No. 23-171

In the
Supreme Court of the United States

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

v.

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

On Petition for Writ of Certiorari to the Supreme Court of Washington

REPLY BRIEF

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Respondents concede that Washington's recently enacted Engrossed Senate Substitute Bill 5096 "is an excise tax on residents' transfer of capital assets, not a property tax on income," and that it directly operates on residents' transfers of property *anywhere*, not just in Washington. District.BIO.1; State.BIO.14. Those textually compelled concessions give away the game and confirm the need for plenary review. This Court reiterated just last Term that state laws that "'*directly* regulate[] transactions which [take] place … wholly outside the State'" exceed the Constitution's fundamental "limits o[n] state authority." *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 376 n.1 (2023) (emphasis in original) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.)). Unlike any other capital-gains tax in the country, that is exactly what Washington's new excise tax does. ESSB 5096 is thus unconstitutional on its face as to the out-of-state transfers it directly regulates.

Unable to square the decision below upholding ESSB 5096 with the Constitution, this Court's decisions enforcing it, or the Ninth Circuit's precedent, respondents try to change the subject. According to respondents, petitioners lack standing to challenge a brand-new tax law that only just took effect because they have not yet been forced to pay it. That is both wrong and beside the point. What is required for Article III is concrete and particularized injury, and it is indisputable not only that petitioners possess both tangible and intangible property held out-of-state, but also that petitioners' out-of-state transfers of that property are now taxable by Washington.

When they finally turn to the merits, respondents prevaricate. They insist that Washington's novel excise tax applies only to "tangible personal property temporarily removed from Washington State before sale by a Washington-domiciled resident." State.BIO.14. That is wrong, but it would not make a difference even if it were true. States cannot directly regulate transactions that occur out of state, period. That is so regardless of whether the property disposed of in an out-of-state transaction once was in the taxing state. And a state cannot simply decree by fiat that intangible property exists within state borders.

Indeed, respondents' theory is directly contrary to the Ninth Circuit's en banc decision in *Sam Francis Foundation v. Christies, Inc.*, 784 F.3d 1320 (2015), which held California's Resale Royalty Act facially unconstitutional as to out-of-state art sales involving Californians. The fact that some of the artworks that statute regulated once were held in California made no difference to the bottom line; even as to out-of-state sales involving such pieces, California's statute was unconstitutional. *Id.* at 1322-24. Respondents thus have no answer for the reality that, if this case could have been brought in federal instead of state court, it would have come out the other way.

Finally, respondents complain that petitioners have "twist[ed] the question presented." State.BIO.2. That claim is puzzling to say the least, as petitioners are the ones who presented the question. The fact that respondents apparently do not like the question presented, and struggle mightily to avoid actually responding to it, is yet another sign that this Court's review is warranted.

I. The Decision Below Conflicts With Basic Principles Of Constitutional Law And This Court's Cases Enforcing Them.

Respondents' opposition briefs confirm just how misguided and dangerous the decision below is. Respondents admit (as they must) that ESSB 5096 "is an excise tax on residents' transfer of capital assets, not a property tax on income," District.BIO.1, and that it operates directly on transfers of property *anywhere*, not just transfers in Washington, State.BIO.14. Respondents nonetheless assert that ESSB 5096 is "the same" as all other states' capital gains taxes "[i]n purpose and effect." District.BIO.1; *see* State.BIO.3. But no other state in the country purports to impose an excise tax on transactions in capital assets that take place wholly out of state. Washington may have had to take that novel approach as a result of restrictions in its state constitution. *See* Pet.1, 11-12. But doing so has brought it into a head-on collision with the federal Constitution.

1. This Court made clear just last Term that purposes and effects are not the touchstone when it comes to state laws that "*directly* regulate[] transactions which [take] place … wholly outside the State." *Ross*, 598 U.S. at 376 n.1 (quoting *Edgar*, 457 U.S. at 641-43 (plurality op.)). Such laws are unconstitutional wholly apart from whether they discriminate against interstate or commerce, as they exceed the fundamental "territorial limits of state authority under the Constitution[]." *Id.* ESSB 5096 is just such a law—as respondents admit—so it is unconstitutional.

To be sure, *Ross* was not a tax case (or a direct-regulation case, for that matter). But its critical discussion of the limits of state authority to "*directly*" regulate out-of-state transactions broke no new ground. Just the opposite: It followed a long line of direct-regulation *holdings*, including many from cases specific to the tax context. *See, e.g.*, *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 331 (1944) (holding that states may not "impose a tax on a transfer of ownership … where the transfer was made beyond the state limits"); *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80, 95 (1948) (emphasizing that it is "beyond the power of the state" to tax when "the taxable event is outside its boundaries"). As those cases illustrate, this Court has held for nearly a century that the territorial limits on state authority preclude states from *directly* taxing transactions that take place wholly outside their borders, even when one of the transacting parties is a resident of the taxing state. *See Am. Oil Co. v. Neill*, 380 U.S. 451, 457-58 (1965) (citing cases).

