No. 100769-8

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRIS QUINN, et al.,

Respondents,

APRIL CLAYTON, et al.,

Respondents,

v.

STATE OF WASHINGTON, et al.,

Appellants,

EDMONDS SCHOOL DISTRICT, et al.,

Intervenors/Appellants.

AMICUS CURIAE BRIEF OF LAW PROFESSORS

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I. INTRODUCTION

Amici are individual law professors who have extensive knowledge in the development of the law of federal and state taxation. These amici offer their expertise in support of the State's position in this case, that Engrossed Substitute Senate Bill 5096's ("ESSB 5096's") tax on capital gains is an excise tax and not a property tax under Wash. Const., Art. VII, § 1. The State's position is grounded not only in this Court's precedent, but in history and logic.

While Amici agree with appellant Intervenors that a tax on income is not a property tax, this Court need not overrule *Culliton v. Chase,* 174 Wash. 363, 25 P.2d 81 (1933), to uphold the capital gains excise tax here. ESSB 5096 falls squarely within this Court's longstanding definition of an excise tax because the incidence of the tax operates upon the act of *transferring* capital assets and not directly upon the property itself. If this Court were to affirm

the trial court's flawed logic that a capital gains tax is "properly characterized as a tax on property" under Art. VII, § 1 because it is a "tax on the receipt of income" (CP 872), the Court would be required to extend *Culliton* far beyond its holding and to disregard the Court's extensive excise tax precedents. These precedents are consistent with U.S. Supreme Court jurisprudence addressing similar distinctions between direct taxes on property and excise taxes on acts or transactions.

The Washington Constitution does not limit the Legislature's prerogative to devise fair and equitable excise taxes to fund its residents' basic needs in housing, health care and education and to redress past economic and social inequities. The trial court erred in holding that the capital gains excise tax was a prohibited, non-uniform tax on property.

II. IDENTITY AND INTEREST OF AMICI

The individual amici are law professors who, as reflected in their CVs (attached as the appendix to this brief), are recognized scholars on issues of state and federal taxation and/or state constitutional law:

Reuven S. Avi-Yonah is the Irwin Cohn Professor of Law at the University of Michigan Law School. He has authored numerous treatises and articles on taxation, including most recently, *U.S. International Taxation: Cases and Materials* (5th ed., with D. Ring, Y. Brauner and B. Wells) (Foundation Press, 2022).

David Gamage is a Professor of Law at Indiana University Maurer School of Law who focusses his scholarship on tax policy. He has drafted and consulted on efforts to tax wealth at the federal, state and local levels, including most recently, co-drafting legislation for President Bident's proposed Billionaires Minimum Income Tax Reform.

Lily Kahng is a Professor of Law at Seattle University School of Law who has written extensively on the taxation of human and intellectual capital and the effect of tax laws on workers, women, and underrepresented communities.

Erin Scharff is Professor of Law at Arizona State University's Sandra Day O'Connor College of Law. Her scholarship has frequently explored state constitutional limits on fiscal authority. She is a co-author of casebooks on both federal income taxation and state and local government law.

Darien Shanske is a Professor of Law at UC Davis School of Law. Many of his academic articles have explored the fiscal provisions of state constitutions. He is a co-author of the only available commentary on California's Constitution and was the primary author of the commentary's provisions relating to taxation.

Hugh Spitzer is a Professor of Law at the University of Washington School of Law, where he has taught Washington state constitutional law for decades. He is a co-author of *The Washington State Constitution* (2nd ed. Oxford University Press 2013) (with Robert F. Utter) and has authored several articles about state tax law and policy.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Appellant State of Washington at 6-14 and Brief of Appellant Intervenors at 5-13.

IV. ARGUMENT

A. This Court distinguishes between a direct tax on property and an excise tax on the voluntary use, sale or transfer of property.

This Court has long held that Art. VII, § 1's mandate that "all taxes shall be uniform upon the same class of property" applies only to direct taxes on property and does not limit the Legislature's broad authority to devise separate classes for the purposes of an excise tax. *See State*

ex rel. Stiner v. Yelle, 174 Wash. 402, 407, 25 P.2d 91 (1933) (in levying excise taxes, Legislature "has very broad power, and we cannot interfere with that power except for arbitrary action, clear abuse, or constructive fraud appearing on the face of the act or from facts of which we may take judicial knowledge.").

