IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR DOUGLAS COUNTY

CHRIS QUINN, *et al*,

Plaintiffs,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *et al*,

Defendants.

and

EDMONDS SCHOOL DISTRICT, *et al.*

Intervenors.

APRIL CLAYTON, *et al.*

Plaintiffs,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, *et al*,

Defendants.

and

EDMONDS SCHOOL DISTRICT, *et al.*

Intervenors.

Case No. 21-2-00075-09

Case No. 21-2-00087-09

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Plaintiffs proved in their own summary judgment motion that ESSB 5096 is a tax on income that is unconstitutional under both the federal and state constitutions. ESSB 5096 violates the Commerce Clause of the United States Constitution because it impermissibly taxes activities occurring outside the state, imposes a tax that is not fairly apportioned to activities occurring within the state, and discriminates against interstate commerce. ESSB 5096 further violates the Washington Constitution because it is a tax on income, income is property under longstanding precedent, and the statute fails to comply with state constitutional restrictions of uniformity and rate limitations. Because Plaintiffs' constitutional challenges are meritorious and the State has not shown that it is entitled to judgment as a matter of law, the Court should deny the State's motion for summary judgment and grant summary judgment to Plaintiffs. *See* CR 56(c); *see also Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992) (summary judgment can be granted to non-moving party).

To avoid this conclusion, the State and Education Parties attempt to deflect by attacking Plaintiffs' standing again, recasting the actual nature of the capital gains tax, and asking this Court to ignore governing case law. Each of their arguments fails.

First, the State and Education Parties repeat their prior contention that the constitutionality of ESSB 5096 is nonjusticiable because of Plaintiffs' purported lack of standing. This Court, however, has already recognized that the issues presented in this case are justiciable under longstanding Washington law. Moreover, the State can present no evidence to overcome the fact that Plaintiffs are presently being injured by the capital gains tax. The State is simply wrong that Plaintiffs' injuries are speculative unless they have already paid taxes. Beyond individual standing, the State ignores entirely Plaintiffs' associational standing—nowhere contesting that at least one member of the three Plaintiff associations has standing to challenge the capital gains tax. Several Plaintiffs also have taxpayer standing, an independent ground that requires no proof of injury. Moreover, the Supreme Court has repeatedly affirmed the public interest exception to standing for UDJA cases challenging the constitutionality of state tax laws.

Second, the State and Education Parties attempt to recast how the capital gains tax actually works in order to fit their argument that ESSB 5096 created an excise tax, not a tax on property. But despite the Legislature's saying so, the capital gains tax is not imposed only on the transactional activity of selling or exchanging long-term capital assets. It requires no voluntary action by the taxpayer. And, unlike excise taxes, the measure of the capital gains tax is the amount of gains reported on federal income tax returns, not the measure of the transaction purportedly being taxed. The capital gains tax is imposed annually on an individual's reported long-term capital gains income. ESSB 5096 created a tax on income, which our Supreme Court has held is a property tax. Since the tax is levied on income—property— under Washington's Constitution it must satisfy Article VII's uniformity and rate limitation requirements. The capital gains tax violates both requirements—and the State's motion offers no argument otherwise.

Third, the Education Parties alone ask this Court to ignore binding Washington Supreme Court precedent and hold that a tax on income is not a property tax subject to the restrictions in Article VII. But the principle of vertical *stare decisis* precludes this Court from entertaining the Education Parties' improper request. The Supreme Court had definitively held that income is property, and an income tax is a property tax. This Court must adhere to that precedent.

Fourth, the State misses entirely the point that the capital gains tax violates the Washington Constitution's Privileges and Immunities Clause by exempting some persons accruing capital gains from the tax but imposing it on others with no reasonable ground for making that distinction.

Finally, the capital gains tax violates the Commerce Clause of the U.S. Constitution, and the State's argument to the contrary is unconvincing. The State fails to address Plaintiffs' contention that the tax does not apply to activity with a substantial nexus to Washington. Nor is the capital gains tax fairly apportioned, as the U.S. Supreme Court requires. And the tax impermissibly discriminates against interstate commerce because it subjects income earned across state lines to the risk of multiple taxation. The capital gains tax's invalidity under the Commerce Clause alone is reason enough to deny the State's motion.

In sum, the State and Education Parties have failed to carry their burden at summary judgment. Their motion must be denied and summary judgment granted to Plaintiffs.

II. BACKGROUND

This capital gains tax is just the latest in a long string of failed efforts to impose an income tax in Washington. But each time, Washington's voters have rejected each effort. Since 1934, Washington voters have turned aside six proposed constitutional amendments that would have allowed graduated taxes on income.[1] The voters have also rejected four statewide initiatives to codify an income tax by statute.[2] The most recent effort was I-1098 in 2010, which concerned establishing a state income tax and reducing other taxes, where Washington voters rejected a proposed income tax by a decisive margin of 64 percent opposed.[3] Indeed, in an advisory vote in the November 2021 election, the voters rejected *this capital gains tax* by a margin of 61 percent to 39 percent.[4] In Douglas County, more than 80 percent voted in favor of repeal.[5]

To evade the Constitution and the popular will, the Legislature has tried to enact another income tax in the guise of an excise tax on "top earners" purportedly aimed at correcting Washington's "regressive" tax system. ESSB 5096 § 1. The Legislature's efforts cannot mask the reality. ESSB 5096 does not provide a single dollar of tax relief for any Washington taxpayer, such as by reducing the sales tax that the Legislature so frequently cites as a reason to impose new "less regressive" taxes.

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[1] H.R.J. Res. 12 (Wash. 1934); S.J. Res. 7 (Wash. 1936); S.J. Res. 5 (Wash. 1938); H.R.J. Res. 4 (Wash. 1942); H.R.J. Res. 42 (Wash. 1970); H.R.J. Res. 37 (Wash. 1973

[2] Initiative 158 (Wash. 1944); Initiative 314 (Wash. 1975) (corporate excise tax measured by income); Initiative 435 (Wash. 1982) (corporate franchise tax measured by income); Initiative 1098 (Wash. 2010).

[3] The results for Initiative 1098 are tallied at https://results.vote.wa.gov/results/20101102/initiative-measure-1098-concerning-establishing-a-state-income-tax-and-reducing-other-taxes_bycounty.html.

[4] The November 2, 2021 advisory vote on the capital gains tax was Advisory Vote No. 37. *See* https://voter.votewa.gov/genericvoterguide.aspx?e=871&c=99#/measure/5068. The results are tallied at https://results.vote.wa.gov/results/20211102/advisory-vote-no-37.html.

[5] November 2, 2021 General Election Results, Advisory Vote No. 27 – County Results (last updated Nov. 23, 2021), https://results.vote.wa.gov/results/20211102/advisory-vote-no-37_bycounty.html.

