

No. 100769-8

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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,*

vs.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE, an agency of the State of Washington; and 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.*

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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,*

vs.

STATE OF WASHINGTON, DEPARTMENT OF  
REVENUE, an agency of the State of Washington; and  
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.*

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**ANSWER TO MOTION FOR STAY OF LOWER  
COURT'S ORDER PENDING REVIEW**

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Respondents Chris Quinn, Craig Leuthold, Suzie Burke, Lewis and Martha Randall, Rick Glenn, Neil Muller, Larry and Margaret King, and Kerry Cox (“the Quinn Respondents”) and April Clayton, Kevin Bouchey, Renee Bouchey, Joanna Cable, Rosella Mosby, Burr Mosby, Christopher Senske, Catherine Senske, Matthew Sonderen, John McKenna, Washington Farm Bureau, Washington State Tree Fruit Association, and Washington State Dairy Federation (“the Clayton Respondents”) (collectively, “Plaintiffs” or “Respondents”) respectfully submit this answer to the motion of Appellants State of Washington, Department of Revenue, and Vikki Smith (collectively, the “State”) for a stay pending appeal.

## **I. INTRODUCTION**

Nearly eight months after the superior court struck down as unconstitutional the capital gains tax at issue in this case, the State has moved for a stay of that decision pending this Court’s decision on appeal. The State’s motion seeks to short-circuit the normal appellate process to reinstate the invalidated tax—



which has never before been collected, which will require significant and unrecoverable expenditures of administrative resources for individual taxpayers to pay, and which was struck down as unconstitutional based on nearly a century of settled precedent—before this Court has determined its constitutionality. The Court should deny the request. The State has not carried its burden to show that the issues presented are sufficiently debatable to warrant a stay. And the equities strongly favor preserving the status quo pending this Court’s final decision.

First, the State’s contentions on the merits do not justify a stay pending appeal. As explained in detail in the merits briefing and as summarized in this Answer, the capital gains tax plainly violates the Washington Constitution because it is a non-uniform tax on property that exceeds permissible rate limitations and is imposed only on select taxpayers within the same classification. *See* Quinn Br. at 14-37. A stay pending appeal is not warranted based on the speculation that this Court

might rewrite nearly a century of precedent holding that individual income is subject to state constitutional limits on taxing property. The State tries to dodge the constitutional restrictions by calling the tax an “excise tax,” but the tax plainly fails to satisfy the well-established test for excise taxes. Separately, the tax also violates the federal constitution because the State would tax income derived from activity occurring entirely outside the state as to which the State grants no privileges—a problem the State does not even address in its motion.

Second, the equities strongly favor preserving the status quo as this Court adjudicates the pending appeal. The State asserts that it needs a stay so it can begin preparing to enforce the tax on schedule in 2023, but all the necessary rulemaking activities are either already in process or would not be affected by a stay order from this Court. The State also argues that it needs to collect the tax even before this Court rules in order to avoid penalties to taxpayers, but ignores that a penalty cannot

attach to the nonpayment of a tax that has been struck down as unconstitutional, as this one has. Meanwhile, a stay would directly harm many taxpayers, as it would coerce them under *threat* of penalties into paying a tax that the superior court has held they do not owe before this Court has addressed the merits of this case, and they would never be able to recover the administrative costs relating to paying the tax while this appeal is pending and then seeking a refund if this Court affirms. In short, the State will be affected little if the status quo prevails pending this Court's decision, while Washington taxpayers will be concretely and unavoidably harmed if the State is allowed to collect the tax pending resolution of the appeal.

The State's motion should be denied.

## **II. BACKGROUND**

The Legislature in 2021 imposed for the first time a tax on the annual capital gains of individuals that was to go into effect in 2022 with the first tax payments due in 2023 upon the filing of a federal income tax return. Laws of 2021, 67th Leg.,

Ch. 196 (Engrossed Substitute Senate Bill (“ESSB”) 5096)

§§ 5, 12.<sup>1</sup> The tax is imposed on Washington residents’ legal or beneficial ownership interest in long-term capital assets that generate a capital gain. ESSB 5096 § 5 (imposing the tax on individuals according to ownership); § 4(13) (defining “Washington capital gains” as “adjusted capital gain”); and § 4(1) (defining “adjusted capital gain” as “federal net long-term capital gain”).