The Court has defined an excise tax as one that operates upon the act or incidence of the transfer of property, such as a sales tax:

> We are committed to the proposition that a tax upon the sale of property is not a tax upon the subject matter of that sale. A sales tax upon personal property or a sales tax upon real property is a tax upon the act or incidence of transfer. The imposition relates to an exercise of one of several rights in and to property. Imposition is not upon each and every owner merely because he is the owner of the property involved.

Mahler v. Tremper, 40 Wn.2d 405, 409-10, 243 P.2d 627 (1952) (real estate excise tax).[1]

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[1] *See Stiner,* 174 Wash. at 404 (B&O tax measured by "the application of rates against values, gross proceeds of

In applying the definition of an excise tax, courts look to "the manner in which it is assessed and the measure of the tax." *Greater Seattle Chamber of Com. v. City of Seattle,* 22 Wn. App.2d 361, 367, ¶16, 512 P.3d 594 (2022) (payroll tax) (citation and internal quotation omitted). The appropriate question is whether the incidence of the tax falls directly on "property" or upon its *transfer*, as inheritances, sales receipts, and the proceeds of sale of real property may all be characterized as "income," under a broad definition of the term. *See Estate of Hambleton,* 181

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sales, or gross income."); *Morrow v. Henneford*, 182 Wash. 625, 627, 47 P.2d 1016 (1935) (sales tax is an excise tax, "defined as one levied upon the manufacture, sale, or consumption of commodities within the country"); *High Tide Seafoods v. State,* 106 Wn.2d 695, 699, 725 P.2d 411 (1986) (defining "a property tax as a tax on things tangible or intangible and an excise tax on the right to use or transfer things."), *dismissed*, 479 U.S. 1073 (1987); *In re Estate of Hambleton*, 181 Wn.2d 802, 832, ¶ 59, 335 P.3d 398 (2014) ("estate tax is an excise tax because the tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits."), *cert. denied*, 577 U.S. 922 (2015).

Wn.2d at 832-33 (estate tax operates on the transfer of assets and income).

The trial court in this case held unconstitutional the 7% tax on capital gains in excess of $250,000, reasoning "as a tax on the receipt of income, ESSB 5096 is . . . properly characterized as a tax on property" under Art. VII, § 1, (CP 872), citing *Culliton v. Chase,* 174 Wash. 363, 25 P.2d 81 (1933); *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), and *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951). While the Intervenors provide convincing reasons to overrule *Culliton*, this Court need not do so to reverse the trial court. As the State cogently demonstrates, the capital gains tax at issue here falls squarely within the established definition of an excise tax because the incidence of the tax operates upon the transfer of capital assets. It is therefore not a direct tax on the "ownership" of an asset or property, "whether tangible or intangible" within the meaning of Art. VII, § 1.

The capital gains tax is imposed upon the sale, not the mere ownership, of a capital asset. It is "distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property." *Morrow v. Henneford,* 182 Wash. 625, 631, 47 P.2d 1016 (1935), quoting *Bromley v. McCaughn*, 280 U.S. 124, 137, 50 S. Ct. 46, 74 L. Ed. 226 (1929). *Accord, Mahler,* 40 Wn.2d at 409-10. ("a tax upon the sale of property is not a tax upon the subject matter of that sale.") "[T]he government is taxing . . . the shifting from one to another of a[] power or privilege incidental to the ownership of a capital asset, not the asset itself." *Estate of Hambleton*, 181 Wn.2d at 811, ¶ 7. That is why an excise tax is measured by the amount of economic benefit resulting from a transfer, as the capital gains tax is measured here, while a property tax is typically measured by *value*—it is called an "*ad valorem*" tax. *See State ex rel. Mason County Logging Co. v. Wiley*, 177 Wash. 65, 78, 31 P.2d 539 (1934) ("an *ad*

valorem tax is a tax upon the value of the article or thing subject to taxation") (Steinert, J. dissenting).

