Exemptions. This chapter does not apply to the sale or exchange of:

(1) All real estate transferred by deed, real estate contract, judgment, or other lawful instruments that transfer title to real property and are filed as a public record with the counties where real property is located;

(2)(a) An interest in a privately held entity only to the extent that any long-term capital gain or loss from such sale or exchange is directly attributable to the real estate owned directly by such entity.

(b)(i) Except as provided in (b)(ii) and (iii) of this subsection, the value of the exemption under this subsection is equal to the fair market value of the real estate owned directly by the entity less its basis, at the time that the sale or exchange of the individual's interest occurs, multiplied by the percentage of the ownership interest in the entity which is sold or exchanged by the individual.

(ii) If a sale or exchange of an interest in an entity results in an amount directly attributable to real property and that is considered as an amount realized from the sale or exchange of property other

than a capital asset under Title 26 U.S.C. Sec. 751 of the internal revenue code, such amount must not be considered in the calculation of an individual's exemption amount under (b)(i) of this subsection (2).

(iii) Real estate not owned directly by the entity in which an individual is selling or exchanging the individual's interest must not be considered in the calculation of an individual's exemption amount under (b)(i) of this subsection (2).

(c) Fair market value of real estate may be established by a fair market appraisal of the real estate or an allocation of assets by the seller and the buyer made under Title 26 U.S.C. Sec. 1060 of the internal revenue code, as amended. However, the department is not bound by the parties' agreement as to the allocation of assets, allocation of consideration, or fair market value, if such allocations or fair market value do not reflect the fair market value of the real estate. The assessed value of the real estate for property tax purposes may be used to determine the fair market value of the real estate, if the assessed value is current as of the date of the sale or exchange of the ownership interest in the entity owning the real estate and the department determines that this method is reasonable under the circumstances.

(d) The value of the exemption under this subsection (2) may not exceed the individual's

long-term capital gain or loss from the sale or exchange of an interest in an entity for which the individual is claiming this exemption;

(3) Assets held under a retirement savings account under Title 26 U.S.C. Sec. 401(k) of the internal revenue code, a tax-sheltered annuity or custodial account described in Title 26 U.S.C. Sec. 403(b) of the internal revenue code, a deferred compensation plan under Title 26 U.S.C. Sec. 457(b) of the internal revenue code, an individual retirement account or individual retirement annuity described in Title 26 U.S.C. Sec. 408 of the internal revenue code, a Roth individual retirement account described in Title 26 U.S.C. Sec. 408A of the internal revenue code, an employee defined contribution program, an employee defined benefit plan, or a similar retirement savings vehicle;

(4) Assets pursuant to, or under imminent threat of, condemnation proceedings by the United States, the state or any of its political subdivisions, or a municipal corporation;

(5) Cattle, horses, or breeding livestock if for the taxable year of the sale or exchange, more than 50 percent of the taxpayer's gross income for the taxable year, including from the sale or exchange of capital assets, is from farming or ranching;

(6) Property depreciable under Title 26 U.S.C. Sec. 167(a)(1) of the internal revenue code, or that qualifies for expensing under Title 26 U.S.C. Sec. 179 of the internal revenue code;

(7) Timber, timberland, or the receipt of Washington capital gains as dividends and

distributions from real estate investment trusts derived from gains from the sale or exchange of timber and timberland. "Timber" means forest trees, standing or down, on privately or publicly owned land, and includes Christmas trees and short-rotation hardwoods. The sale or exchange of timber includes the cutting or disposal of timber qualifying for capital gains treatment under Title 26 U.S.C. Sec. 631(a) or (b) of the internal revenue code;

(8)(a) Commercial fishing privileges.

(b) For the purposes of this subsection (8), "commercial fishing privilege" means a right, held by a seafood harvester or processor, to participate in a limited access fishery. "Commercial fishing privilege" includes and is limited to:

(i) In the case of federally managed fisheries, quota and access to fisheries assigned pursuant to individual fishing quota programs, limited entry and catch share programs, cooperative fishing management agreements, or similar arrangements; and

(ii) In the case of state-managed fisheries, quota and access to fisheries assigned under fishery permits, limited entry and catch share programs, or similar arrangements; and

(9) Goodwill received from the sale of an auto dealership licensed under chapter 46.70 RCW whose activities are subject to chapter 46.96 RCW. [2021 c 196 § 6.]