Before the tax went into effect, individual and associational plaintiffs filed separate lawsuits in Douglas County Superior Court to obtain declaratory judgment that ESSB 5096 is constitutionally invalid under both the federal and state constitutions. CP Vol. I 1-9 (*Quinn Compl.*); CP Vol. II 1-17 (*Clayton Compl.*). Each complaint asserted that ESSB 5096 (1) violates Article VII, Sections 1 and 2, of the Washington Constitution because it imposes a non-uniform tax

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<sup>1</sup> ESSB 5096 is codified at Chapter 82.87 RCW.

on income and exceeds the one percent limit on taxes upon personal property; (2) violates Article I, Section 12, of the Washington Constitution by imposing a tax on certain persons while exempting others; and (3) violates the Commerce Clause of the United States Constitution because it allocates taxable gain to Washington based on the taxpayer's location instead of the location of the activity, discriminates against interstate commerce, and is not fairly apportioned. *See id.* The cases were later consolidated. CP Vol. I 107-111.

After both sides moved for summary judgment, CP Vol. I 227-31, the superior court granted summary judgment for the Plaintiffs. CP Vol. I. 872, 876. The court first noted that it had disregarded the policy considerations put forth by the State and Intervenors as being inapplicable to determining the legality of the tax. CP Vol. I 866 (citing *State ex rel. Namer Inv. Corp. v. Williams*, 73 Wn.2d 1, 7, 435 P.3d 975 (1968)). The court next summarized “nearly a century of case law” setting forth how tax statutes should be analyzed to determine their proper nature

and incidents. CP Vol. I 867-69. It then described multiple aspects of ESSB 5096 which establish that the capital gains tax is not an excise tax, but an “absolute and unavoidable” tax meeting the definition of a property tax under the case law. *See* CP Vol. I 871-72. The superior court concluded that ESSB 5096 violates Article VII, Sections 1 and 2, of the Washington Constitution because the tax lacks uniformity and exceeds the one percent rate limit for property taxes. CP Vol. I 872. The court did not reach the Plaintiffs’ other arguments for the invalidity of ESSB 5096 under the federal constitution, having found the law invalid under Article VII. *Id.*

On March 22, 2022, the court entered an order declaring ESSB 5096 unconstitutional and “void and inoperable as a matter of law.” CP Vol. I. 876. The State and Intervenors sought direct review by this Court, which was granted on July 13, 2022. Briefing was completed by all parties on October 7, 2022. At no point in the 226 days preceding did the State question the superior court’s order declaring ESSB 5096 “void

and inoperable.” Rather, it was only after a non-party to this case submitted a letter to the Department of Revenue objecting to the agency’s rulemaking activities that the State filed its motion on November 6, 2022.

### **III. ARGUMENT**

This Court looks to two factors to determine whether a stay pending appeal should be granted. *See Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). First, the Court determines whether the issue presented by the appeal is debatable. *Id.* Second, the Court considers whether a stay is necessary to preserve for the movant the fruits of a successful appeal, considering the equities of the situation. *Id.*; *see also* RAP 8.1(b)(3). This Court will find it appropriate to deny the stay if either factor is lacking. *Purser*, 104 Wn.2d at 177. Here, proper consideration of the merits based on the actual text of ESSB 5096 strongly supports denying the State’s motion. Further, the State will suffer few adverse effects if the superior court’s order remains in effect pending this Court’s final

resolution. Comparatively, the Plaintiffs and taxpayers of Washington will be greatly harmed if the State implements and enforces the unconstitutional tax. This Court should deny the motion to stay.

**A. The Capital Gains Tax Is Unconstitutional Beyond Any Reasonable Doubt.**

The capital gains tax enacted by the Legislature in ESSB 5096 undoubtedly violates both the Washington State and United States Constitutions. The capital gains tax violates the state constitution because it is a non-uniform tax on property— income in the form of capital gains—that exceeds permissible rate limitations and is imposed only on select taxpayers within the same classification. *See* Quinn Br. at 14-37. The capital gains tax also violates the Commerce Clause in the federal constitution by levying a tax on income derived from activity occurring entirely outside the state, without apportionment, and subjecting the income to risk of multiple state taxation. *See* Quinn Br. at 37-64.

