NO. 100769-8

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents,

v.

STATE OF WASHINGTON; DEPARTMENT OF REVENUE, an agency of the State of Washington; VIKKI SMITH, in her official capacity as Director of the Department of Revenue,

Appellants,

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, ADRIENNE STUART, MARY

MOTION FOR STAY OF LOWER COURT'S ORDER PENDING REVIEW

CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors.

APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, an individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERINE SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN MCKENNA, an individual; WASHINGTON FARM BUREAU; WASHINGTON STATE TREE FRUIT ASSOCIATION; WASHINGTON STATE DAIRY FEDERATION,

Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, an agency of the State of Washington; VIKKI SMITH, in her official capacity as Director of the Department of Revenue,

Appellants.

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, ADRIENNE STUART, MARY CURRY, and WASHINGTON EDUCATION ASSOCIATION,

Intervenors.

I. INTRODUCTION

Our state's elected leaders adopted a capital gains excise tax to fund education, the State's paramount duty, and to help rebalance our tax code, the nation's most regressive. The tax started applying to transactions occurring on and after January 1, 2022, and the first payments are due April 18, 2023. In this case, however, the Douglas County Superior Court erroneously ruled the tax invalid. The State's appeal of that ruling is fully briefed, with argument set for January 26. But without earlier action from this Court, the trial court's ruling risks delaying implementation of the tax and achievement of the vital goals it furthers.

This Court should stay the trial court's order until it rules on the merits. In deciding whether to stay a lower court order, this Court asks whether debatable issues are present on appeal and compares the injuries the parties would suffer from a stay. RAP 8.1(b)(3). Here, both factors strongly support a stay.

The issues presented in this appeal sharply favor the State, and are at the very least debatable. Because the capital gains tax is a properly enacted statute and because review is de novo, this Court's starting presumption is that the law is constitutional, a presumption Plaintiffs can overcome only by proving otherwise beyond a reasonable doubt. Plaintiffs cannot do so because the trial court's ruling rests on the false premise that the capital gains tax is a property tax subject to the limits in article VII of Washington's Constitution. For decades, however, this Court has held that property taxes are taxes that apply merely because a person owns property, while excise taxes are ones that apply because a person sells, transfers, or uses property. *Morrow v. Henneford*, 182 Wash. 625, 630-31,

47 P.2d 1016 (1935). As Plaintiffs concede, the capital gains tax applies only when "assets are sold or exchanged." Quinn Br. 17. It is thus an excise, not a property tax.

The balance of harms also strongly favors the State. Granting a stay will injure no one. If the Court grants a stay and ultimately upholds the tax, taxpayers will obviously suffer no injury from a stay. But even if the court grants a stay and later invalidates the tax, taxpayers will suffer no harm: if the merits ruling comes before April 18, 2023, they won't have to pay the tax, and if the ruling comes after April 18 and they have already paid, they will receive a refund with statutorily required interest. Either way, they suffer no ultimate harm.

By contrast, denying a stay will harm the public, the State, and even those who will owe the tax. Because this is a new tax, the Department of Revenue must set up new mechanisms and rules to collect it. Those mechanisms and rules need to be in place well before the tax due date of April 18, 2023, to ensure that taxpayers can timely file and pay thereby

avoiding statutorily mandated penalties if the tax is ultimately upheld. While the Department is currently developing those mechanisms and rules, opponents of the tax have recently initiated administrative proceedings and threatened litigation to block such efforts unless the State obtains a stay. If the Department is unable to establish the mechanisms and rules to collect the tax before the due date, there is a risk that some taxpayers will evade the tax altogether, reducing funding for the vital education programs it supports.

In short, there is no sound reason to leave the trial court's ruling in place while this Court considers the merits. This Court will review that decision de novo, starting from a presumption that the law is constitutional. Allowing the opposite assumption to persist impedes preparations to implement the tax and benefits no one. The Court should grant a stay.

II. STATEMENT OF RELIEF SOUGHT

State Appellants respectfully request that this Court stay the trial court order entered in this case, which declared the

capital gains tax unconstitutional, pending this Court's decision on this appeal. This motion is supported by the Declaration of Alyson Fouts, Senior Assistant Director of Operations with the Department of Revenue, and by the record below.