Nor can irrelevant arguments about the need to fund education cure constitutional defects or deflect from the fact that the State once again projects a substantial increase in revenue in the coming years. The State's Economic and Revenue Forecast Council forecasts State General Fund revenues of $57.5 billion for 2021–23 and $60.9 billion for 2023–25, up from $50.8 billion for 2019–21.[6] ESSB 5096 is just another legislative attempt to dodge the constitutional prohibition on non-uniform income taxes that the people have chosen to maintain by resoundingly rejecting ten ballot measures that would have removed it.

Plaintiff challengers to Washington's unconstitutional capital gains tax—many of them business owners and farmers who have worked their whole lives to run a farm or build a business—face real and immediate harms from ESSB 5096. The Department of Revenue ("DOR") estimates that about 7000 Washington residents will be forced to pay half a billion dollars in aggregate in just the first year.[7] The DOR's estimate refutes the State's cynical argument that injury is uncertain and speculative. It takes just one person whose rights are infringed by an unconstitutional law to seek declaratory relief.[8]

The State and their amici seek to minimize the extent of injury by suggesting that only 0.2 percent of taxpayers, purportedly uber-wealthy and predominantly residing in King County, will pay the tax. *See* Amicus Curiae Br. of Warren et al. at 2, 11. This argument is both irrelevant and statistically misleading. Even if only 0.2 percent of residents will pay the tax *in any given* year, that does not mean those particular taxpayers are among the *wealthiest* 0.2 percent of Washington residents. In any given year, an untold number of middle-class individuals will engage in a once-in-a-lifetime transaction, e.g., selling the family farm or business they spent their lives building to secure their retirement, that will subject them to this unconstitutional tax.

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[6] *See, e.g.*, Wash. State Econ. & Rev. Forecast Council, "Revenue Review," at 7 (Nov. 19, 2021) (("The final total of GF-S revenue for the 2019-21 biennium was $50.803 billion. Forecasted GF-S revenue is now $57.519 billion for the 2021-23 biennium and $60.864 billion for the 2023-25 biennium."), https://erfc.wa.gov/sites/default/files/public/documents/meetings/rev20211119.pdf.

[7] *See* https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363.

[8] So long as one Plaintiff has standing, the Court need not address whether other challengers also have standing. *See, e.g.*, *League of Educ. Voters v. State*, 176 Wn.2d 808, 817 n.3, 295 P.3d 743 (2013).

And beyond paying the illegal tax itself, the inevitable injuries it causes will be, and are already, substantial.

Plaintiffs—many of them from Eastern Washington and people of ordinary means—include individuals who took over family businesses from the previous generation and local entrepreneurs who have worked hard to build successful Washington businesses. They also include local farmers and their families who have lived and worked in Washington for almost a century. *See, e.g.*, Bouchey Decl. ¶¶ 3, 4.[9] Many plan to pass their businesses to the next generation, but because of ESSB 5096, they are already suffering harm. Some have engaged tax professionals or lawyers, or in some cases both, to plan for the negative effect of the capital gains tax on their retirement plans. *See, e.g.*, Randall Decl. ¶ 6, Bouchey Dec. ¶ 11, Cable Dec. ¶ 12. Others have begun reassessing plans to alter the ownership structure of their businesses. *See, e.g.*, J. McKenna Decl. ¶ 8, Sonderen Decl. ¶¶ 10, 12.

For the farmers, the tax has already caused a decrease in the value of their non-exempt farm assets—not only does the tax skim 7% off their current gains, it also depresses the value of the assets to buyers that will themselves be subject to the tax—and realize less value—in the future. *See* Am. Amicus Curiae Br. of Wash. State Tree Fruit Ass'n et. al. at 5. Given this harm, farm owners are already making decisions about altering investments and ownership of non-exempt farm assets with the tax in mind. *Id.*

ESSB 5096 also threatens these individuals with harm in the near future. Several Plaintiffs know they will be subject to the capital gains tax in the next year or two based on previously planned transactions. *See* Cable Decl. ¶¶ 6, 2; Muller Decl. ¶¶ 4, 5; Quinn Decl. ¶ 3. Other Plaintiffs will soon retire and sell the businesses that represent a substantial portion of their life savings, and they know they need to mitigate the impact of the tax on those savings. *See* Senske Decl. ¶¶ 6, 7. Some individuals believe they may need to move out of Washington. *See* Cable Decl. ¶ 13; Senske ¶ 7. And still others may need to restructure their businesses or reincorporate them in another state, away from the local communities they serve, to avoid the

[9] Unless otherwise noted, all declarations cited in this opposition refer to the concurrently filed declarations of Plaintiffs.

tax's negative effects. *See* Sonderen Decl. ¶ 13; Senske Decl. ¶ 7. In short, Plaintiffs are already experiencing the harmful effects of ESSB 5096, and there is nothing speculative about those harms.

III. ARGUMENT

Summary judgment is appropriate only when the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). In considering a motion for summary judgment, courts view the evidence in the light most favorable to the non-moving party. *Landberg v. Carlson*, 108 Wn. App. 749, 757, 33 P.3d 406 (2001).

A. Plaintiffs Have Standing to Bring Their Constitutional Challenge Against the Capital Gains Tax

In challenging Plaintiffs' standing, the State rehashes arguments this Court has already rejected, without offering any reason—or evidence—for the Court to reach a different result. This Court correctly denied the State's motion to dismiss for lack of standing because the injuries Plaintiffs asserted are "concrete and non-speculative." Sept. 10, 2021 Letter Decision ("Letter Decision") at 2. As the Court previously observed in denying the State's motion to dismiss:

> [Plaintiffs] have also asserted that the mere existence of the new tax statute has already lowered the market value of their property and forced them to make tax planning decisions that impact their financial interests in a way that is concrete and non-speculative. This Court finds no basis to suggest that these allegations are unreasonable…

Id. at 2. Nothing has changed since the Court's ruling.

The parties agree that justiciability is controlled by the four-part test in *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973).[10] But rather than support its motion with evidence that disproves the *fact* of injury, the State submits no evidence at all, instead resting its motion on the flawed legal theory that a tax law cannot be challenged until Plaintiffs definitively pay the tax. That is not the law. *Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 455–

[10] *Diversified* holds that for justiciability under the UDJA, "there must be a justiciable controversy: (1) which is an actual, present and existing dispute, *or the mature seeds of one*, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive." 82 Wn.2d at 815.

56, 495 P.3d 808 (2021) (upholding standing even though complaint was filed before tax was effective or paid). In opposition, Plaintiffs submit numerous declarations that evidence present and future injuries, described in more detail below. Because Plaintiffs' testimony is uncontradicted and the Court must view the evidence in the light most favorable to the non-moving party, *Landberg*, 108 Wn. App. at 757, the Court is required to find that Plaintiffs' declarations establish sufficient injury for standing.

The State's argument that Plaintiffs fail to satisfy the first and third prongs of the *Diversified* test boils down to the same basic contention: Plaintiffs do not currently owe, and do not know with absolute certainty that they will owe, the capital gains tax. State's MSJ at 7–8. There are at least four fundamental flaws with the State's argument.