The State contends that the capital gains tax is an excise



tax, not a property tax. Mot. 16-17. In making this claim, the State ignores the language of the statute, as well as the true subject matter and incidents of the capital gains tax, in disregard of this Court’s long-held principles distinguishing a property tax from an excise tax.

This Court has held that a property tax is “an absolute and unavoidable demand against property or the ownership of property.” *Covell v. City of Seattle*, 127 Wn.2d 874, 890, 905 P.2d 324 (1995), *abrogated on other grounds by Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). Excise taxes, on the other hand, require two conditions. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 799-800, 123 P.3d 88 (2005). “First, excise taxes are imposed upon a voluntary act of the taxpayer, which affords the taxpayer the benefits of the occupation, business, or activity that triggers the taxable event. Second, excise taxes are directly imposed based upon the extent to which the taxpayer enjoys the taxable privilege.” *Id.* at 800; see also *Covell*, 127 Wn.2d at 889.

Here, the capital gains tax is imposed by reason of a Washington resident's *ownership* of property—capital gains income—not because the “person sells, transfers, or uses property,” as the State asserts. Mot. 17. The State ignores the plain language of the statute that declares “[t]he tax applies when the Washington capital gains are recognized by the taxpayer.” *See* ESSB 5096 § 5(4)(a).<sup>2</sup> Under long-established Washington law, a tax on the receipt of income, untethered to any state-conferred privilege to engage in business or exercise a privilege within state boundaries, is a property tax, not an excise tax. *Jensen v. Henneford*, 185 Wash. 209, 216-17, 53 P.2d 607 (1936). This Court has had “no hesitancy” in finding that a tax on income 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

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<sup>2</sup> Codified at RCW 82.87.040(4)(a).

P.2d 173 (1951). “It is no longer subject to question in this court that income is property.” *Id.* at 194.

And such circumstances are not unusual or complex, as the State suggests. *See e.g.*, CP Vol. I 693-99 (describing varied personal circumstances that would subject the individual to the tax). A person is subjected to the tax because of their ownership of property in the form of income, and ***not*** because they engaged in any voluntary act for which the State grants substantive privileges, which signifies that the capital gains tax is not an excise but a tax on property. As this Court has stated, “the right to own and hold property cannot be made the subject of an excise tax, because to tax by reason of ownership of property is to tax the ownership itself.” *Covell*, 127 Wn.2d at 889 (citing *Jensen*, 185 Wash. at 218).

Second, the true subject matter and incidence of the tax are the capital gains, i.e., income, recognized by an individual taxpayer over the course of a given year. *See* ESSB 5096 §§ 4, 5 (imposing the tax on an individual’s “Washington capital

gains”).<sup>3</sup> If the tax was on the sale or exchange of long-term capital assets sited in Washington, as the State asserts, then the capital gains tax would be imposed on every transfer event—as in the case of true excise taxes such as the sales tax, real estate excise tax, or the estate tax. *See* RCW 82.08.020 (sales tax); RCW 82.45.060 (real estate excise tax); RCW 83.100.040 (estate tax).

Even more telling, the tax would not be imposed on activity occurring wholly outside the State’s borders. *See* ESSB 5096 § 11(1)(a)(i)-(iii) (allocating gains to Washington though derived from tangible property located outside the state at the time of sale); § 11(b) (allocating gains to Washington based solely on taxpayer’s domicile).<sup>4</sup> And if the capital gains tax were a true excise, the measure of the tax would be based on the value of the activity engaged in by the taxpayer, such as the sales or transfer price of the capital asset, as is the case with

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<sup>3</sup> Codified at RCW 82.87.020, .040.

<sup>4</sup> Codified at RCW 82.87.100.

other transaction-based excises like those on sales of real estate, goods, gasoline, and cigarettes. *Sheehan*, 155 Wn.2d at 800. Instead, the actual measure of the capital gains tax is on the individual's recognition of federal net long-term capital gain reported for annual federal income tax purposes, less certain subtracted amounts. *See* ESSB 5096 §§ 4(1), (3), 5(3), 11.<sup>5</sup> In other words, the actual measure of the tax is net income.