The capital gains tax is not a direct tax on the value of property. Nor is it a tax on all incidents of ownership of property, whether tangible or intangible. It is thus distinguishable from the tax on rental income, which operated directly as "a tax upon the real estate itself." *Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960).

Rental income from property generally operates as a regular and recurring flow, rather than having its incidence triggered by specific transfers that may occur quite infrequently.[2] The capital gains tax established by ESSB

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[2] *See* Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation: What's Law Got to Do With It?,* 39 Southwestern L. J. 869, 887-906 (1985) (discussing the early American and British historical precedents for distinguishing between general income taxes on regular and recurring flows of income, such as rental income, on the one hand, and, on the other hand, taxes on capital gains arising from sales or other specific transfers that may occur irregularly and infrequently).

5096 is also markedly different from a broad-based corporate or personal tax on net income. *See Jensen,* 185 Wash. at 218-19 (personal income tax); *Power,* 39 Wn.2d at 197 (corporate income tax "taxes almost any income from almost every source").

The Court has recognized that there is no "precise line which sets off direct taxes from others," *Morrow*, 182 Wash. at 630, quoting *Bromley*, 280 U.S. at 136, resulting in "a maze of conflicting and bewildering decisions." *Stiner,* 174 Wash. at 406. Given that almost every transactional excise tax "is measured by the amount of the income" realized, *Stiner,* 174 Wash. at 407, *stare decisis* does not compel the trial court's conclusion that every tax measured by some type of income is a direct tax on property.

This Court should be wary of creating more "bewildering" decisions (*Stiner*, 174 Wash. at 406) by extending *Culliton* and *Jensen* to preclude the Legislature's

plenary power to enact a non-uniform tax that is imposed and measured by the taxpayer's gain on transactions. The capital gains excise tax is well supported by this Court's excise tax precedent. This Court should reverse the trial court's order because SB 5096 is not a direct tax on property.

B. The distinction between a direct tax on property and an excise tax on its transfer is well established by the United States Supreme Court.

The distinction between a direct tax on property and an excise tax that operates upon the property's transfer is well-established not just by this Court, but by the U.S. Supreme Court's jurisprudence before and after adoption of the 16th Amendment. While the Supreme Court occasionally deviated from its expansive view of the sovereign's power to impose excise taxes, it has consistently refused to invoke *stare decisis* to expand upon these limited deviations. *See* John R. Brooks & David

Gamage, *Taxation and the Constitution, Reconsidered,* Tax Law Review (forthcoming 2023).

1. Until the *Lochner* era, the Supreme Court broadly construed Congress's power to levy a "duty, impost or excise," narrowly defining a direct tax on property.

Historically, the sovereign's power to collect "excises" was a broad one, without regard for whether a tax might be considered "direct" or "indirect." In colonial times, most taxes took the form of either customs and other excise taxes on goods and activities, or lump-sum levies on individual "polls" (heads) or on property. Thomas J. Cooley, *Treatise on the Law of Taxation, Including the Law of Local Assessments*, 18-31 (1st ed. 1876).

The U.S. Constitution, ratified in 1788, imposed only two restrictions on Congress's power to enact taxes. First, any "duty impost, or excise" was required to be "uniform throughout the United States" in a geographic sense—that is applied in the same manner and at the same rates across

the country. U.S. Const., Art. 1, § 8, cl.1.[3] Second, any "direct tax" was required to be apportioned—that is divided among the states in proportion to their shares of the population. U.S. Const., Art. 1, § 2, cl.3; §9, cl.4.[4]

According to Hamilton, when not assessed as a poll tax, such direct taxes that required apportionment among the states "principally relate to lands and buildings," the major components of capital or property in the pre-industrial era. Alexander Hamilton, *The Federalist Papers,* No. 21. By contrast, the "duties, impots and excises"

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[3] The constitution's "uniformity" requirement for excise or indirect taxes meant only geographic uniformity; it did not mandate only flat-rate taxes. *See Edye v. Robertson*, 112 U.S. 580, 594, 5 S. Ct. 247, 28 L. Ed. 798 (1884) ("The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.").

