No. 23-171

In The
Supreme Court of the United States

CHRIS QUINN, et al.,

Petitioners,

v.

WASHINGTON, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

RESPONDENTS EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, MARY CURRY, AND WASHINGTON EDUCATION ASSOCIATION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Washington is one of 42 states that impose a tax on the capital gains from transactions involving the transfer of capital assets. Washington's capital gains tax, like those in the other 41 states, taxes the benefit received by its state's residents from the transaction. The tax, like the capital gains taxes in other states, also includes a mechanism for a credit to avoid double taxation.

Petitioners challenging the tax have provided no evidence that they have paid the Washington capital gains tax, and admit that other states' capital gains taxes on out-of-state transfers are constitutional.

The questions presented are:

1. Do Petitioners have standing to challenge the alleged out-of-state application of Washington's capital gains tax when they have not shown that they pay the tax at all, much less based on out-of-state transactions?

2. If Petitioners have standing, should this Court declare that a state's capital gains tax cannot apply to the benefits received by their residents from out-of-state transactions even though that is a universal feature of such taxes, the tax is structured to credit taxes paid to another state on the same transaction, and no court has ever so declared for any of the similarly structured capital gains taxes imposed in 41 other states?

CORPORATE DISCLOSURE STATEMENT

Respondent Washington Education Association, a nonprofit corporation, has no parent or publicly held company owning 10% or more of the corporation's stock.

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INTRODUCTION

Washington is unique in that its Supreme Court has determined that a progressive income tax is prohibited by its Constitution. As a result, Washington has one of the most regressive tax systems in the country. To address persistent challenges raising sufficient funds to meet its paramount duty under the Washington Constitution to offer all children in Washington a free education without further burdening its middle- and low-income residents, Washington adopted a capital gains tax. The state legislature specified that the tax is an excise tax on residents' transfer of capital assets, not a property tax on income. In purpose and effect, however, Washington's tax is the same as 41 other states with a tax on capital gains: to tax the benefit to residents from the transfer of capital assets while crediting any tax due in any other state from the same transaction.

Most states tax their residents' gains from both in-state and out-of-state transfers. Washington taxes more limited categories of transfers: transfers of intangible property anywhere and transfers of tangible property in Washington. The tax provides a credit if another state taxes the same gains. To prevent tax avoidance, the tax also applies to gains from transfers of tangible property removed from Washington during the tax year to a state that does not impose a tax on the gains.

Petitioners claim that Washington's capital gains tax violates the dormant Commerce Clause. While they

frame the question presented broadly, in fact, they challenge two specific aspects of the tax: transfers of intangible assets where the resident did not "confine [their] activities" to Washington and the tax's provision to mitigate tax avoidance.

Initially, Petitioners lack standing. They filed suit before the tax went into effect and have never even alleged that they pay the tax. They relied on Washington's liberal standing rules in the state courts below, but their opposition to the tax is not sufficient in itself to invoke Article III standing.

Even if they have standing, Petitioners fail to cite any case that conflicts with the decision below. They argue the court below violated a bright-line rule prohibiting states from taxing transfers outside of their borders. This Court's recent dormant Commerce Clause precedent, however, rejects such a formalistic approach, in favor of a case-by-case assessment focused on the purpose of the tax and its effects on interstate commerce. The cases they cite do not support this Court reviving a bright-line rule or otherwise conflict with the narrow issues addressed by the court below. The only lower court decision they cite also does not create a conflict because the court there expressly distinguished its decision from cases about state taxes and refused to apply the applicable rule established by this Court in *Complete Auto*. *See Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320, 1324 (9th Cir. 2015) (en banc).

Petitioners' speculation that the decision below will prompt states to reach beyond their borders to tax their residents' activities everywhere bears no relationship to the actual function and reach of Washington's tax. In purpose and effect, Washington's tax is materially indistinguishable from other states' existing capital gains taxes, which Petitioners concede are just fine. Additionally, despite Petitioners' admonitions that the tax will subject them to multiple taxation, the tax includes safeguards against that result, including a tax credit in the amount of any tax paid by the taxpayer to another state. Petitioners largely ignore these mechanisms, and fail to offer any evidence of double taxation. This lack of evidence about how the tax applies in practice also makes this case a poor vehicle for review.

The Petition should be denied.