First, the State entirely ignores that, whatever the status of their future tax bills, Plaintiffs are *currently* experiencing concrete injuries because of ESSB 5096—a point this Court recognized in its earlier ruling based on the allegations of the complaint. As Plaintiff Senske puts it in his declaration, he is "already feeling ESSB 5096's effects," having to "plan[] … steps that would minimize the substantial impact that ESSB 5096 will have on [his] family's financial future." Senske Decl. ¶ 7. Plaintiff Sonderen is similarly "reassessing" long-term plans to alter the ownership structure of his family business and transfer his shares to his children to avoid triggering a taxable event under ESSB 5096. Sonderen Decl. ¶¶ 10, 12. And Plaintiff Cable has "engaged an accountant to advise [her] on altering [her] estate and tax planning to account for and mitigate the impacts of ESSB 5096." Cable Decl. ¶ 12. So too with Plaintiffs Lewis and Martha Randall, who engaged tax professionals and lawyers for assistance because of the negative impact that the capital gains tax will have on their retirement plans. Randall Decl. ¶ 6.

Second, future tax liability supplies a sufficient injury to render this dispute justiciable. *Lakehaven Water & Sewer Dist. v. City of Federal Way*, 195 Wn.2d 742, 769, 466 P.3d 213 (2020) (standing if party *will* suffer injury). As the State acknowledges, "*future* injury" suffices so long as the events that will cause the injury are not too remote or uncertain. State's MSJ at 7. That was not the case in *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 412–16, 27 P.3d 1149 (2001) (cited by State's MSJ at 7), where the direct effect of the allegedly unconstitutional

statute fell on third-party dealers, not the plaintiff, and where there was evidence that those third parties did not engage in the activity the challenged law prohibited. *See id.* at 415 ("To-Ro has not shown that there are unlicensed dealers waiting in the wings to display their unpriced vehicles at a To-Ro trade show"). But it is the case here. Plaintiff Neil Muller, for instance, knows he will be subject to the capital gains tax because he is a minority shareholder in a privately held company that has existing plans to redeem shareholder stock. Muller Decl. ¶¶ 4, 5. Plaintiff Cable states that she and her siblings have *already* "agreed to sell th[eir] farm," a sale that, along with others, will realize taxable gains above the exempted amount. Cable Decl. ¶¶ 6, 2. Similarly, Plaintiff Quinn is "currently in the process of selling some of his long-term investment assets in a transaction that will close this year." Quinn Decl. ¶ 3. And Plaintiff Sonderen is "actively planning how to transfer" ownership of the family business to his children—another taxable event—as his father did, and his father before him. Sonderen Decl. ¶¶ 4, 5, 12.[11]

Third, Defendants make no argument that the Plaintiff associations lack standing, nor could they.[12] At least one taxpayer among Washington Farm Bureau's 46,000 members will realize a taxable gain. The Farm Bureau's declaration confirms as much. Washington Farm Bureau Decl. ¶¶ 5–11. As in *Knight v. City of Yelm*, 173 Wn.2d 325, 340–44, 267 P.3d 973 (2011) (cited by State's MSJ at 7), it does not matter that the adverse event—there, development that threatened to impair the challenger's water rights; here, the realization of unexempted gains—has not *yet* occurred. What matters is that the challengers have supplied enough evidence

[11] These injuries contrast with those the courts held inadequate in *Freedom Foundation v. Bethel School District*, 14 Wn. App. 2d 75, 89–90, 469 P.3d 364 (2020), *review denied*, 196 Wn.2d 1033, 478 P.3d 83 (2021) (holding that "[t]he mere fact that an unfavorable result could become precedent to Freedom Foundation's potential future litigation is not" a "specific or perceptible harm"), and *Thompson v. City of Mercer Island*, 193 Wn. App. 653, 663, 375 P.3d 681 (2016) (holding that "sole interest is trying to enforce zoning protections" absent any "specific injury to [challenger] or his property" is too "abstract" to confer standing), both of which the State cites at State's MSJ at 7.

[12] Courts avoid "overly technical application of the standing rules" for associations because doing otherwise would needlessly burden association members and "burden our courts with an increased number of lawsuits arising out of identical facts." *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 216, 45 P.3d 186 (2002); *see also Wash. Bankers Ass'n*, 198 Wn.2d at 456–58 (approving facial constitutional challenge to B&O tax filed by associations).

to show that the risk of the direct injury to them is imminent rather than remote. *Id.* at 342–43. In any event, the State's failure to address this independent ground for standing in its summary judgment motion absolves Plaintiffs of any obligation as the non-moving party to introduce evidence supporting the theory. *See Preston v. Duncan*, 55 Wn.2d 678, 682–83, 349 P.2d 605 (1960).[13]

Fourth, Plaintiffs Washington Tree Fruit Association and Washington Dairy Federation present an independent basis for standing as taxpayers. These Associations demanded that the Attorney General challenge the constitutionality of the capital gains tax, but he declined. *See* Wash. Tree Fruit Ass'n Decl. ¶¶ 5–6 & Exs. A–B; Wash. Dairy Fed. Decl. ¶¶ 5–6 & Exs. A–B. Similarly, with knowledge of the previous denials, taxpayer John McKenna filed suit after reasonably concluding that making a third demand on the Attorney General would be useless. *See* J. McKenna Decl. ¶¶ 9–11; *State ex rel. Boyles v. Whatcom Cty. Super. Ct.*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985). Persons, including associations, need only pay taxes, including sales taxes, to qualify as taxpayers with standing to challenge a government act as unlawful. *See Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wn. App. 105, 116, 336 P.2d 632 (2014) ("Washington courts have long recognized the right of an individual or entity to 'challenge governmental acts based solely upon the litigant's status as a taxpayer'") (citation omitted); *El Centro de la Raza v. State*, No. 16-2-18527-4-SEA, 2017 WL 10504766, at *2 (King Cty. Super. Ct. Jan. 20, 2017) (denying motion to dismiss eight organizational plaintiffs for lack of taxpayer standing because "each organization pays at least sales tax, if not also B&O and property taxes"). The taxpayer status of these three Plaintiffs provides an independent basis for standing.

Finally, there is a significant public interest in this case proceeding. If the State were right that Plaintiffs lack standing because it is "unknowable" "exactly who will owe capital gains tax in any given year," State's MSJ at 4, no one could ever challenge the constitutionality of a tax before it is enforced against them. But as this Court emphasized in its decision denying the

[13] *Preston* explained that when the party seeking summary judgment failed to show the absence of a genuine issue of fact, "the plaintiff was technically justified in relying on the allegations in her pleadings …" *Id.* at 683. Here, the State has offered no evidence or argument on associational standing.