III. FACTS RELEVANT TO MOTION

A. Enactment of the Capital Gains Tax

In April 2021, the Legislature enacted a narrowly tailored seven percent capital gains excise tax to help fund education, early learning, and child care programs and to make "material progress toward rebalancing the state's tax code," which disproportionately burdens low- and middle-income Washingtonians. RCW 82.87.010; *see generally* 82.87.040(1) (imposing the tax); RCW 82.87.030 (distribution of tax revenue). The tax applies only to an individual's sale or exchange of long-term capital assets (those held for more than one year) with a physical or legal situs in Washington. RCW 82.87.040(1); RCW 82.87.100(1); RCW 82.87.020(6).

To ensure that the tax is owed only by those with the greatest ability to pay, the Legislature exempted sales of certain assets, including "qualified family-owned small businesses, all . . . real property, and retirement accounts." RCW 82.87.010. Additionally, the tax is owed only to the extent that an individual's non-exempt capital gains in a given year exceed $250,000. RCW 82.87.060(1). The Department of Revenue estimates that approximately 7,000 individuals will owe the tax in the first year. CP Vol. I, p. 352.

The tax applies to sales of non-exempt capital assets occurring on or after January 1, 2022, RCW 82.87.040(1), and the first payments under the tax are due on April 18, 2023. RCW 82.87.110; Decl. of Alyson Fouts, ¶ 5. The Legislature earmarked the first $500 million collected from the tax each year to the Education Legacy Trust Account to support K-12 education, expand access to higher education, and provide funding for early learning and child care programs. RCW 82.87.030(1)(a). Revenue above $500 million each year is

dedicated to the Common School Construction Account to assist school districts with capital projects, such as building or renovating schools. RCW 82.87.030(1)(b). The Department forecasts that the tax will generate approximately $2.5 billion over its first six years for these important education investments. CP Vol. I, p. 354.

B. The Trial Court Creates a New Test and Invalidates the Tax

Three days after the Legislature passed the capital gains tax, the Quinn Plaintiffs filed suit in Douglas County Superior Court seeking to invalidate the tax in its entirety. CP Vol. I, p. 1. The Clayton Plaintiffs filed a similar lawsuit soon thereafter. CP Vol. II, p. 1. The trial court consolidated the two actions. CP Vol. I, p. 107. The court also granted a motion by the Edmonds School District and other education parties to intervene as defendants. CP Vol. I, p. 136.

Both the Quinn and Clayton Plaintiffs asserted that the capital gains tax was unconstitutional on its face. Specifically, they claimed that the tax violates (1) the requirements in article

VII, sections 1 and 2 of the Washington Constitution that all taxes on property be uniform and not exceed one percent of the value of the property taxed; (2) the privileges and immunities protections in article I, section 12 of the state Constitution; and (3) the federal Commerce Clause. *See* CP Vol. I, pp. 5-8 (Quinn Plaintiffs' causes of action); CP Vol II, pp. 15-16 (Clayton Plaintiffs' causes of action).

The parties filed cross motions for summary judgment on the facial constitutionality of the capital gains tax. The trial court adopted Plaintiffs' first theory, concluding that the capital gains tax had too many of what the court deemed "hallmarks of an income tax rather than an excise tax." CP Vol. I, p. 869. After reciting these alleged "hallmarks," the court concluded that the tax is "properly characterized as a tax on property" and, as such, "violates the uniformity requirement by imposing a 7% tax on an individual's long-term capital gains exceeding $250,000 but imposing zero tax on capital gains below that $250,000 threshold." *Id*. at 872. Similarly, the court concluded

that the tax "violates the [levy] limitation requirement because the 7% tax exceeds the 1% maximum annual property tax rate[.]" *Id*. The court declined to reach Plaintiffs' additional arguments. *Id*.

On March 22, 2022, the trial court entered an order granting summary judgment to Plaintiffs and denying summary judgment to State Defendants and Intervenors. CP Vol. I, p. 873. Defendants and Intervenors sought direct review, which this Court granted on July 13, 2022. The matter has been fully briefed, and the Court has set argument for January 26, 2023.

C. The Department of Revenue's Implementation Process

The Department of Revenue is charged with administering the capital gains tax. Individuals owing the tax will be required to file "a return with the department on or before the date the taxpayer's federal income tax return for the taxable year is required to be filed." RCW 82.87.110(1)(a). The first payments are thus due April 18, 2023. Fouts Decl., ¶ 5.

The Department has initiated processes for implementing the capital gains tax, which will include adopting administrative rules, creating tax forms and instructions, providing letter rulings and advice to individuals who may be subject to the new tax, updating its website to inform the public about the tax and to provide general guidance, and developing internal systems to register new taxpayers and accept returns and payments. The Department's goal is to have its on-line registration system up and running by February 1, 2023. Fouts Decl., ¶ 8. And it is diligently working internally and with the public on the other key parts of the implementation process.