STATEMENT OF THE CASE

A. Washington Adopts a Capital Gains Tax to Pay for Critical Investments in Public Education.

Washington faces significant challenges in raising sufficient revenue each year to meet its "paramount duty" under the Washington Constitution to amply fund public education for children living in Washington. Wash. Const. art. IX, § 1; *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012). Among other things, such funding goes toward salaries for educators, counselors,

nurses, and social workers; materials, supplies, and operating costs; and special education programs and services. The need for funding educational resources has become even more acute in the wake of the COVID-19 pandemic, which caused severe disruptions and setbacks in the educational system. *See* Wash. Student Achievement Council, *Facing Learning Disruption: Examining the Effects of the COVID-19 Pandemic on K-12 Students* (2021), https://shorturl.at/ipqs4.

These challenges can be traced back to the 1930s, when the Washington Supreme Court struck down multiple attempts by the legislature and voters to enact an income tax. *See Culliton v. Chase*, 25 P.2d 81, 84 (Wash. 1933); *Jensen v. Henneford*, 53 P.2d 607, 613 (Wash. 1936). The court held that an "income tax" is a "property tax" within the meaning of the Washington Constitution—not an excise tax. *Culliton*, 25 P.2d at 82. The court then held that the progressive income taxes at issue violated the Washington Constitution's limitations on property taxes. *Id.* at 83.

Following the 1930s cases, Washington developed a tax code unlike any other state in the nation. Washington does not have an income tax. Instead, Washington primarily relies on real property taxes and excise taxes such as sales taxes, as well as its unique business and occupation (B&O) taxes, which are taxes on the privilege of doing business in the state based on gross receipts. The tax code is the "most regressive in the nation because it asks those making the least to pay the most as a percentage of their income." Wash. Rev. Code § 82.87.010.

Meanwhile, the vast majority of states adopted broad income taxes to help pay for critical government functions, including public education. While specifics vary by state, we are not aware of any state that taxes income as property, that is, a tax based on valuation of property owned by the taxpayer. Instead, state income taxes are structured as excise taxes on the realization of income from activities (e.g., wages from a job, income from business activities). This Court has recognized that an income tax can properly be viewed as an excise tax. *See Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 16–17 (1916); *Graves v. People of State of N.Y. ex rel. O'Keefe*, 306 U.S. 466, 480 (1939).

As part of their income tax system, 41 states (plus the District of Columbia) tax capital gains realized from the sale of capital assets. These capital gains taxes may include intangible property (e.g., stocks, bonds) and tangible property (e.g., real property, vehicles, collectibles). And the taxes may extend to out-of-state transfers of assets (e.g., sale of out-of-state investment real estate). *See*, *e.g.*, Del. Code Ann. tit. 30, § 1124(b)(2); Ind. Code § 6-3-2-2; Kan. Stat. Ann. § 79-3276; N.M. Stat. Ann. § 7-4-7.

In 2021, Washington enacted a capital gains tax to raise revenue for critical investments in education without increasing the burden on existing sources of tax revenue. *See* Pet. App. 10; Wash. Rev. Code § 82.87.010. The tax is structured as a stand-alone excise tax on Washington residents' sale or exchange of certain long-term capital assets. *See* Pet. App. 10; Wash. Rev. Code § 82.87.010. All of the revenue from

the tax is dedicated to education. Wash. Rev. Code § 82.87.030.

Washington's tax is narrower than most other states. It imposes a seven percent tax on annual long-term capital gains over $250,000 of individuals who are Washington residents. *Id.* §§ 82.87.020(6), 82.87.040. It does not apply to businesses or non-residents and it excludes many types of property, including real estate, retirement accounts, agriculture, certain family-owned businesses, and charitable donations. Pet. App. 12; Wash. Rev. Code §§ 82.87.050–.070.

Washington only taxes certain transactions: (1) in- and out-of-state transfers of intangible property owned by domiciliary[1] residents; and (2) transfers of tangible property located in Washington. Wash. Rev. Code § 82.87.100(1). To mitigate tax avoidance, the tax also extends to tangible personal property temporarily moved during the tax year to a state that does not have an applicable capital gains tax. *Id.* § 82.87.100(1)(a). Washington does not tax any other transfers of tangible property outside of Washington. To further avoid any risk of double taxation, Washington also gives credits for capital gains taxes paid in other states. *Id.* § 82.87.100(2).

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[1] Domicile means "a person's true, fixed, and permanent home and place of habitation, and shall be the place where the person intends to remain, and to which the person expects to return when the person leaves without intending to establish a new domicile elsewhere." Wash. Rev. Code § 72.36.035.