State's motion to dismiss, "nearly a century of case law" says otherwise. Letter Decision at 3. Beginning January 1, 2022, the DOR estimates that approximately 7000 Washington residents will be forced to pay hundreds of millions in capital gains taxes annually,[14] so payment of the tax is not some speculative event that may never come to pass. It is a non-speculative certainty, and the Supreme Court recently reaffirmed that the constitutionality of tax statutes presents an issue of such "significant public interest" and that courts must "engage in a more liberal and less rigid [standing] analysis." *Wash. Bankers Ass'n*, 198 Wn.2d at 455–56 (holding associations may challenge constitutionality of B&O tax to be paid by some of their members). "[T]he UDJA's procedures are 'peculiarly well suited to the judicial determination of controversies concerning constitutional rights and . . . the constitutionality of legislative action.'" *Id.* at 455.

In this regard, "our Supreme Court has recognized an exception to *Diversified*'s standing test when a party raises an issue of 'broad overriding public import.'" *City of Edmonds v. Bass*, 16 Wn. App. 2d 488, 496, 481 P.3d 596 (2021) (quoting *Walker v. Munro*, 124 Wn.2d 402, 432, 879 P.2d 920 (1994)); *Diversified*, 82 Wn.2d at 814–815. Whether an issue is one of major public importance depends on "the extent to which public interest would be enhanced by reviewing the case." *Snohomish Cty. v. Anderson*, 124 Wn.2d 834, 841, 881 P.2d 240 (1994) (emphasis omitted). The public interest exception certainly applies here,[15] where multiple taxpayers and associations are competently and aggressively litigating their facial constitutional

[14] *See* https://fnspublic.ofm.wa.gov/FNSPublicSearch/GetPDF?packageID=63363.

[15] The press attention the tax has garnered demonstrates the tax is a matter of significant public interest. *See, e.g.*, Editorial, *Capital Gains Tax Is Wrong for Many Reasons*, Yakima Herald (Feb. 26, 2021), https://www.yakimaherald.com/opinion/editorials/opinion-capital-gains-tax-is-wrong-for-many-reasons/article_8f6518f2-8633-5382-a782-a2e106708923.html ; Editorial, *Latest Capital Gains Tax Plan Is Still an Income Tax*, Walla Walla Union-Bulletin (Feb. 22, 2021), https://www.union-bulletin.com/opinion/editorials/latest-capital-gains-tax-plan-is-still-an-income-tax/article_54eb15ec-b15e-5bd4-a8a9-79e63d72edd6.html; Tyler Crow, Opinion, *Capital Gains Tax a Distraction*, Peninsula Daily News (Feb. 25, 2021), https://www.peninsuladailynews.com/opinion/capital-gains-tax-a-distraction ; Jason Mercier, Guest Column, *Taxing Capital Gains Is an Income Tax*, Kitsap Sun (Mar. 1, 2021), https://www.kitsapsun.com/story/opinion/columnists/2021/03/01/your-turn-taxing-capital-gains-income-tax/6821720002/. Editorial, *The* Times *Recommends: Advisory Votes Won't Change Policy But Send Message*, Seattle Times (Oct. 14, 2021), https://www.seattletimes.com/opinion/editorials/the-times-recommends-advisory-votes-wont-change-policy-but-send-message/.

challenges to the new tax. *See Bass*, 16 Wn. App. 2d at 496 (considering a single pre-enforcement challenge advances the public interest).

The UDJA "is a remedial statute and is to be liberally construed and administered." *Wash. Bankers Ass'n*, 198 Wn.2d at 455 (internal quotation marks and citation omitted). The State asks this Court to do just the opposite, but "[s]tanding is not intended to be a high bar to overcome." *Id.* (internal quotation marks and citation omitted). So long as one Plaintiff has standing, the Court need not address whether other challengers also have standing given that all seek identical declaratory judgment relief. *See, e.g., League of Educ. Voters*, 176 Wn.2d at 817 n.3. Defendants' motion for summary judgment based on challenges to Plaintiffs' standing must be denied.

B. ESSB 5096 Imposes an Impermissible Property Tax on Income

ESSB 5096 imposes a tax on capital gains income and is therefore a tax on property under the Washington Constitution as interpreted by the Supreme Court in a long series of binding precedents. *See* Plaintiffs' MSJ at 15–24. In order to claim ESSB 5096 instead imposes an excise tax, the State has to ignore how the capital gains tax actually works: by taxing the capital gains realized by Washington's individual taxpayers and reported to the federal government on annual basis. But, contrary to the State's assertion, ESSB 5096 does not actually impose a tax on the privilege of selling or exchanging property in the state. If it did, then the capital gains tax would be imposed on every taxpayer who voluntarily acts and it would be imposed only to the extent to which the taxpayer enjoys the privilege of engaging in those actions within the state. *See, e.g., Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88 (2005) (requiring "two conditions" for an excise tax); *Jensen v. Henneford*, 185 Wash. 209, 218, 53 P.2d 607 (1936) ("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); *see also Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 438–39, 59 S. Ct. 325, 83 L. Ed. 272 (1939) ("[S]tate taxation, whatever its form, is precluded if it … undertakes to lay a privilege tax measured by gross receipts derived from activities in such

commerce which extend beyond the territorial limits of the taxing state.").[16] ESSB 5096 does not, however, require a Washington resident to take any action or invoke any privilege to be subject to the capital gains tax. Further, ESSB 5096 does not limit the reach of the tax to only those sales or exchanges that occur within Washington's borders. Instead, ESSB 5096 imposes the tax when an individual reports long-term capital gains on their annual, federal income tax forms, without regard to whether the individual acted voluntarily or intentionally to sell or exchange assets, and without regard to whether the transaction occurred within the State. ESSB 5096 § 5(1), (4)(a). Our Supreme Court has said such an annual tax on income is a tax on property, *see, e.g.*, *Jensen*, 185 Wash. at 217, and thus subject to the constitutional requirements of uniformity and a one percent tax rate limit (unless a higher tax rate is approved by voters). Wash. Const. art. VII, §§ 1, 2. Because the capital gains tax violates both requirements, it is constitutionally invalid.

1. The Capital Gains Tax Is Not an Excise Tax

The State spends many pages walking this Court through a history of cases describing excise taxes and property taxes. *See* State's MSJ at 9–17. It then summarily concludes in one paragraph that ESSB 5096 is an excise tax because it is purportedly on the "voluntary sale or exchange of long-term capital assets." *Id.* at 16. The State calling the capital gains tax in ESSB 5096 an "excise tax" does not make it so. This is because "[t]he character of a tax is determined by its incidents, not by its name." *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 607, 989 P.2d 542 (1999) (quoting *Jensen*, 185 Wash. at 217). As the Court of Appeals observed in *Kunath v. City of Seattle*: "To determine the incidence of a tax, we consider who is being taxed, what is being taxed, and how the tax is measured." 10 Wn. App. 2d 205, 221, 444 P.3d 1235 (2019) (internal quotation marks and citations omitted). Analyzing ESSB 5096's subject matter and its incidents, "*i.e.*, the manner in which it is assessed and the measure of the tax," *Harbour Vill. Apartments*, 139 Wn.2d at 607 n.1 (citation omitted), confirms that that the

[16] See also *Dravo Corp. v. Tacoma*, 80 Wn.2d 590, 602, 496 P.2d 504 (1972) (There exists no legal basis for any other state to seek to apportion the tax "if the taxable incident or activity occurs entirely within the taxing jurisdiction.").

capital gains tax is a tax on income. *See, e.g.*, *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 650 & n. 12, 62 P.3d 462 (2003) (collecting cases recognizing that income is property and taxes on the receipt of income are property taxes).

a. The Manner in Which the Capital Gain Tax Is Assessed Is Based on Individual Ownership Interest in Long-Term Capital Assets, Not Voluntary Activity.