RCW 82.87.060 Deductions. In computing tax for a taxable year, a taxpayer may deduct from his or her Washington capital gains:

(1) A standard deduction of $250,000 per individual, or in the case of spouses or domestic partners, their combined standard deduction is limited to $250,000, regardless of whether they file joint or separate returns. The amount of the standard deduction shall be adjusted pursuant to RCW 82.87.150;

(2) Amounts that the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

(3) The amount of adjusted capital gain derived from the sale or transfer of the taxpayer's interest in a qualified family-owned small business pursuant to RCW 82.87.070; and

(4) Charitable donations deductible under RCW 82.87.080. [2021 c 196 § 7.]

RCW 82.87.070 Qualified family-owned small business deduction.

(1) In computing tax under this chapter for a taxable year, a taxpayer may deduct from his or her Washington capital gains the amount of adjusted capital gain derived in the taxable year from the sale of substantially all of the fair market value of the assets of, or the transfer of substantially all of the taxpayer's interest in, a qualified family-owned small business, to the extent that such adjusted capital gain would otherwise be included in the taxpayer's Washington capital gains.

(2) For purposes of this section, the following definitions apply:

(a) "Assets" means real property and personal property, including tangible personal property and intangible property.

(b) "Family" means the same as "member of the family" in RCW 83.100.046.

(c)(i) "Materially participated" means an individual was involved in the operation of a business on a basis that is regular, continuous, and substantial.

(ii) The term "materially participated" must be interpreted consistently with the applicable treasury regulations for Title 26 U.S.C. Sec. 469 of the internal revenue code, to the extent that such interpretation does not conflict with any provision of this section.

(d) "Qualified family-owned small business" means a business:

(i) In which the taxpayer held a qualifying interest for at least five years immediately preceding the sale or transfer described in subsection (1) of this section;

(ii) In which either the taxpayer or members of the taxpayer's family, or both, materially participated in operating the business for at least five of the 10 years immediately preceding the sale or transfer described in subsection

(1) of this section, unless such sale or transfer was to a qualified heir; and

(iii) That had worldwide gross revenue of $10,000,000 or less in the 12-month period immediately preceding the sale or transfer described in subsection (1) of this section. The worldwide gross revenue amount under this subsection (2)(d)(iii) shall be adjusted annually as provided in RCW 82.87.150.

(e) "Qualified heir" means a member of the taxpayer's family.

(f) "Qualifying interest" means:

(i) An interest as a proprietor in a business carried on as a sole proprietorship; or

(ii) An interest in a business if at least:

(A) Fifty percent of the business is owned, directly or indirectly, by any combination of the taxpayer or members of the taxpayer's family, or both;

(B) Thirty percent of the business is owned, directly or indirectly, by any combination of the taxpayer or members of the taxpayer's family, or both, and at least:

(I) Seventy percent of the business is owned, directly or indirectly, by members of two families; or

(II) Ninety percent of the business is owned, directly or indirectly, by members of three families.

(g) "Substantially all" means at least 90 percent. [2021 c 196 § 8.]

RCW 82.87.080 Charitable donation deduction. (1) In computing tax under this chapter for a taxable year, a taxpayer may deduct from his or her Washington capital gains the amount donated by the taxpayer to one or more qualified organizations during the same taxable year in excess of the minimum qualifying charitable donation amount. For the purposes of this section, the minimum qualifying charitable donation amount equals $250,000. The minimum qualifying charitable donation amount under this subsection (1) shall be adjusted pursuant to RCW 82.87.150.

(2) The deduction authorized under subsection (1) of this section may not exceed $100,000 for the taxable year. The maximum amount of the available deduction under this subsection (2) shall be adjusted pursuant to RCW 82.87.150.

(3) The deduction authorized under subsection (1) of this section may not be carried forward or backward to another tax reporting period.

(4) For the purposes of this section, the following definitions apply:

(a) "Nonprofit organization" means an organization exempt from tax under Title 26

U.S.C. Sec. 501(c)(3) of the internal revenue code.