B. Before the Tax Goes into Effect, the Washington Supreme Court Rejects a Facial Challenge.

Petitioners filed a lawsuit in state court challenging the capital gains tax before it went into effect. Pet. App. 13.[2] Petitioners alleged they are Washington residents with long-term capital assets who might have to pay the tax if they decide to sell those assets and derive capital gains above $250,000. *Id.* at 10. Petitioners claimed the tax violates the Washington Constitution's restrictions on property taxes and its privileges and immunities clause. *Id.* at 13. Petitioners also claimed the tax violates the dormant Commerce Clause of the United States Constitution. *Id.* The Edmonds School District, Tamara Grubb (a teacher), Adrienne Stuart (a parent), Mary Curry (an early learning and childcare provider), and the Washington Education Association ("Education Parties") intervened in the case as defendants in support of the constitutionality of the capital gains tax. *Id.* at 13–14.

On cross-motions for summary judgment, the trial court ruled that the capital gains tax violates the Washington Constitution's limitations on property taxes. *Id.* at 14. The trial court characterized the tax as an income tax and then relied on the 1930s cases holding that "income is property" for state constitutional

[2] Another group of Washington residents filed a separate lawsuit, which was consolidated with Petitioners' case. The other group did not file a petition for certiorari.

purposes. *Id*. Having so ruled, the trial court did not address Petitioners' other claims. *Id.*

The Washington Supreme Court reversed and upheld the capital gains tax. The court determined that the tax is an excise tax and, thus, is not subject to the limitations on state property taxes. *Id.* at 16. The capital gains tax, the court explained, is not owed simply as a result of the taxpayer's ownership of the property, but "relates to the exercise of rights 'in and to property'—namely, the power to sell or transfer capital assets." *Id.* at 18 (quoting *Mahler v. Tremper*, 243 P.2d 627, 629–30 (Wash. 1952)). The court also rejected Petitioners' claim under the privileges and immunities clause of the Washington Constitution because the tax does not implicate a "fundamental right of state citizenship, and even if it did, reasonable grounds support the tax." *Id.* at 37.

Having rejected Petitioners' state constitutional claims, the court turned to their single federal constitutional claim: whether the capital gains tax violates the dormant Commerce Clause. *Id.* at 40. The court applied this Court's four-part test established in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). The court held that the tax satisfies the first factor of the *Complete Auto* test—substantial nexus—because "the taxable incident is the taxpayer's exercise of their power to dispose of capital assets" and not a tax on the ownership of the property. *Id.* at 43.

The court next held that the capital gains tax meets the second factor because the tax is fairly

apportioned to Washington as it is both internally and externally consistent. *Id.* at 45. The tax is internally consistent because the statute specifically allocates gains or losses based on the location of the property or the residence of the taxpayer in Washington and is externally consistent because Washington has a valid interest in taxing the gains. *See id.* at 45–47. The court specifically highlighted the statute's tax credit, noting that this Court has "repeatedly held that a tax credit is an acceptable method of avoiding dormant commerce clause infirmity." *Id.* at 46.

As to the third factor of the *Complete Auto* test, the court held that the tax is not facially discriminatory because "the plain text of the statute does not treat out-of-state individuals unfavorably." *Id.* at 48. And the tax does not discriminate in its effects because it includes safeguards against the risk of multiple taxation, such as the tax credit. *Id.*

The parties agreed that the capital gains tax met the fourth factor of the *Complete Auto* test. The court concluded that, having satisfied each factor of the test, the capital gains tax did not offend the dormant Commerce Clause. *Id.* at 42, 49. In so holding, the court noted that its decision did not foreclose as-applied challenges to the tax. *Id.* at 49.

After the Washington Supreme Court's decision, the tax went into effect. The capital gains tax is estimated to apply to only about 7,000 Washington residents. *Id.* at 13. In its first year, the tax generated more than $800 million to fund education and construct

schools in Washington. We are not aware of any as-applied challenges to the capital gains tax under the dormant Commerce Clause.

REASONS TO DENY THE PETITION

I. Petitioners Lack Article III Standing.

This Court lacks jurisdiction over this case because Petitioners fail to demonstrate they have standing under Article III. The Education Parties join in the State's Response in Opposition to the Petition, which explains that Petitioners are challenging the application of the tax to transactions outside of Washington without having alleged or shown that they are subject to, or have even paid, the capital gains tax at all, let alone a tax on a transaction outside of Washington. Even if this Court has jurisdiction, however, Petitioners fail to demonstrate any compelling reason for this Court to review the decision below.