The parties agree that an excise tax requires two conditions. First, the obligation to pay must be based on "the voluntary action *of the person taxed* in performing the act" and "the element of absolute and unavoidable demand, as in the case of a property tax, [must be] lacking." *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965) (emphasis added). ESSB 5096 violates both of these principles.

First, the State's repeated statement that the capital gains tax is imposed "only upon the voluntary sale of a long-term capital asset" by the taxpayer, *see* State's MSJ at 10, 16, is contrary to the plain language of the law. The express language of ESSB 5096 provides:

> (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 grantor of [incomplete gift non-grantor trusts] 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 their Washington capital gains.]

ESSB 5096 § 5(4) (emphases added). In contrast to a true excise tax, the capital gains tax is imposed when three conditions are met: (1) an individual owns or possesses a beneficial interest in long-term capital assets for a period of at least 12 months; (2) the assets are sold or exchanged for gain; and (3) the individual recognizes the capital gains on their federal income tax returns. *Id.*; *see also* § 4(1), (3), (13) (defining "adjusted capital gains," "federal net long-term capital

gain," and "Washington capital gains"). An individual thus need not engage in *any* voluntary act to be subject to the capital gains tax.

For example, an individual who is the beneficiary of a grantor trust will be subject to the capital gains tax when the trustee sells or exchanges long-term capital assets held by the trust because the income is passed through to the beneficiary under both federal income tax law and ESSB 5096. Likewise, a shareholder in an S corporation will be subject to the capital gains tax when the Board of Directors or manager of the entity sells or exchanges long-term capital assets held by the entity because the income is passed through to shareholders to the extent of their interest in the entity. So too with individuals who have an interest in a partnership, limited liability corporation, and any other entity that is "a pass through or disregarded entity for federal tax purposes," and for an individual who happens to own stock in a corporation that is acquired in a securities tender offer, requiring no action from the individual. All these individuals will be subject to the capital gains tax even if they do not deliberately or intentionally take any action to cause the sale or exchange of long-term capital assets held by the related entities. So long as these individuals report non-exempt long-term capital gains on their federal income tax returns, they will be subject to the state capital gains tax. The State is simply wrong that the tax applies only on the taxpayer's voluntary action of selling or exchanging long-term capital assets.

Second, the State's contention that the capital gains tax "is imposed on the beneficial use of property as distinguished from a tax on property itself," State's MSJ at 16, is contrary to how the capital gains tax actually works. The tax is not imposed on the privilege of engaging in the activities of selling or exchanging long-term capital assets within the State. If it were, the tax would be imposed on every person engaging in similar capital asset transactions, including Washington residents that are not individual taxpayers, like corporations. *See* Plaintiffs' MSJ at 21–22. But the tax is not imposed on all Washington residents who sell or transfer long-term capital assets. Indeed, unlike, for example, an excise tax on the transfer of real property within state boundaries, the capital gains tax is not necessarily even imposed on the *legal* owner that is a party to the *legal* transfer, as in the case of a trust or a pass-through entity, but is instead

imposed on the beneficial or pass-through owner of the gains realized and reported later as net income.

Further, if this were a true excise on transactions, the tax would be imposed only on transactions occurring within the State's borders. *See* Plaintiffs' MSJ at 8–10, 16–20. Instead, the capital gains tax is assessed based on an individual's residence or domicile in Washington, and measured by the aggregate of all of that individual's gains. The tax requires no state nexus to the covered property or transaction; the only state nexus required is that an individual be a Washington resident or domiciliary and eventually realize and report long-term capital gains as net income—a classic income tax.

These characteristics combine to make the capital gains tax an "absolute and unavoidable" demand on property (i.e., income)—which per our Supreme Court cannot be an excise tax. *See Jensen*, 185 Wash. at 218–19. The Supreme Court expressly rejects the notion that the right to receive income from property can be subject to an excise tax because "to tax by reason of ownership of property is to tax the property itself." *Id.* at 2189. "The right to receive, the reception, and the right to hold are progressive incidents of ownership and indispensable thereto. To tax any one of these elements is to tax their sum total, namely, ownership, and therefore the property (income) itself." *Id.* at 219. Here, like the net income tax in *Jensen*, the subject matter of the capital gains tax is not the privilege of using or transferring a class or property within the state—corporations and other such entities are not subject to the tax. Rather, the incidence is the aggregate net income that individuals receive from their direct or beneficial ownership of the income from such property transactions, wherever they occur, and regardless whether they are undertaken voluntarily or entirely passively. Thus, ESSB 5096 does not pass judicial scrutiny under the guise of an excise tax.

b. The Measure of the Capital Gains Tax Is the Amount of Gains Reported on Federal Income Tax Returns, Not the Measure of the Transaction Purportedly Being Taxed.

"[E]xcise taxes are directly imposed based upon the extent to which the taxpayer enjoys the taxable privilege." *Sheehan*, 155 Wn.2d at 800. Thus, in every excise tax highlighted by the State, the measure of the excise tax is based on the total value of the privilege being taxed. For

example, the business and occupation ("B&O") tax upheld in *Morrow v. Henneford*, 182 Wash. 625, 631, 47 P.2d 1016 (1935), was 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. The real estate excise tax upheld in *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), was imposed on the selling price of the property. In *Black v. State*, the measure of the sales tax was the total cost of the lease. 67 Wn.2d at 98. So too with the leasehold excise tax in *Washington Public Ports*, which was measured by the total taxable rent. 148 Wn.2d at 642–43. In *High Tide Seafoods v. State*, the measure of the tax on enhanced fish food was the total value of the fish at first possession. 106 Wn.2d 695, 700, 725 P.2d 411 (1986) (citing RCW 82.27.020). In *Sheehan*, 155 Wn.2d at 800, the measure of the motor vehicle excise tax was the value of the vehicle at registration. And the estate tax upheld in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014), was measured by the value of the property at the time of the decedent's death and is apportioned to the extent any of the property was located outside of Washington. *See* RCW 83.100.040.