(b) "Qualified organization" means a nonprofit organization, or any other organization, that is:

(i) Eligible to receive a charitable deduction as defined in Title 26 U.S.C. Sec. 170(c) of the internal revenue code; and

(ii) Principally directed or managed within the state of Washington. [2021 c 196 § 9.]

RCW 82.87.090 Other taxes. The tax imposed under this chapter is in addition to any other taxes imposed by the state or any of its political subdivisions, or a municipal corporation, with respect to the same sale or exchange, including the taxes imposed in, or under the authority of, chapter 82.04, 82.08, 82.12, 82.14, 82.45, or 82.46 RCW. [2021 c 196 § 10.]

RCW 82.87.100 Allocation of long-term capital gains and losses—Credit. (1) For purposes of the tax imposed under this chapter, long-term capital gains and losses are allocated to Washington as follows:

(a) Long-term capital gains or losses from the sale or exchange of tangible personal property are allocated to this state if the property was located in this state at the time of the sale or exchange. Long-term capital gains or losses from the sale or exchange of tangible personal property are also allocated to this state even though the property was not

located in this state at the time of the sale or exchange if:

(i) The property was located in the state at any time during the taxable year in which the sale or exchange occurred or the immediately preceding taxable year;

(ii) The taxpayer was a resident at the time the sale or exchange occurred; and

(iii) The taxpayer is not subject to the payment of an income or excise tax legally imposed on the long-term capital gains or losses by another taxing jurisdiction.

(b) Long-term capital gains or losses derived from intangible personal property are allocated to this state if the taxpayer was domiciled in this state at the time the sale or exchange occurred.

(2)(a) A credit is allowed against the tax imposed in RCW 82.87.040 equal 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 to the extent such capital gains are included in the taxpayer's Washington capital gains. The amount of credit under this subsection may not exceed the total amount of tax due under this chapter, and there is no carryback or carryforward of any unused credits.

(b) As used in this section, "taxing jurisdiction" means a state of the United States other than the state of Washington, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any foreign country or political subdivision of a foreign country. [2021 c 196 § 11.]

RCW 82.87.110 Filing of returns—Additional documentation—Penalty. (1)(a) Except as otherwise provided in this section or RCW 82.32.080, taxpayers owing tax under this chapter must file, on forms prescribed by the department, a return with the department on or before the date the taxpayer's federal income tax return for the taxable year is required to be filed.

(b)(i) Except as provided in (b)(ii) of this subsection (1), returns and all supporting documents must be filed electronically using the department's online tax filing service or other method of electronic reporting as the department may authorize.

(ii) The department may waive the electronic filing requirement in this subsection for good cause as provided in RCW 82.32.080.

(2) In addition to the Washington return required to be filed under subsection (1) of this section, taxpayers owing tax under this chapter must file with the department on or before the date the federal return is required to be filed a

copy of the federal income tax return along with all schedules and supporting documentation.

(3) Each taxpayer required to file a return under this section must, without assessment, notice, or demand, pay any tax due thereon to the department on or before the date fixed for the filing of the return, regardless of any filing extension. The tax must be paid by electronic funds transfer as defined in RCW 82.32.085 or by other forms of electronic payment as may be authorized by the department. The department may waive the electronic payment requirement for good cause as provided in RCW 82.32.080. If any tax due under this chapter is not paid by the due date, interest and penalties as provided in chapter 82.32 RCW apply to the deficiency.

(4)(a) In addition to the Washington return required to be filed under subsection (1) of this section, an individual claiming an exemption under RCW 82.87.050(2) must file documentation substantiating the following:

(i) The fair market value and basis of the real estate held directly by the entity in which the interest was sold or exchanged;

(ii) The percentage of the ownership interest sold or exchanged in the entity owning real estate; and

(iii) The methodology, if any, established by the entity in which the interest was sold or exchanged, for allocating gains or losses to the owners, partners, or

shareholders of the entity from the sale of real estate.

(b) The department may by rule prescribe additional filing requirements to substantiate an individual's claim for an exemption under RCW 82.87.050(2). Prior to adopting any rule under this subsection (4)(b), the department must allow for an opportunity for participation by interested parties in the rule-making process in accordance with the administrative procedure act, chapter 34.05 RCW.