As noted, an important part of the Department's implementation process involves developing administrative rules. The Department began the process in September 2022 by issuing a Preproposal Statement of Inquiry inviting public

participation.[1] The Department held the first public meeting on September 28, 2022. *Id.*

Shortly after the first public meeting regarding the draft rules, the Department received a letter from the Citizen Action Defense Fund (CADF) demanding that it "cease and desist" any rulemaking activity until this Court either reverses the trial court's order or stays that decision. Fouts Decl., ¶ 7 & Exhibit A, p. 2. The Department timely responded to the CADF's concerns, *id*. at Exhibit B, but the organization continues to threaten litigation. *Id*. at Exhibit C. CADF is also seeking a hearing before the Joint Administrative Rules Review Committee, citing the trial court order below as its basis for objecting to the Department's rulemaking efforts. *Id*. at p. 1.

[1] Available on-line at https://dor.wa.gov/sites/default/files/2022-09/WSR_22-18-097.pdf?uid=633b4c63c893f#:~:text=In%20March%20of%202022%2C%20the,to%20the%20Washington%20Supreme%20Court.

As the Department prepares to implement the tax if it is upheld, the Governor and Legislature are preparing for the 2023 legislative session, when the Legislature will pass a budget for the 2023-2025 biennium. As noted above, the capital gains statute directs that the first $500 million of revenue from the tax go into the Education Legacy Trust Account, with amounts beyond that deposited into the Common School Construction Account. RCW 82.87.030. Without that revenue, the Legislature will have to provide less funding for education, find a different funding source, or cut other programs.

IV. GROUNDS FOR RELIEF

A. Standards for Granting a Stay

RAP 8.1(b)(3) and 8.3 give this Court "discretion to stay the enforcement of trial court decisions." *Moreman v. Butcher*, 126 Wn.2d 36, 42 n.6, 891 P.2d 725 (1995); *see also In re Koome*, 82 Wn.2d 816, 818-19, 514 P.2d 520 (1973). When evaluating a request to stay enforcement under RAP 8.1(b)(3), this Court must "(i) consider whether the moving party can

demonstrate that debatable issues are presented on appeal and (ii) compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3); *see Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). A showing of debatable issues on appeal does not require the moving party to demonstrate ultimate success on the merits of the appeal, but simply that the issue is a debatable one. *Kennett v. Levine*, 49 Wn.2d 605, 607, 304 P.2d 682 (1956).

B. The Issues On Appeal Strongly Favor the State, and Are at the Very Least Debatable

As demonstrated in the now-completed merits briefing, the State is likely to prevail on the merits, and at the very least has presented debatable issues on appeal. Both the standard of review and the substance of the merits favor granting a stay.

This Court has long held that a party challenging the constitutionality of a tax statute bears a heavy burden. As in any case challenging a statute, the "'statute is presumed to be

constitutional and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt.'" *Spokane Cnty. v. State*, 196 Wn.2d 79, 84, 469 P.3d 1173 (2020) (quoting *Island Cnty. v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998). When the statute being challenged is a tax statute, "'a particularly heavy presumption of constitutionality applies.'" *Dot Foods, Inc. v. Dep't of Revenue*, 185 Wn.2d 239, 250, 372 P.3d 747, 750 (2016) (quoting *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990)). And because this case presents a question of law, this Court's review is de novo. *Spokane Cnty.*, 196 Wn.2d at 84. Thus, the starting presumption when this Court considers the merits will be that the tax is constitutional, with Plaintiffs bearing a heavy burden to prove otherwise.

Plaintiffs will not be able to meet their burden of proving beyond a reasonable doubt that the capital gains tax is unconstitutional. The trial court ruled in their favor based on the erroneous premise that the tax is a property tax subject to the

limitations in article VII of Washington's Constitution, but that conclusion was incorrect, and is at the very least debatable.

Over the course of decades, this Court has articulated a clear test for distinguishing between property taxes and excise taxes, and the capital gains tax falls on the excise side of the line. Property taxes are taxes that apply merely because a person owns property, while excise taxes are ones that apply because a person sells, transfers, or uses property. *Morrow*, 182 Wash. at 630-31. The capital gains tax does not fall on owners merely because they own property. A person can own extensive stocks, bonds, or other capital assets without owing the tax. Rather, as Plaintiffs concede, this tax applies only when "assets are sold or exchanged for gain." Quinn Br. at 17; RCW 82.87.040(1). The capital gains tax is thus an excise tax.