II. The Decision Below Is Consistent with this Court's Decisions on the Dormant Commerce Clause.

This case does not present the sweeping question Petitioners pose in their Petition: whether "the Constitution permits a state to tax out-of-state transactions involving only out-of-state property." Pet. i. Washington has never claimed such broad taxing authority. And the court's decision below would not support Washington or another state asserting it in the future. Washington

taxes only certain types of transfers: (1) transfer of intangible property owned by a domiciled resident, Wash. Rev. Code § 82.87.100(1)(b), and (2) transfer of tangible property owned by a resident in Washington and located in Washington at the time of the transfer or moved temporarily from Washington to a state without a capital gains tax, *id*. § 82.87.100(1)(a). Furthermore, Petitioners have not identified any true conflict between the Washington Supreme Court's holding and a holding of this or any other federal court. Because this Court has made clear that transactions of intangible and tangible property are fundamentally different, we address each separately below. *See Curry v. McCanless*, 307 U.S. 357, 365 (1939) ("Very different considerations, both theoretical and practical, apply to the taxation of intangibles.").

First, Petitioners admit Washington can tax domiciled residents' transfer of intangible property, even if the parties designate the locus of the transaction to be elsewhere. Pet. 19–20 (citing *Curry*, 307 U.S. at 367–69). Quoting out-of-context a phrase in *Curry*, however, Petitioners argue Washington only can tax these transfers if "the owner of [the] intangibles confines his activity to the place of his domicile." *Id.* (quoting *Curry*, 307 U.S. at 369). Ironically, in *Curry* itself, this Court rejected the Petitioners' argument: "[I]t is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax." 307 U.S. at 368. The Court stated: "From the beginning of our constitutional system control over the person at the place of his domicile and his duty

there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value." *Id*. at 366. Thus, this Court has rejected the argument upon which the Petition is based: that there is a bright-line test that bars a state from taxing the transfer of intangible property of a resident if the transaction takes place outside the state. The other decisions Petitioners cite concerned tangible property, and none abrogate this long-standing rule. As such, no conflict exists to warrant this Court's review.

Second, Petitioners admit Washington has authority to tax transfers of tangible property in Washington. Pet. 12, n.2. This leaves only the question whether Washington can extend this valid tax to tangible personal property that temporarily leaves the state in order to foreclose a common method of tax avoidance. The court below said yes, and Petitioners fail to identify any conflict that would warrant this Court's review.

Petitioners acknowledge this Court has never invalidated a tax similar to Washington's under the dormant Commerce Clause. *Id.* at 22. Petitioners also acknowledge the court below applied the well-established test applicable to their claim—this Court's four-pronged *Complete Auto* test. *Id.* at 13. Nevertheless, Petitioners argue that various decisions of this Court establish a sweeping bright-line constitutional rule prohibiting states from taxing out-of-state transactions.

This Court rejected out of hand the exact same type of rigid physical presence requirement Petitioners propose. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2094 (2018). Specifically, this Court overruled its prior decision, *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–308 (1992), which prohibited a state from requiring sellers without a physical presence in the state from collecting sales taxes due in the buyer's home state. The Court explained: "*Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of a sensitive, case-by-case analysis of purposes and effects." *Wayfair*, 138 S. Ct. at 2085 (internal quotation omitted). *Wayfair* thus rejects the notion that there is a bright-line test prohibiting a state from taxing a transaction involving tangible property that takes place out of state. The bright-line argument fails as applied to tangible property, as well as non-tangible property as outlined above. *See supra* at 8.

In an effort to distinguish *Wayfair*, Petitioners point out that their physical presence rule applies to the physical presence of the tangible property during the transfer, not the physical presence of the seller or the buyer. Pet. 16. But this distinction does not create a conflict. Petitioners offer no explanation for reading a strict requirement into this one aspect of the dormant Commerce Clause, but no other. *See Complete Auto*, 430 U.S. at 278–79 (rejecting formalistic rule that "interstate commerce should enjoy a sort of 'free trade' immunity from state taxation"); *Goldberg v. Sweet*, 488 U.S. 252, 259–60 (1989) (noting that *Complete Auto* sought to resolve tension by "specifically rejecting the

view that the [s]tates 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 (1981) (holding that courts must apply a "consistent and rational method of inquiry") (quoting *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 443 (1980)). The key to *Wayfair* is that the benefit—the purchased goods—obtained by the buyer can be taxed as a sale in the buyer's home state. *Wayfair* supports the principle underlying all states' capital gains taxes that a state can tax the benefit—the gain—obtained by its residents from the transfer of capital assets.