[4] The purpose of such apportionment is inextricably bound up with the requirement that enslaved persons be considered "three fifths of all other Persons." U.S. Const., Art. 1, § 2, cl.3. *See* Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1 (1999) (discussing the "tainted origins of the 'direct tax' clauses.")

allowed by Art. 1, § 8 included taxes on manufactured goods as well as imports.

In a case brought shortly after ratification of the Constitution, the U.S. Supreme Court (most of whose members were involved in drafting the Constitution) held that a tax on carriages was an excise tax, and not a direct tax on property subject to apportionment. *Hylton v. United States*, 3 U.S. 171, 1 L. Ed. 556 (1796). This was so even though the carriage itself was obviously property, and the tax was imposed on the owner of the carriage. Similarly, the Whiskey Tax of 1791 was a per-gallon charge assessed on domestically distilled whiskey. Though an expansive definition of a direct tax on property might suggest the whiskey and carriage taxes were subject to the apportionment requirement, the Founding-era Congress clearly understood them to be excise taxes.

The Court continued to interpret the phrase "excise" broadly and "direct" narrowly in approving taxes levied by

Congress to fund the Civil War.[5] The Court held that a "direct tax" was limited to those imposed upon only "real estate and slaves" and that the 1864 tax on income and capital gains was a valid excise tax "to pay the debts and provide for the common defence and public welfare" under Art. 1, § 8. *Springer v. United States,* 102 U.S. 586, 589, 602, 26 L. Ed. 253 (1880).

While almost any tax levied on the transfer of property could be viewed as a direct tax on the property itself, prior to the *Lochner* era the Supreme Court thus took an expansive view of the legislative prerogative to enact excise taxes on the use or transfer of property. *See* Marjorie E. Kornhauser, *The Origins of Capital Gains Taxation:*

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[5] *See Pac. Ins. Co. v. Soule,* 74 U.S. 433, 444-45, 19 L. Ed. 95 (1868) (income tax on insurance companies); *Veazie Bank v. Fenno*, 75 U.S. 533, 540-48, 19 L. Ed. 482 (1869) (10% tax on bank notes); *Scholey v. Rew*, 90 U.S. 331, 347, 23 L. Ed. 99 (1874) ("succession tax"—an early form of inheritance or estate tax—imposed on the value of real estate transferred to another because of death is an "an excise tax or duty," because it was levied on the *act* of "devolution" of the property, not the property itself).

What's Law Got to Do With It?, 39 Southwestern L.J. 869, 911-16 (1985).

2. The U.S. Supreme Court briefly invalidated Congress's ability to tax new forms of wealth by holding that a tax on income derived from property was a direct tax on the property itself in *Pollock*, but then quickly retreated.

The U.S. Supreme Court subsequently adopted a narrower view of Congress's authority to assess excise taxes, coinciding with the Court's broader protection of property rights under the due process clause, but that narrow view was short lived. In 1895, the Court in *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429, 15 S. Ct. 673, 39 L. Ed. 759 *(Pollock I)*, *on reargument,* 158 U.S. 601, 15 S. Ct. 912, 39 L. Ed. 1108 *(Pollock II)* (1895), invalidated taxes on land rents, 157 US at 583, interest from municipal bonds, 157 U.S. at 586, and taxes on income from personal property, 158 U.S. at 628, as all direct taxes subject to apportionment.

However, the Supreme Court did not continue to narrow the scope of Congress' excise tax authority. Indeed, in the early years of the 20th century, the Court upheld every tax statute that came before it as a valid excise tax that need not be apportioned.

In *Knowlton v. Moore*, 178 U.S. 41, 20 S. Ct. 747, 44 L. Ed. 969 (1900), the Court unanimously upheld a "death duty"—an estate tax, essentially—as a "duty or excise." 178 U.S. at 83. In *Patton v. Brady,* 184 U.S. 608, 22 S. Ct. 493, 46 L. Ed. 713 (1902), the Court held that a tax levied on the value of tobacco was an excise tax and not a direct tax on property, noting the clear overlap between the two: "They are each methods by which the individual is made to contribute out of his property to the support of the government."184 U.S. at 622. And in *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 S. Ct. 342, 55 L. Ed. 389 (1911), the Court held a corporate income tax, which taxed capital gains, was not a tax on property solely because of its

ownership, but was instead "a tax upon business done in a corporate capacity," and therefore could be called an excise. 220 U.S. at 146.