Plaintiffs initially agree that *Morrow* sets out the relevant test, Quinn Br. at 14-15, but they attempt to graft new requirements onto the *Morrow* standard in asking the Court to nonetheless hold that the capital gains tax is a property tax.

None of these purported requirements finds support under this Court's decisions. *See* State's Opening Br. 33-47; State's Reply Br. 4-12. For example, Plaintiffs say that an excise tax can apply only to purely "voluntary" action, and they posit complex scenarios in which a person could receive capital gains without choosing to sell assets. Quinn Br. at 18-19. But virtually every tax this Court has deemed an excise sometimes applies where the action triggering the tax is not purely voluntary (e.g., the sales tax applies even where a person makes a purchase solely because of a legal obligation). Plaintiffs also claim that the capital gains tax cannot be an excise because it includes exemptions, but every excise tax contains exemptions (e.g., the sales tax exemption for groceries). Similarly flawed is Plaintiffs' contention that the tax is not actually "on" the sale of capital assets, but on the recognition of capital gains on one's federal tax return. That confuses what is taxed with when and how it gets reported.

Even if the Court decided to alter its longstanding test by adopting one of the new limitations Plaintiffs advocate, whether the Court should do so is at the very least debatable. It is thus beyond serious dispute that the first factor favors a stay.

C. The Balance of Harms Weighs in Favor of a Stay

Comparing the injuries of the parties from the grant or denial of a stay also strongly weighs in favor of granting a stay. Granting a stay will not harm Plaintiffs, while denying a stay will harm the State, the public, and even Plaintiffs themselves.

1. Plaintiffs Will Suffer No Harm from a Stay and Will Actually Benefit

This is the rare case where granting a stay would benefit the nonmoving party as well as the moving party, making it obvious that the balance of harms favors granting a stay.

Plaintiffs and other Washington taxpayers will be better off with a stay than without one. The only harm Plaintiffs can plausibly allege from the granting of a stay is that *if* any of them owe tax for 2022 (which none of them have yet alleged), and *if* the Court does not rule on the merits by April 2023, then

granting a stay would mean that they have to pay the tax in April 2023 even though this Court might later invalidate the tax. But if that happens, state law requires that anyone who has paid the tax receive a refund of their tax payment, *with interest*, so Plaintiffs would suffer no harm. *See* RCW 82.32.060 (mandating refunds with interest where tax is not owed); Fouts Decl., ¶ 10 (affirming that if the tax is held invalid in this appeal, the Department will issue refunds with interest as required by RCW 82.32.060). There is thus no harm in granting a stay even if this Court ultimately invalidates the tax after taxpayers have paid it.

By contrast, if the Court denies a stay and ultimately upholds the tax, the result for taxpayers will be confusion and added costs. By statute, if an excise tax is not paid when due, an automatic penalty equal to nine percent of the underpaid tax is imposed. RCW 82.32.090(1). That penalty jumps to nineteen percent if the payment is more than one month late, and twenty-nine percent if payment is more than two months late. *Id.* The

Department has no authority to extend the date upon which the tax must be paid. Fouts Decl., ¶ 9. Because of these provisions, some taxpayers would undoubtedly choose to pay the tax when due in April 2023, even if the Court has not yet ruled, knowing that they would get a refund with interest if the Court ultimately invalidates the tax. But absent a stay, some taxpayers would undoubtedly wait to see how the Court rules, and if the Court upholds the tax in an opinion after April 18, such taxpayers would then need to pay the tax *and* statutory penalties.

In short, even Plaintiffs would be better off if the Court granted a stay. In that scenario, any Plaintiff that actually owes capital gains tax in the first year will be entitled to a refund with interest if Plaintiffs ultimately prevail. And if Plaintiffs ultimately lose, they will already have paid the required tax and will not face mandatory penalties.

2. The State and Public Will Suffer Significant Harms Absent a Stay

The capital gains tax is expected to generate hundreds of millions of dollars annually to fund education, and it would

significantly harm the public interest for any of that money to be unavailable. To be prepared to collect the tax in April 2023 as the Legislature directed, the Department must take many steps, from rulemaking to website development. Opponents of the tax, however, have initiated administrative proceedings and threatened litigation to delay the Department's efforts. The resulting legal uncertainty means that, absent a stay, the State may be unable to collect and timely use some of these funds even if the Court ultimately upholds the tax. A stay would not only ensure that the Department can take the steps necessary to be prepared to collect the tax if this Court ultimately upholds it, but also allow the Governor and Legislature to use projected revenue from the capital gains tax to fund education in their proposed budgets.