2. Respondents cannot deny the conflict with this Court's cases. Their principal submission is that ESSB 5096 applies out of state only insofar as it taxes transfers involving "tangible personal property temporarily removed from Washington State before sale by a Washington-domiciled resident." State.BIO.14. In respondents' eyes, that makes this case "unique" and distinguishes it from *McLeod*, which held that Arkansas lacked the power to tax "sales made by Tennessee vendors that are consummated in Tennessee" even when the goods at issue were to be shipped to "Arkansas buyers." 322 U.S. at 328.

Respondents are doubly incorrect. First and foremost, nothing in ESSB 5096 limits its application to out-of-state transactions involving temporarily removed property. Respondents tellingly point to no such limiting language in the statute. Indeed, nothing in the statute limits its application to property that was *never* held in Washington. If the owner and seller is a Washington resident, then ESSB 5096 applies to the sale of property, full stop. Second, it would make no difference even if ESSB 5096 *were* limited in the manner respondents claim. Respondents simply ignore that state laws that "'*directly* regulate[] transactions which [take] place … wholly outside the State'" exceed "the territorial limits of state authority." *Ross*, 598 U.S. at 376 n.1. Whether the transferred property was out of state pre-sale for a month or a millennium is of no moment—which is likely why nothing in *McLeod* turned on the wafer-thin distinction respondents now try to draw.

Nor can respondents evade these bedrock constitutional limits by decreeing that Washington residents' intangible property exists in Washington. Indeed, that argument reflects a category mistake. By respondents' own telling, ESSB 5096 is an excise tax. It does not regulate property or income; it regulates the activity of transfers. When those transfers take place out of state, Washington may not tax them. *See* Pet.23. Respondents' attempts to liken this case to *New York ex rel. New York Central & Hudson River Railroad Co. v. Miller*, 202 U.S. 584 (1906), fail for the same reason. The holding there was that states may tax property "brought back" to the state. *Id.* at 597; State.BIO.19. But ESSB 5096 taxes transfers of property *disposed of* out of state that is not coming

home with the state resident who sold it, not the value of property held in-state before or after taxation. Respondents cannot defend Washington's tax by pretending that it is something other than what they themselves insist it is.

3. Respondents find no refuge in *Complete Auto* or its progeny. As petitioners have explained, this Court has never held that a state tax that operates directly on out-of-state transactions could pass muster under the *Complete Auto* test. *See* Pet.18-19. Respondents ignore that inconvenient reality, but it dooms their submission. To be sure, states have "wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 441 (1939). But their powers to tax are no less territorially bound than any of their other powers. "Taxation," after all, "is regulation just as prohibition is." *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 96 (1927). And, if anything, out-of-state taxation poses an even greater threat to the sovereignty of sister states than other forms of extraterritorial regulation, as it intrudes on a core sovereign function on which virtually all others depend.

Finally, respondents try to make something of the fact that ESSB 5096 taxes sales by residents (albeit ones out of state). But this 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." *Allied-Signal, Inc. v. Dir., Div. of*

Tax'n, 504 U.S. 768, 778 (1992). Washington's novel excise tax thus exceeds the limits of each state's constitutional authority and conflicts with this Court's cases enforcing them.

II. The Decision Below Squarely Conflicts With An En Banc Decision Of The Ninth Circuit.

In the decision below, the Washington Supreme Court held that Washington may impose a 7% excise tax on sales that take place entirely out of state, so long as the seller is a Washington resident. In *Sam Francis Foundation v. Christies, Inc.*, the en banc Ninth Circuit held that the California may *not* impose a 5% surcharge on sales that take place entirely out of state, even if the seller is a California resident, because such direct regulation of out-of-state transactions exceeds a state's constitutional authority regardless of where the seller typically resides. *See* 784 F.3d at 1322-24. Respondents' efforts to deny the palpable conflict between those two decisions are unavailing.

Respondents first argue that there can be no conflict because *Sam Francis* was not a tax case. But as petitioners have explained, and as this Court has long held, that is a distinction without a difference. A state law that directly regulates state residents' out-of-state transactions by imposing a 5% surcharge on the sale price (as in *Sam Francis*) and a state law that directly regulates state residents' out-of-state transactions by imposing a 7% tax on the sale price (as in this case) both commit the same constitutional sin. To be sure, the limits on the *federal* government's power to tax may well be different from its power to regulate commerce. But that distinction is a unique

outgrowth of Article I, and it has no purchase as to the states. When it comes to state governments, taxation is regulation—and direct regulation of out-of-state sales exceeds the territorial limits of state authority.

As for respondents' theory that *Ross* "abrogate[d]" *Sam Francis*, State.BIO.28; *see* District.BIO.18, that argument fails coming out of the gate. To be sure, *Ross* certainly made clear that there is no per se rule against state laws that regulate only in-state conduct but have out-of-state *effects*. But that is not what the law in *Sam Francis* did (or what the law here does). Respondents simply elide the fundamental distinction this Court drew in *Ross* between state laws like California's Prop 12, which regulated *only the in-state sale* of pork—and thus did not *directly* regulate any out-of-state conduct—and laws like this one and California's Resale Royalty Act (from *Sam Francis*) that regulate the out-of-state transactions themselves. *See Ross*, 598 U.S. at 376 n.1. And *Ross* went out of its way to make clear that it was not abandoning the long line of cases holding that laws that fall in the latter camp exceed the territorial limits of state authority under our Constitution. *Id.* Thus, far from undermining *Sam Francis*'s holding, *Ross* confirms it.