Thus, in distinguishing between a tax on specific uses, activities or "privileges" related to property and a direct tax on property itself "solely because of . . . ownership," *Knowlton*, 178 US at 82, the Court, while not overruling *Pollock*, refused to expand upon it to limit Congress's ability to impose excise taxes on a wide range of activities and transactions in the country's new industrial economy. Today, *Pollock* may be seen as one of the first of the *Lochner*-era cases, where the Court elevated property rights by deriving laissez-faire natural law from vague passages in the Constitution.[6]

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[6] *See, e.g.*, Richard White, *The Republic for Which it Stands: The United States During Reconstruction and the Gilded Age*, 1865-1896, 820 (2017); Marjorie E. Kornhauser, *The Story of Macomber: The Continuing Legacy of Realization,* in *Tax Stories: An In-Depth Look at Ten Leading Federal Income Tax Cases*, 112 (2009).

The 16th Amendment, ratified in 1913, authorized a federal tax on "income from whatever source derived." While the amendment overruled *Pollock*'s holding that taxing income was tantamount to taxing property, the U.S. Supreme Court had already refused to expand *Pollock*'s reasoning to other forms of taxation.

This Court has followed a similar path. Though it has held that Wash. Const., Art. VII, § 1's requirement of uniform property taxation applies to a broad-based income tax, it has not expanded *Culliton's* reasoning. It should not do so now because ESSB 5096's tax on capital gains falls squarely within the Legislature's authority to impose a transaction-based excise tax. (§ IV.A, *supra*)

3. In interpreting the broad definition of "income" under the 16th Amendment, the U.S. Supreme Court continued to distinguish a tax on property from a tax on proceeds derived from property's sale, use or transfer.

The 16th Amendment did not put to rest the question whether one can receive (and therefore be taxed) on

"income" that has not been severed from the property itself, nor the transaction-based distinction between a direct tax on property, and an excise tax on its proceeds and uses.

In *Macomber v. Eisner*, 252 U.S. 189, 40 S. Ct. 189, 64 L. Ed. 521 (1920), the U.S. Supreme Court held invalid Congress's attempt to tax stock dividends as "income" under the newly enacted corporate income tax. The Court characterized dividends paid in the form of company stock as the property of the corporation itself and therefore not taxable as "income" because those dividends did not enrich the stockholder. The tax was "direct" and subject to apportionment under Art. 1, § 9 because the dividends represented an "increase in the value of the stockholder's capital interest resulting from an accumulation of profits by the company. . ." *Macomber*, 252 U.S. at 210.

But, as it had with *Pollock,* the Court retreated from *Macomber*'s broad definition of property, holding that a

tax on unrealized profits held by a partnership is not a "property" tax subject to apportionment under Art. I, § 9 in *Heiner v. Mellon,* 304 U.S. 271, 278, 58 S. Ct. 926, 82 L. Ed. 1337 (1938). The Court later confined *Macomber* to its particular facts.[7]

Thus, the U.S. Supreme Court, like this Court, has on occasion held unconstitutional what the legislature has called an excise tax. However, the U.S. Supreme Court has consistently refused to expand on those decisions to limit Congress's extensive authority to fund the changing social and economic needs of a modern nation. This Court should similarly decline to extend its Depression-era decisions to preclude the Legislature from enacting a capital gains tax

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[7] *See C.I.R. v. Glenshaw Glass Co.*, 348 U.S. 426, 431, 75 S. Ct. 473, 99 L. Ed. 483 *(Macomber* "was not meant to provide a touchstone to all future gross income questions."), *reh'g denied*, 349 U.S. 925 (1955); *Helvering v. Bruun*, 309 U.S. 461, 468-69, 60 S. Ct. 631, 84 L. Ed. 864 (1940) (gain received "as a result of business transaction" held taxable as income regardless whether it is "cash derived from the sale of an asset.").

that can be sustained under the Court's substantial excise tax jurisprudence.