It would be profoundly irresponsible for the Department to fail to prepare to collect the tax in April 2023 as directed by statute. As noted above, the tax is presumed constitutional unless Plaintiffs convince this Court otherwise beyond a

reasonable doubt, and Plaintiffs' arguments on that score are contrary to settled precedent, as explained in the State's merits briefing. Moreover, the tax is expected to bring in hundreds of millions of dollars annually to fund education, early learning, and childcare programs, advancing the State's paramount duty to fund education. For these reasons and others, the Department must prepare to implement the capital gains tax in case this Court upholds it.

Implementing the tax is a significant undertaking that must start well before April 2023. For example, the Department must adopt new rules governing aspects of how the tax will be calculated and collected, a process it has just begun. *See* September 7, 2022, Preproposal Statement of Inquiry filed in WSR 22-18-097 (*see* footnote 1). The Department also must develop an on-line tax reporting system, which it hopes to make available to the public on February 1, 2023. *See* Fouts Decl., ¶¶ 8-10. Doing so will ensure that all impacted taxpayers have adequate time to set up their "Secure Access Washington"

accounts, complete the registration process, and remit returns and payments. *Id*., ¶ 8. The Department estimates that the last day it "feasibly could go 'live' with its on-line system is March 13, 2023," which is only 37 days prior to the April 18, 2023, reporting due date. *Id*. Further, because the capital gains tax is a brand new tax program, the Department anticipates a high level of interaction with the public to field questions and provide tax reporting instructions. *Id.*, ¶ 9.

Opponents of the tax, however, are using the trial court's order to create substantial uncertainty over what the Department is permitted to do to implement the tax before this Court rules. For example, opponents of the tax recently filed an administrative request with the Joint Administrative Rules Review Committee of the Legislature arguing that the Department's rulemaking process is invalid because of the trial court's order and asking the Committee to block the rulemaking. Fouts Decl., Ex. C, p. 2. That same group of opponents previously sent a letter to the Department demanding

that it "cease and desist" all rulemaking activity or face potential litigation. Fouts Decl., Ex. A, p. 2.

While the Department believes that these objections to its rulemaking process are legally flawed, they threaten significant harm. If the Department's rulemaking is blocked or delayed by administrative or court action, the Department may be unable to have the rules and payment mechanisms in place before the tax is due. In that event, if this Court later upheld the tax, the Department would do its utmost to collect all tax that was due in April 2023, but significant revenue would undoubtedly be lost because the rules and mechanisms to collect the tax would not have been in place when it was due. Some taxpayers who should have paid the tax may seek to use the lack of reporting and tax payment processes, and the lack of Department rulemaking, as a means of avoiding the tax, and significant revenue that should have gone to fund education would be lost. And even if tax opponents' efforts to block the Department's

preparations fail, absent a stay the Department and its counsel will have to devote resources to defeating these efforts.

A stay of the trial court order would resolve any uncertainty over the Department's authority to move forward with its implementation plan and rulemaking. Even with a stay, the Department would of course continue to advise the public of this on-going appeal and that this Court's decision will be the final word, but implementation efforts could continue unencumbered so that the tax can ultimately be collected and used for education purposes if the Court upholds the tax.

A similar but related concern is that, absent a stay, opponents of the tax may seek to block the Governor and Legislature from allocating funding from the tax in the fast-approaching budget process for the 2023-2025 biennium. If this funding is not included in the budget, it cannot be spent for its statutorily mandated education purposes, even if the Court later upholds the tax. Again, though the Department believes any such challenge would lack a legal basis, granting a stay would

eliminate any doubt about the propriety of allocating funds from the duly enacted tax for the purposes specified by law: to fund education.

In sum, given the significant harms the State and public will suffer absent a stay, and the net benefit Plaintiffs would receive from a stay, the balance of harms here tips sharply in favor of granting a stay.

V. CONCLUSION

Because the State has demonstrated that this appeal presents at least debatable issues, and because the balance of harms favors a stay, this Court should stay the trial court's ruling until this Court decides the merits of this case.

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RESPECTFULLY SUBMITTED this 3rd day of November, 2022.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of November, 2022, at Tumwater, WA.

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