Petitioners' admission that states can tax gains their residents derive from out-of-state transactions similarly undermines their bright-line rule. *See* Pet. 1. Petitioners' attempts to distinguish Washington's excise tax on its residents' transfer of property from the many other states that include a capital gains tax within the state income tax system are unpersuasive. Both are excise taxes on residents based on capital gains earned from the transfer of property. *See Brushaber*, 240 U.S. at 16–17 (recognizing "that taxation on income [is] in its nature an excise entitled to be enforced as such"); *supra* at 3. The taxable incident is technically different—the "taxpayer's exercise of their power to dispose of capital assets" in Washington, Pet. App. 43, and the taxpayer's receipt of the capital gain in other states—but the practical effect is the same. That is the pertinent inquiry for purposes of the Commerce Clause. *See Complete Auto*, 430 U.S. at 279 (explaining courts should consider "not the formal

language of the tax statute but rather its practical effect"). While Petitioners disagree with the Washington Supreme Court's construction of the tax and its taxable incident (as a taxpayer's exercise of their power to dispose of capital assets), Pet. 21, this Court is "bound by the construction of the state statute by the state court." *Memphis Nat'l Gas v. Stone*, 335 U.S. 80, 84–85 (1948). And even if this Court adopts a different construction from the court below, the tax's practical effect remains the same.

The other decisions Petitioners cite do not support their proposed strict physical presence rule or otherwise conflict with the decision below. Petitioners' reliance on *American Oil Co. v. Neill*, 380 U.S. 451 (1965) and *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944) is misplaced. Pet. at 15. Both decisions apply the more rigid analysis this Court abandoned in its modern dormant Commerce Clause jurisprudence. To the extent still relevant, these decisions do not conflict with the court's decision below. In *American Oil*, this Court struck down an Idaho sales tax on a Utah vendor's sales of gasoline in Utah, even though after the sale the gasoline would enter and be used in Idaho. 380 U.S. at 458. The Court emphasized that Idaho imposed the tax on the Utah vendor and that "each and every phase of the transaction had its locus outside of Idaho: invitations for bids were issued by the Government in Seattle, Washington; Utah Oil submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; Utah Oil delivered the gasoline to Salt Lake

City, and it was there that title passed." *Id.* *American Oil* cited *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), which is a similar case where the Court struck an Arkansas sales tax on vendors domiciled in Tennessee for sales of goods in Tennessee, even though after the sale the goods were delivered to Arkansas. *McLeod*, 322 U.S. at 328. Thus, in both cases, the Court held that a state cannot tax sellers domiciled in another state on sales of tangible property consummated out of state based only on the goods entering the state after the sale.

By contrast, Washington is not taxing out-of-state sellers, nor does Washington claim authority to tax transfers based on delivery of tangible property to Washington after the transfer. Instead, Washington's tax only extends beyond its borders when tangible personal property is temporarily moved to another state during the tax year. This mechanism, designed to prevent tax avoidance, only applies if the taxpayer is a Washington resident at the time of the transfer and the transfer is not subject to another state's capital gains tax. Wash. Rev. Code § 82.87.100(1)(a).

This Court's decision in *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768 (1992), bears even less resemblance to this case. The Court considered whether and how to apply the unitary business principle to a tax on multistate income from a corporation domiciled in another state. Petitioners misrepresent a quote from the decision as confirming the Court "ha[s] not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to

the activity itself, rather than a connection only to the actor the State seeks to tax." Pet. 15 (quoting *Allied-Signal*, 504 U.S. at 778). Petitioners fail to mention this quote relies solely on *Quill*, which this Court overruled in *Wayfair* as explained above. *See also Memphis Nat'l Gas*, 335 U.S. at 85 (plurality opinion) (upholding franchise tax on out-of-state pipeline company operating pipeline through the state). And, in any event, Washington's tax does not apply to transactions that lack any connection to the state.

In sum, Petitioners fail to cite any decisions of this Court that bear any resemblance to, let alone conflict with, Washington's mechanism to mitigate tax avoidance. As this Court has explained, a taxpayer "is in no position to found a constitutional right on the practical opportunities for tax avoidance." *Wayfair*, 138 S. Ct. at 2086 (quoting *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 366 (1941)). The court below properly considered the purpose and effect of the challenged aspects of the tax under the *Complete Auto* test and rejected Petitioners' claim. *See* Respondents' Brief in Opposition at 21–25 (explaining Petitioners' failure to identify any conflict with the court's application of *Complete Auto*). There is no conflict that would warrant review.