In each of these instances, the excise tax is measured by the extent to which the taxpayer engages in a privilege conferred by or an activity regulated by Washington. Unlike the real estate excise tax or the retailing B&O tax, the measure of the capital gains tax at issue here is not measured by the value of the sale or exchange of long-term capital assets, which the State never addresses. Instead, the capital gains tax is measured by an individual's total, annual long-term Washington capital gains for the federal taxable year. ESSB 5096 §§ 4(1), (13), 5. ESSB 5096 defines Washington capital gains as the aggregate sum of the individual's federal net long-term capital gains adjusted by the amounts of long-term capital losses and gains that are either exempt or not allocated to Washington, less the amounts of standard and itemized deductions set forth in the statute. *See* ESSB 5096 §§4(1), (4)(13), 7, 8, 9; *see also* Plaintiffs' MSJ at 5–6 (describing each step of how the capital gains tax in ESSB 5096 is measured). In other words, the capital gains tax is measured by the amount of the individual's net income earned from the sale or exchange of long-term assets and reported on the individual's federal income tax return over the course of one tax year. The capital gains tax is a tax on annual income. *Cf. Trinova Corp. v.*

Mich. Dep't of Treasury, 498 U.S. 358, 374, 111 S. Ct. 818, 829, 112 L. Ed. 2d 884 (1991) ("A tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes.") (citation omitted).

2. *Stare Decisis* Mandates Following Binding Authorities that Non-Uniform Taxes on Income Are Impermissible Property Taxes

In their supplemental brief, the Education Parties ask the Superior Court to reject binding precedents of the State Supreme Court that have been consistently followed for more than eight decades. *See* Educ. Parties' Joinder at 1–6. This Court should not be led to commit legal error by the Education Parties' misleading arguments—this Court is bound by principles of vertical *stare decisis* and must follow controlling Supreme Court precedent.[17]

"Education Parties acknowledge that the Supreme Court previously has held that income is 'property' and an income tax is a 'property tax.'" Educ. Parties' Joinder at 1–2 (citing *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) and *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936)). Every tax on property must comply with Article VII, section 1 of Washington's Constitution, requiring that "[a]ll taxes shall be uniform upon the same class of property…." Plaintiffs' MSJ at 2 (quoting Const., art. VII, § 1)**.** In addition, Article VII, section 2 sets a ceiling of one percent on property taxes. As explained in Plaintiffs' motion for summary judgment,[18] ESSB 5096 classifies capital gains income into two classes and taxing them at different rates, taxing capital gains below $250,000 at 0 percent and capital gains above $250,000 at 7 percent. Such a two-part classification is virtually identical to the classification ruled unconstitutional in *Kunath*, 10 Wn. App. 2d at 231–32 (Seattle income tax violated uniformity by taxing individual income above $250,000 at a rate of 2.25 percent and income below $250,000 at 0 percent). Under binding precedent, the capital gains tax is unconstitutional.

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[17] This brief focuses on the controlling law on *vertical stare decisis* that binds the Superior Court. The Education Parties' direct attacks on *stare decisis* are improper in the Superior Court for the reasons explained above. Plaintiffs dispute the substantive arguments Education Parties have made to overrule *stare decisis*, and Plaintiffs reserve all rights, legal arguments, and objections to stare decisis arguments that may be made on any appeal in this matter.

[18] *See* Plaintiffs' MSJ at 22–24.

The Education Parties ask the Court to reject *stare decisis* in this case. They argue that "Washington courts" consider "two circumstances" under which *stare decisis* may be abandoned, Educ. Parties' Joinder at 2, but they ignore the distinction between vertical and horizontal *stare decisis*:

> The doctrine of *stare decisis* has two primary incantations: *vertical stare decisis* and *horizontal stare decisis*. Under vertical *stare decisis*, courts are required to follow decisions handed down by higher courts in the same jurisdiction.

Matter of Arnold, 198 Wn. App. 842, 846–48, 396 P.3d 375 (2017) (citing *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)). Whether the Supreme Court may overrule its own precedential decisions is a matter of *horizontal stare decisis*, and all the authorities cited by the Education Parties are in this context. No doctrine, however, allows an *inferior* court to overrule the Supreme Court's binding precedent. "[T]rial and appellate courts in Washington must follow decisions handed down by our Supreme Court and the United States Supreme Court. Adherence is mandatory, regardless of the merits of the higher court's decision." *Id.* at 846.

The Education Parties' request that this Court reject *stare decisis*, then, directly contravenes one of the most fundamental principles governing our courts—that a decision by the Washington Supreme Court "is binding on all lower courts in the state." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). Thus, in *State v. Gore*, the Washington Court of Appeals concluded that a United States Supreme Court decision interpreting a federal statute expressed "better public policy" than the Washington Supreme Court's interpretation of a similar state statute, so it chose to disregard *stare decisis*. *See* 101 Wn.2d at 487. The Supreme Court reversed:

> In failing to follow directly controlling authority of this court, the Court of Appeals erred …. [O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by *this court* … The Court of Appeals was therefore without authority to adopt [non-binding United States Supreme Court authority] based on what it perceived to be the preferable policy.

Id. (emphasis added).

Moreover, other courts have also rejected arguments identical to those made by Education Parties here:

> Under the doctrine of stare decisis, we are bound by our Supreme Court's precedential decisions that a tax on income is a property tax and that a graduated income tax violates the uniformity provision of article VII, section 1. Because Seattle enacted a graduated tax on income, it is unconstitutional.

Kunath, 10 Wn. App. 2d at 235.

The Supreme Court itself has also refused requests to overrule these decisions over many years. Three years after *Culliton*, the Washington Attorney General urged the Supreme Court in *Jensen* to abandon *stare decisis* for many of the same reasons the City urges here. The Court rejected the Attorney General's arguments, citing the need to adhere to previous case law, distinguishing the Attorney General's cited authorities, and rejecting the idea that merely relabeling the tax as something other than a property tax could overcome its essential character under binding law. 185 Wash. at 215–17. Justice Millard, who had dissented from the decision in *Culliton* that a tax on income impermissibly taxed property, concurred in *Jensen*, noting the power of *stare decisis*:

> We held in [*Culliton*], that, under our Constitution, income is property, and that an income tax is a property tax. From that declaration this court has never departed, and the people have not seen fit to amend the Constitution to permit us to hold otherwise. . .

Id. at 225 (Millard, J., concurring).

Arguments to overturn *stare decisis* were rejected again several decades later in *Huntley*, where the Court had "no hesitancy" in finding that a tax on income that was not based on the amount of "any business in this state," and "geared throughout to the Federal income tax legislation…" is "a mere property tax 'masquerading as an excise.'" *Power, Inc. v. Huntley*, 39 Wn.2d 191, 196–97, 235 P.2d 173 (1951). In critical respects, the *Huntley* Court could have been describing the State's capital gains tax here, and that Court did not hesitate to follow *Culliton*—

> It is no longer subject to question in this court that income is property. Art. VII, § 1, of our state constitution, as amended in 1930, see amendment 14, provides that "... The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership..."