Further, the State's motion for stay disregards entirely that the capital gains tax enacted by the Legislature violates the federal constitution—regardless of whether it is deemed a property tax, excise tax, or something other. The State makes no attempt to defend the State's extraterritorial taxation of capital gains derived from transactions occurring outside the State's borders. *See* ESSB 5096 § 11(1)(a)(i)-(iii), (1)(b).<sup>6</sup> Further, the State does not argue against the fact that the statutory scheme lacks any means of apportionment to reflect

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<sup>5</sup> Codified at RCW 82.87.020, .040, .100.

<sup>6</sup> Codified at RCW 82.87.100.

the location of the activity where the capital gains were derived. *See generally* ESSB 5096. And the State does not acknowledge that, because of these deficiencies, the capital gains tax scheme discriminates against interstate commerce because it subjects gains earned across state lines to risk of multiple state taxation. *See* Quinn Br. at 62-64.

In short, there is no doubt that the capital gains tax is unconstitutional under both the state and federal constitutions. The merits of this case therefore do not warrant a stay of the superior court’s judgment finding the capital gains tax “unconstitutional and invalid” and therefore “void and inoperable as a matter of law.” CP Vol. I. 876; *see also* *Montgomery v. Louisiana*, 577 U.S. 190, 204, 136 S. Ct. 718, 196 L.Ed.2d 599 (2016) (“[A]n unconstitutional law is void, and is as no law.”) (citation omitted); *State v. Blake*, 197 Wn.2d 170, 195, 481 P.3d 521 (2021) (finding statute violating state and federal constitutions to be “void”).

**B. The Equities Do Not Favor A Stay.**

Separate and apart from the absence of debatable issues, the balance of equities does not support a stay pending appeal. *See* RAP 8.1(b)(3)(ii). When appropriate, a stay pending appeal “maintain[s] the status quo” until the issues have been fully and finally resolved. *In re Koome*, 82 Wn.2d 816, 818, 514 P.2d 520 (1973). In this context, however, the State’s requested stay would drastically disrupt the status quo by authorizing the State to enforce a recently enacted tax—which has never before been collected and which was held to conflict with nearly a century of precedent—on the eve of this Court’s adjudication of its constitutionality. The State’s unusual request to enforce this “entirely new tax” (Fouts Decl. ¶ 6) after the superior court invalidated it but before this Court has decided the appeal should be rejected.

The State has identified no sound reason to disturb the status quo—and certainly no sound reason to do so now, when nearly eight months passed since the superior court’s decision

without any motion to stay in the trial court or any request for interim relief. The State fails to articulate any concrete injury to the State's own interests in the absence of a stay, and its claims of taxpayer confusion and implementation delays are without merit. By contrast, if the superior court's judgment is stayed pending appeal, taxpayers may be forced to go through a costly, time-intensive process to obtain refunds if the decision below is affirmed, not to mention incurring professional expenses to prepare unnecessary tax filings.

*Asserted harms to taxpayers.* The State first claims that a stay is necessary to avoid a situation where a taxpayer chooses not to pay the tax when due in April 2023, this Court thereafter upholds the tax, and the Department of Revenue then imposes a penalty on the amount of unpaid tax. That scenario rests on a number of unfounded premises and represents a problem entirely of the State's own making.

As an initial matter, the contention that taxpayers could incur penalties for nonpayment while this appeal is pending



disregards the fact that the capital gains tax has been declared “unconstitutional and invalid and, therefore, is void and inoperable as a matter of law.” CP Vol. I 876. In other words, the tax is now a nullity. Unless and until this Court rules otherwise, nothing compels the Department to collect the tax, nor is there any basis for penalties to attach to the nonpayment of a tax that has been declared “void and inoperable.” *See, e.g., Jensen*, 185 Wash. at 219 (“The question then arises whether the 1935 act offends the constitutional provision of uniformity. If it does, then to the extent of such violation the act is unconstitutional *and void.*” (emphasis added)); *Corwin Inv. Co. v. White*, 166 Wash. 195, 197, 6 P.2d 607 (1932) (“The law having been declared unconstitutional, the taxes were illegally exacted.”).