III. The Decision Below Does Not Conflict with the Ninth Circuit's Decision on State Regulatory Authority.

The court's decision below on state tax authority under the dormant Commerce Clause does not conflict

with the Ninth Circuit's decision in *Sam Francis*, because *Sam Francis* is not about taxing authority. The Ninth Circuit specifically refused to apply "cases that concerned the validity of state-imposed taxes such as *Quill* . . . and *Complete Auto* . . . because the [state law at issue] does not impose a tax." 784 F.3d at 1324.

Worse, *Sam Francis* is no longer good law. In striking down a law requiring payment of royalties to artists for the sale of fine art, the Ninth Circuit applied a per se rule against application of state laws to commerce that takes place wholly outside the state's borders. *Id.* at 1323; *see also id.* at 1333 (Reinhardt, J., concurring) (expressing "serious doubts that such a per se rule is wise as a matter of policy or that it is within the purview of the dormant Commerce Clause as properly framed"). Earlier this year, this Court rejected a per se rule against extraterritorial application of state laws. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 390 (2023). While the Court left open the validity of a state law that "*directly* regulated out-of-state transactions by those with *no* connection to the State," *id.* at 376 n.1 (emphasis in original), just like the regulatory law in *Ross*, those conditions to not exist with Washington's tax on its own residents.

IV. This Case Does Not Present an Important Federal Question Requiring this Court's Review, Nor Is It a Good Vehicle for Review.

Petitioners argue that, of the 42 state capital gains taxes, only Washington's violates the dormant Commerce Clause. *See* Pet. 1, 16, 22. Petitioners' claim relies on the unique structure of Washington's tax. While the other 41 states levy taxes on capital gains as a component of their income tax system, Washington's capital gains tax is a stand-alone excise tax on the transfer of capital assets. Washington structured its tax this way in response to state constitutional limitations on property taxes and 1930s Washington Supreme Court decisions classifying an income tax as a property tax subject to those limitations. Because no other state faces the same state-level constraints on taxation, states have no reason to switch to Washington's approach and potentially draw a lawsuit.

Perhaps recognizing their challenge to Washington's unique tax would have minimal relevance outside Washington, Petitioners make doomsday predictions about states adopting taxes on "virtually anything . . . residents do in the rest of the nation." Pet. 23. Petitioners' hypothetical taxes—from Washington taxing all purchases by its residents at Disneyland to Utah taxing its residents' purchase or sale of alcohol anywhere in the country, Pet. 13, 28—stretch credulity. As explained above, Washington is only taxing residents' out-of-state transfers of intangible property and their transfers of tangible property located in state but

moved temporarily to avoid taxation out of Washington. Thus, Washington's capital gains tax generally extends no further than the other 41 states' capital gains taxes. And the tax-avoidance mechanism is strictly limited so as not to apply to the vast majority of out-of-state transfers, including where the property enters Washington after the transfer, where the gains are subject to another state's income or excise tax, or where the owner is no longer a Washington resident at the time of the transfer. Other states have been taxing capital gains from even broader categories of out-of-state transfers for decades without opening the floodgates. All the decision below means is that now Washington can have a capital gains tax too. Petitioners may disagree with Washington's policy decision, but that does not justify this Court's review.

Finally, this case is not a good vehicle for this Court's review. Petitioners filed a facial challenge before the tax went into effect. They argue the tax improperly applies to out-of-state transfers and subjects Washington residents to double taxation, but offer no evidence of either. For example, Petitioners argue double taxation remains an issue despite the tax's allocation and credit provisions, but they offer no evidence or explanation about how this would occur in practice. *See* Pet. 24. Due to these failures, the Court would not have the facts needed to conduct a "sensitive, case-by-case analysis of purposes and effects," as required under modern Commerce Clause precedents. *See Wayfair*, 138 S. Ct. at 2094. As noted, for these same reasons,

Petitioners do not have standing to assert their Commerce Clause claims.

CONCLUSION

Washington's capital gains tax applies functionally to the same set of transactions that 41 other states tax, and in many cases fewer transactions. Washington's tax-avoidance mechanism is narrowly tailored to apply only to real tax-avoidance activity. No cases of this Court or any federal court conflict with the Washington Supreme Court's decision. And this case is a particularly inappropriate one to address Petitioners' claims because none of the Petitioners claim to have paid a Washington capital gains tax, let alone one based on an out-of-state transaction. Accordingly, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted this 3rd day of November, 2023.

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