In short, the Washington Supreme Court's decision squarely conflicts with an en banc decision of the federal court of appeals in which the state sits, in a context where litigants have only limited recourse to the federal courts, *see* Pet.27. That makes the need for this Court's intervention particularly acute.

III. The Question Presented Is Important, And This Is A Good Vehicle To Resolve It.

The decision below imposes immediate and severe hardship on taxpayers. *See* Pet.27-28, 30-31. Respondents are mum about the burdens the new law foists upon taxpayers in and out of Washington. That silence is deafening. As petitioners' *amici* explain, Washington's decision "to tax *transactions* rather than *income*" not only creates insuperable constitutional problems, but "leads to the very real chance of duplicative or double taxation." CADF.Amicus.5.

The risk is greatest when it comes to "intangible" assets, as Washington provides *no credit whatsoever* against other states' capital gains tax on intangible assets. *See* RCW 82.87.100(1)(b). Respondents have nothing to say about the "many instances in which another state might reasonably impose a capital gains tax on the sale of those assets even if owned by a Washington domiciliary." CADF.Amicus.8; *see id.* at 8-10 (describing examples). And while that may be the worst double-taxation problem, it is not the only one, as "the Washington law creates a significant risk of double taxation for residents of other states." *Id.* at 10; *see id.* at 11-12 (providing examples).

Unable to deny the untenable consequences of ESSB 5096, respondents try to conjure up vehicle problems. Their efforts do not move the needle. Respondents first insist that petitioners lack Article III standing to challenge Washington's novel excise tax because (they say) petitioners "have presented no evidence that they have ever been subject to Washington's capital gains tax at all." State.BIO.12. But as they acknowledge, this is a

preenforcement challenge, filed "before the capital gains tax went into effect." *Contra* State.BIO.12. Neither Article III nor this Court's cases interpreting it saddles a plaintiff in a preenforcement challenge with the impossible task of alleging (let alone proving) that the not-yet-effective law they are challenging has already been enforced against him. Instead, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)); *cf. 303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023).

That is precisely what petitioners did here. As respondents acknowledge, petitioners "alleged that they own capital assets and 'would be subject to the capital gains tax in ESSB 5096 if they realized capital gains and would incur a tax liability on capital gains in excess of $250,000.'" State.BIO.12 (emphasis omitted) (quoting BIO.App.58a). Respondents fault petitioners for not alleging that they will *in fact* incur such liability. State.BIO.12. But it is the rare plaintiff who can know for *certain* what capital gains tax he may incur in a future year. And Article III does not require clairvoyance; it just requires a credible threat of injury.

Respondents next faut petitioners for failing to put on "evidence … that any tax they might owe is due to out-of-state transactions." State.BIO.13. That argument is gamesmanship of the worst sort. As

respondents themselves acknowledge, to the extent questions like that were not a focus of the proceedings below, that is because Washington state courts do not require plaintiffs to make the same standing showing as a federal court would. But the bare fact that a plaintiff may not need to allege or prove Article III standing in a state court that is not bound by Article III hardly compels the conclusion that it must be lacking. Had respondents ever bothered to ask petitioners whether, e.g., they do in fact own capital assets out of state, petitioners would happily have assured them that they do.[1] Respondents cannot deprive this Court of jurisdiction by faulting petitioners for not *sua sponte* proving up something that respondents have never before given them any reason to believe they might doubt.

Finally, respondents seem to think that the issue of Washington's authority to directly regulate out-of-state transactions was "not raised to the state court below." State.BIO.34. But the fact that the Washington Supreme Court failed to fully grasp petitioners' challenge does not change the fact that, as respondents themselves admit, "Petitioners did argue that the tax impermissibly allocated capital gains to Washington based on activities occurring outside its borders." State.BIO.33. Nor does it confine petitioners to only those arguments in support of that claim that the Washington Supreme Court chose to address. *See Vance v. Terrazas*, 444 U.S. 252, 259 n.5 (1980). To the contrary, the fact that the Washington Supreme Court failed to fully appreciate the nature of

[1] Petitioners are likewise happy to supply the Court with affidavits to that effect if it would find them useful.

the challenge petitioners were actually pressing just underscores the problems with the decision below.

* * *

ESSB 5096 violates the Constitution and threatens our federal order at a fundamental level. The Washington Supreme Court's decision upholding ESSB 5096 conflicts with this Court's decisions and an en banc Ninth Circuit decision. Adding insult to injury, the decision "offer[s] a roadmap for states to shift their costs onto other states." WPC.Amicus.17. Only this Court can stop them following it.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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