39 Wn.2d at 194 (quoting Const. Art. VII, § 1).

The rulings in *Culliton*, *Jensen*, and *Huntley* have been acknowledged and followed by the Washington Supreme Court numerous times. *See, e.g.*, *Dean v. Lehman*, 143 Wn.2d 12, 25, 18 P.3d 523 (2001) (citing *Jensen* for rule that income is property); *Harbour Vill. Apartments*, 139 Wn.2d at 608 (relying on *Jensen* to hold a tax on rental income is a tax on property that violates constitutional prohibition against nonuniform taxation of real property); *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960) (relying on *Jensen* and holding that question whether tax on rent is a property tax "is foreclosed by prior decisions of this court"); *Petrol. Nav. Co. v. Henneford*, 185 Wash. 495, 496–97, 55 P.2d 1056 (1936) (following *Culliton* and *Jensen* to hold that tax measured by net income is a tax on property); *see also Kunath*, 10 Wn. App. 2d at 235 (same).

The Education Parties ask this Court not only to overrule the Supreme Court, but to substitute its judgment for the repeatedly expressed will of the people. Washington voters have rejected six proposed amendments to the Constitution and four statewide initiatives to codify an income tax by statute.[19] The voters have said, over and over, that the courts got it right in *Culliton*, *Jensen*, and *Huntley*. None of the interests offered by the Education Parties is sufficient to amend the Constitution by judicial fiat when the voters have repeatedly declined to do so.

In sum, the Education Parties do not cite a single decision of any Washington court suggesting *Culliton* was either "incorrect" or undermined by an eroded legal foundation. This Court is bound to apply the binding precedent—acknowledged by the Education Parties—which holds that the two-tiered tax on capital gains income violates the Washington Constitution's uniformity clause and one-percent ceiling on property taxes.

C. ESSB 5096 Violates the Privileges and Immunities Clause of Article I, Section 12 of the Washington Constitution

The State claims that ESSB 5096 does not implicate any fundamental right of state citizenship and imposes reasonable distinctions for those who fall subject to the tax and those that do not. State's MSJ at 18–19. Neither claim is true. ESSB 5096 violates the Privileges and Immunities Clause of the Washington Constitution because it imposes the capital gains tax

[19] *Supra* note 2.

unequally on persons accruing capital gains under the same circumstances without any "reasonable ground" for doing so. *See* Plaintiffs' MSJ at 26–27.

First, despite the State's suggestion otherwise, ESSB 5096 implicates "a fundamental right" that belongs to all citizens of the State. *Grant Cty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004). The Supreme Court has long recognized that the term "privileges and immunities" "as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution." *Id.* The federal constitution's "privileges and immunities" clause includes the fundamental right "to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from." *Id.* Thus, "[b]y analogy," the Washington Constitution's "privileges and immunities" clause would also include the fundamental right to be exempt from taxes which other citizens or corporations are also exempt from. *See id*. ESSB 5096, however, specifies that "[o]nly individuals are subject to payment" of the capital gains tax, § 5, meaning that any non-natural person that also earns capital gains is not subject to payment of the tax—even though they all purportedly engage in the exact same activity.

Second, ESSB 5096 fails the "reasonable grounds" test articulated by the Supreme Court, which asks (1) whether the law applies equally to "all persons within a designated class," and (2) whether there is a "reasonable ground for distinguishing between those who fall within the class and those who do not." *See Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 783, 317 P.3d 1009 (2014) (citation omitted). Contrary to the State's assertion, State's MSJ at 18, the capital gains tax does not apply equally to all persons within a designated class. If it did, the tax would apply equally to any person engaging in the activity of selling or exchanging long-term capital assets (if it were in fact an excise tax) or alternatively equally on any owner of long-term capital assets (as it is a property tax). Instead, the Legislature determined that only individuals should be subject to the tax. Furthermore, the State's assertion that the legislature had reasonable grounds for imposing the tax on those with more than $250,000 misses the point. *See* State's MSJ at 19. As admitted by the State, "[t]he purpose of the tax is to raise revenue and address Washington's regressive tax code." *Id.* (citing ESSB 5096 § 1). Applying the capital gains tax

only to individuals—instead of anyone incurring the gains—makes no sense given these stated purposes. The Legislature's arbitrary singling out of individuals does not comport with its stated purpose. ESSB 5096 unconstitutionally burdens the tax against only a select set within the relevant class of taxpayers in violation of the Privileges and Immunities Clause. [20]

D. ESSB 5096 Violates the Commerce Clause of the United States Constitution

To survive Commerce Clause scrutiny, a state tax must meet a four-part test that focuses on the practical effect of the challenged tax. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). The tax must (1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services that the state provides. *Id.* at 279. As fully addressed in the Plaintiffs' opening brief, ESSB 5096 violates this inquiry because the statute impermissibly taxes activity occurring outside the state, imposes a tax that is not fairly apportioned to activities occurring within the state, and discriminates against interstate commerce. *See* Plaintiffs' MSJ at 7–15. The State's attempt to prove otherwise fails.

The State first mistakenly claims that Plaintiffs do not challenge the nexus prong of the *Complete Auto* test, State's MSJ at 21, and therefore the State does not address the prong at all. As a threshold issue, the Plaintiffs expressly asserted in their Complaint that "ESSB 5096 violates the Commerce Clause of the United States Constitution because it . . . allocates taxable gain to Washington based on residency instead of the location of the sale." Quinn Pl. First Am. Compl. ¶ 52; *accord* Clayton Pl. First Am. Compl. ¶ 80. This plainly concerns nexus because it involves the connection between the state and the activity the state seeks to tax. *See Allied-Signal, Inc. v. Dir. of Taxation*, 504 U.S. 768, 778, 112 S. Ct. 225, 119 L. Ed. 2d 533 (1992) ("[W]e have 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."). Imposing tax on transactions that occur outside the state violates the nexus prong of *Complete Auto*. In any event, the State's lack of argument on this issue is fatal to its own attempt

[20] Plaintiffs are not moving forward on the claim that ESSB 5096 violates the privacy clause of Article I, section 7 of the Washington Constitution, and therefore do not address those arguments in the State's brief.

at summary judgment. *Cf. White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) ("It is the responsibility of the moving party to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment."). In contrast, the Court can grant summary judgment to Plaintiffs because they proved in their motion that the capital gains tax imposed by ESSB 5096 lacks constitutional nexus because it allocates gains to Washington that are derived from activities outside the statute; in other words, it imposes tax when there is no nexus with the activity purportedly taxed. Plaintiffs' MSJ at 8–10.

The State's next claim, that the capital gains tax is fairly apportioned, also lacks merit. *See* State's MSJ at 21. The State acknowledges that, if every state adopted the same tax scheme as ESSB 5096, there are "circumstances" in which more than one state would impose tax on the same capital gains. State's MSJ at 22. This is a defect the U.S. Supreme Court calls "internal inconsistency." Internally inconsistent taxes violate both the discrimination and fair apportionment prongs of *Complete Auto*. *See Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 549–50, 135 S. Ct. 1787, 191 L. Ed. 2d 813 (2015) (striking down state tax under fair apportion because it resulted in multiple state taxation); *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 247–48, 107 S. Ct. 2810, 97 L .Ed. 2d 199 (1987) (version of Washington's B&O tax unconstitutionally discriminated against interstate commerce because it was internally inconsistent). The State argues that the credit provision in Section 11 saves the capital gains tax by preventing actual multiple taxation by a state with an identical tax scheme. State's MSJ at 22. The State is wrong for two reasons. First, the credit applies when the "gains are derived from capital assets within the other taxing jurisdiction." But that is not the only "circumstance" in which two states with tax schemes identical to ESSB 5096 would both impose tax on the same capital gain income. Double taxation would also occur when the taxpayer is domiciled in Washington and also is a resident of another state. *See* Plaintiffs' MSJ at 14.