4. *Stare decisis* has not impeded the U.S. Supreme Court from refusing to extend other questionable and outdated tax precedent.

As it did following *Pollock* and *Macomber,* the U.S. Supreme Court has refused to extend its questionable tax precedent in other contexts. For instance, in *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), the Court held that physical presence was required before a state could force an out-of-state vendor to collect Illinois's use tax. Twenty-five years later, in *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), the Supreme Court candidly explained that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today." 504 U.S. at 311. Nonetheless, the Court upheld

Nat'l Bellas Hess, primarily on *stare decisis* grounds. 504 U.S. at 317-18.

Because the Court crafted its upholding of the *Nat'l Bellas Hess* rule so narrowly, lower courts did not extend the physical presence rule upheld in *Quill* to other contexts. The Supreme Court let stand those lower court decisions,[8] and in 2018 expressly overruled *Nat'l Bellas Hess* and *Quill,* reasoning "[t]he Internet's prevalence and power have changed the dynamics of the national economy." *S. Dakota v. Wayfair, Inc.,* ___ U.S. ___, 138 S. Ct. 2080, 2098, 201 L. Ed. 2d 403 (2018).

As then-10th Circuit Judge Neil Gorsuch explained, there is a small group of poorly reasoned precedents that

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[8] *See, e.g., Tax Comm'r v. MBNA Am. Bank, N.A.*, 220 W.Va. 163, 640 S.E.2d 226, 232-34 (2006) (physical presence not required for state corporate income tax), *cert. denied sub nom FIA Card Servs., N.A. v. Tax Comm'r*, 551 U.S. 1141 (2007); *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1147 (10th Cir. 2016) (physical presence not a predicate for out-of-state vendors to comply with Colorado's significant regulatory requirements), *cert. denied*, 137 S. Ct. 593 (2016).

are given such a "distinguished fate" because of the weakness and narrowness of their rationale. *Direct Mktg. Ass'n.*, 814 F.3d at 1149-50 (Gorsuch, J., concurring). *Pollock* and *Culliton* may be viewed in a similar historical light; they are not just "bewildering," *Stiner*, 174 Wash. at 406, but relics of a bygone era that venerated property rights and denigrated human rights. This Court is "under no obligation to extend" *Culliton* and *Jensen* as the trial court did below. *Direct Mktg. Ass'n.*, 814 F.3d at 1149-50.

C. This Court should not expand on *Culliton* to limit Legislature's ability to tax the gains realized on the transfer of capital assets.

Just as the U.S. Supreme Court has refused to expand its precedent to narrow the legislative prerogative to enact an excise tax, this Court should decline to expand the reasoning of its Depression-era cases to limit the Legislature's power to impose excise taxes to fund Washingtonians' basic needs in housing, health care and

education and to redress past economic and social inequities.

Both this Court's and U.S. Supreme Court's older decisions have allowed opponents to characterize almost any tax levied on the use or transfer of property as a tax burdening that property itself, as respondents do here. But only occasionally and in a much different time have those arguments succeeded, as in *Culliton* and in *Pollock*.

Culliton's and *Pollock*'s reasoning—that a broad-based income tax is a tax on property so any tax on income is a property tax—is far from compelling in today's transaction driven economy. And this Court has refused to blindly adhere to this syllogism in its excise tax jurisprudence. It should refuse to do so here.

At a minimum, this Court should ensure that *Culliton's* reach is limited and refrain from broadening *Culliton's* dubious logic to invalidate a tax that operates only upon the transfer of a capital asset. Rather than

extend case law that has never been applied to bar a tax narrowly targeted to the economic benefits attendant to the transfer of property, this Court should rely on its substantial excise tax precedent to uphold the Legislature's decision to tax the gains realized on the transfer of a capital asset under ESSB 5096.

I certify that this brief is in 14-point Georgia font and contains 4,530 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 12th day of December, 2022.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 12, 2022, I arranged for service of the foregoing Amicus Curiae Brief of Law Professors, to the court and to the parties to this action as follows:

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/s/ Victoria K. Vigoren
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