(5) If a taxpayer has obtained an extension of time for filing the federal income tax return for the taxable year, the taxpayer is entitled to the same extension of time for filing the return required under this section if the taxpayer provides the department, before the due date provided in subsection (1) of this section, the extension confirmation number or other evidence satisfactory to the department confirming the federal extension. An extension under this subsection for the filing of a return under this chapter is not an extension of time to pay the tax due under this chapter.

(6)(a) If any return due under subsection (1) of this section, along with a copy of the federal income tax return, is not filed with the department by the due date or any extension granted by the department, the department must assess a penalty in the amount of five percent of the tax due for the taxable year covered by the return for each month or

portion of a month that the return remains unfiled. The total penalty assessed under this subsection may not exceed 25 percent of the tax due for the taxable year covered by the delinquent return. The penalty under this subsection is in addition to any penalties assessed for the late payment of any tax due on the return.

(b) The department must waive or cancel the penalty imposed under this subsection if:

(i) The department is persuaded that the taxpayer's failure to file the return by the due date was due to circumstances beyond the taxpayer's control; or

(ii) The taxpayer has not been delinquent in filing any return due under this section during the preceding five calendar years. [2021 c 196 § 12.]

RCW 82.87.120 Joint filers—Separate filers—Tax liability. (1) If the federal income tax liabilities of both spouses are determined on a joint federal return for the taxable year, they must file a joint return under this chapter.

(2) Except as otherwise provided in this subsection, if the federal income tax liability of either spouse is determined on a separate federal return for the taxable year, they must file separate returns under this chapter. State registered domestic partners may file a joint return under this chapter even if they filed separate federal returns for the taxable year.

(3) The liability for tax due under this chapter of each spouse or state registered domestic partner is joint and several, unless:

(a) The spouse is relieved of liability for federal tax purposes as provided under Title 26 U.S.C. Sec. 6015 of the internal revenue code; or

(b) The department determines that the domestic partner qualifies for relief as provided by rule of the department. Such rule, to the extent possible without being inconsistent with this chapter, must follow Title 26 U.S.C. Sec. 6015. [2021 c 196 § 13.]

RCW 82.87.130 Administration of taxes. Except as otherwise provided by law and to the extent not inconsistent with the provisions of this chapter, chapter 82.32 RCW applies to the administration of taxes imposed under this chapter. [2021 c 196 § 14.]

RCW 82.87.140 Tax criminal penalties. (1) Any taxpayer who knowingly attempts to evade payment of the tax imposed under this chapter is guilty of a class c felony as provided in chapter 9A.20 RCW.

(2) Any taxpayer who knowingly fails to pay tax, make returns, keep records, or supply information, as required under this title, is guilty of a gross misdemeanor as provided in chapter 9A.20 RCW. [2021 c 196 § 15.]

RCW 82.87.150 Annual adjustments. (1) Beginning December 2023 and each December thereafter, the department must adjust the applicable amounts by multiplying the current applicable

amounts by one plus the percentage by which the most current consumer price index available on December 1st of the current year exceeds the consumer price index for the prior 12-month period, and rounding the result to the nearest $1,000. If an adjustment under this subsection (1) would reduce the applicable amounts, the department must not adjust the applicable amounts for use in the following year. The department must publish the adjusted applicable amounts on its public website by December 31st. The adjusted applicable amounts calculated under this subsection (1) take effect for taxes due and distributions made, as the case may be, in the following calendar year.

(2) For purposes of this section, the following definitions apply:

(a) "Applicable amounts" means:

(i) The distribution amount to the education legacy trust account as provided in RCW 82.87.030(1)(a);

(ii) The standard deduction amount in RCW 82.87.020(13) and 82.87.060(1);

(iii) The worldwide gross revenue amount under RCW 82.87.070; and

(iv) The minimum qualifying charitable donation amount and maximum charitable donation amount under RCW 82.87.080.

(b) "Consumer price index" means the consumer price index for all urban consumers, all items, for the Seattle area as

calculated by the United States bureau of labor statistics or its successor agency.

(c) "Seattle area" means the geographic area sample that includes Seattle and surrounding areas. [2021 c 196 § 17.]