Second, the constitutionality of a state's tax system is not dependent on whether or not a state with nexus exercises its authority to impose tax. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644–45 and n.8, 104 S. Ct. 2620, 82 L. Ed. 2d 540 (1984) (validity of one state's tax does not turn on how another state has chosen to exercise its taxing authority). If every state had the exact

same tax as ESSB 5096, Washington would never impose tax on capital gains arising from a transfer of personal property in another state because the credit would result in the tax only being imposed by the state in which the property was located. Under ESSB 5096, Washington would impose tax on capital gains income derived from a sale of personal property outside Washington because the state in which the sale occurred (the only state with nexus) did not exercise its authority to tax. The Commerce Clause does not permit Washington to project its taxing power outside its boundaries merely because another state chose not to exercise its own taxing authority over the activity within its borders. Nor does the Section 11 credit address "circumstances" in which other states apportion capital gains among the various jurisdictions or if another jurisdiction can reach the gains because the value of the gains was earned from business activity in that state—such as in the instance of the sale of a multistate business.

Moreover, no relationship exists between the gain allocated to Washington and the activity that generated the tax liability in two of the three situations outlined in ESSB 5096 § 11. The State allocates to itself all of the gain earned from sales or exchanges of tangible personal property occurring outside the state if the taxpayer was a resident of the state and no other state has chosen to impose a tax on the same gains. The State also allocates to itself all of the gain earned from the sale or exchanges of intangible personal property solely if the taxpayer was domiciled in Washington at the time of the transaction.[21] In either instance, the State overreaches. It taxes activity occurring outside its jurisdiction and fails to limit the tax to only that portion of income reasonably attributed to the taxpayer's in-state activities.

Finally, the State's argument that ESSB 5096 is not facially discriminatory because its "plain text does not grant unfavorable treatment to out-of-state persons" misses the point. *See* State's MSJ at 23. ESSB 5096 discriminates against interstate commerce in its effect because it subjects income earned across state lines to risk of multiple taxation. *See Wynne*, 575 U.S.

[21] The State misses the point about the problem with allocating gains derived from intangible personal property solely based on the taxpayer's domicile. *See* State's MSJ at 24. The problem is not with using that method. The constitutional defect arises because the State does not apportion the gains according to where profits are earned. *See Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 212, 56 S. Ct. 773, 80 L. Ed. 1143 (1936) (recognizing that tax on net profits from intangible property demands a method of apportionment amongst different jurisdictions with respect to the processes by which the profits are earned).

at 549–50. While gains earned from sales of tangible personal property located in Washington are subject to tax only once by Washington, gains earned from out-of-state tangible personal property or gains earned from intangible personal property can be taxed not just by Washington but other states as well—simply because Washington has chosen to allocate the gains based on the taxpayer's residency or domicile and without apportionment. The Act thus inherently discriminates against interstate commerce because it allows multiple taxation. *See id.* This is more than a "mere assertion" of discrimination. State's MSJ at 23. It is fact.

IV. CONCLUSION

For these reasons, the Court should deny summary judgment to the State and Education Parties, and grant summary judgment to Plaintiffs instead. And given that Defendants have submitted no affirmative evidence to support their arguments, the Court should grant summary judgment for Plaintiffs on the issue of standing as well.

Dated: January 7, 2022

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: *s/Robert M. McKenna*
Robert M. McKenna (WSBA# 18327)
Daniel J. Dunne, Jr. (WSBA# 16999)
Aaron P. Brecher (WSBA# 47212)
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
Telephone (206) 839-4300
Fax (206) 839-4301
rmckenna@orrick.com
ddunne@orrick.com
abrecher@orrick.com

FOREMAN, HOTCHKISS, BAUSCHER & ZIMMERMAN, PLLC

By: *s/Allison R. Foreman*
Allison R. Foreman (WSBA# 41967)
124 N Wenatchee Avenue, Suite A
Wenatchee, WA 98801
Telephone (509) 662-9602
Fax (509) 662-9606
allison@fhbzlaw.com

Attorneys for Clayton Plaintiffs

LANE POWELL PC

By: *s/ Callie A. Castillo*
Scott M. Edwards, WSBA No. 26455
Callie A. Castillo, WSBA No. 38214
Lane Powell PC
1420 5th Avenue, Suite 4200
Seattle, WA 98101
Telephone: 206.223.7000
Facsimile: 206.223.7107
edwardss@lanepowell.com
castilloc@lanepowell.com

Attorneys for Quinn Plaintiffs

Eric R. Stahlfeld, WSBA No. 22002
Freedom Foundation
P.O. Box 552, Olympia, WA 98507
Telephone 360.956.3482
Facsimile 360.839.2970
estahlfeld@freedomfoundation.com

Attorneys for Quinn Plaintiffs

PROOF OF SERVICE

I certify that on the date below, I caused to be served a copy of this document, through electronic mail, per agreement on:

Cameron G. Comfort
Noah G. Purcell
Jeffrey T. Even
Peter B. Gonick
Charles E. Zalesky
Attorney General of Washington
Cam.Comfort@atg.wa.gov
Chuck.Zalesky@atg.wa.gov
REVOlyEF@atg.wa.gov
SGOOlyEF@atg.wa.gov

Attorneys for Defendants

Scott Edwards
Callie Castillo
Lane Powell PC
EdwardsS@lanepowell.com
CastilloC@lanepowell.com
CraigA@lanepowell.com
Docketing@lanepowell.com

Eric Stahlfeld
c/o The Freedom Foundation
EStahlfeld@freedomfoundation.com
kelder@freedomfoundation.com

Attorneys for the Quinn Plaintiffs

Gregory J. Wong
Sarah S. Washburn
Pacifica Law Group LLP
Greg.Wong@pacificalawgroup.com
Sarah.Washburn@pacificalawgroup.com
Thien.Tran@pacificalawgroup.com
Cindy.Bourne@pacificalawgroup.com

Attorneys for Intervenors

Joseph Henchman (Admitted *pro hac vice*)
National Taxpayers Union Foundation
jbh@ntu.org

Attorney for Amicus

Stephen R. Crossland
Crossland & Evans PLLC
Steve@crosslandlaw.net

Attorney for Amicus

Jackson Wilder Maynard, Jr.
Brooke Frickleton
Nikky Castillo
JacksonM@biaw.com
BrookeF@biaw.com
NikkyC@biaw.com

Attorney for Amicus

Dated January 7, 2022.

s/Robert M. McKenna
Robert M. McKenna