Even indulging the State’s unexplained assumption that taxpayers could possibly be penalized for not paying a tax that has been invalidated as unconstitutional, the Department already possesses express statutory authority to refrain from

collecting the tax during the pendency of this appeal. RCW 82.32.190(1) permits the department to “hold in abeyance the collection of tax from any taxpayer or any group of taxpayers when a question bearing on their liability for tax hereunder is pending before the courts.” Department regulations, in turn, specify that a stay pending collection without a bond may be appropriate when “[a] constitutional issue [is] to be litigated by the taxpayer, the resolution of which is uncertain.” WAC 458-20-228(12)(a)(i). That authority wholly undercuts the State’s assertion, which is unsupported by citation to authority, that the State would have no choice but to attempt to collect the currently invalidated tax while this appeal remains pending and impose penalties on taxpayers who elect not to pay. There is no basis for this Court to grant a stay pending appeal under RAP 8.1 when the State may not assess penalties for an invalid tax that is void, but even if it could, the State already possesses

express statutory authority to resolve the supposed unfairness to taxpayers upon which this motion is predicated.

Turning to potential harm to taxpayers, the State is also mistaken to claim that “[t]here is ... no harm in granting a stay even if this Court ultimately invalidates the tax after taxpayers have paid it.” Mot. 20. The State appears to believe that if taxpayers pay the tax during the pendency of this appeal, and this Court later affirms the superior court’s decision, those taxpayers can be made whole by obtaining a refund, with interest. That overlooks the reality that the refund process will require significant time and expense, including professional fees, that taxpayers will never be able to recoup. *See* RCW 82.87.110 (documentation and filing requirements for capital gains tax); RCW 82.32.060 (refund process); RCW 82.32A.030(6) (requiring taxpayers to “[s]ubstantiate claims for refund”). Additionally, if the superior court is affirmed, taxpayers will also have been harmed by unnecessarily incurring the legal and accounting fees that come with filing

new state tax returns, in addition to taxpayers’ personal time and effort, to comply with the State’s capital gains reporting requirements. And payment of interest after the fact cannot fully compensate taxpayers for opportunities they lose while they are deprived of funds that are rightfully theirs.

*Asserted threats to implementation.* The State also argues that a stay is needed so that the Department can “prepare to collect the tax in April 2023 as directed by statute.” Mot. 22. As explained, however, the statute containing that directive is currently void and invalid. As a result, the Department is not presently under a statutory obligation to collect the now-invalidated tax. But even assuming the Department is entitled to take steps to prepare to collect a tax set forth in an invalidated statute, the State fails to show that a stay is needed to allow for the preparations it claims are necessary—initiating a rulemaking process and developing a website.

Without a stay from any court, the Department has already commenced rulemaking and begun preparations to

implement the tax statute in the event it is upheld. On September 2, 2022, the Department issued a Preproposal Statement of Inquiry announcing the rulemaking process. *See* Preproposal Statement of Inquiry, Wash. St. Reg. 22-18-097 (Sept. 7, 2022). And earlier this month, the Department issued a proposed rulemaking notice including the full text of the proposed rules governing the tax’s implementation. *See* Proposed Rule Making, Wash. St. Reg. 22-22-101 (Nov. 2, 2022). That notice acknowledged the superior court’s holding that the tax “is unconstitutional and invalid,” and explained that “[w]hile the appeal is pending, the Department will continue to provide guidance, such as this rule, to the public regarding the tax as a courtesy.” *Id.* at 1. The notice expressly states: “This rule will apply only if the tax is ruled constitutional and valid by the Washington Supreme Court.” *Id.*

Even though the Department’s rulemaking process is proceeding apace, the State claims that select “opponents of the tax”—none of which are parties to this case—have objected to

its preparatory efforts and, from there, surmise that these activities may create a litigation challenge. Mot. 6; Fouts Decl. ¶ 14. But the prospect of litigation is, at this point, entirely hypothetical. Just last week, the legislature’s Joint Administrative Rules Review Committee sent the Department a letter requesting that the Department “amend the proposed rule to include language” expressly in the text of the rule itself “that the rule serves as guidance and only applies if the capital gains tax authorized under chapter 82.87 RCW is ruled constitutional and valid by the Washington Supreme Court.”<sup>7</sup> That step, if taken, would appear to respond to the concern that the tax’s nonparty opponents have raised. The State thus cannot point to any concrete likelihood of litigation challenging guidance that all agree has no binding effect unless this Court were to reverse. And rather than engage in speculative foreshadowing here, the

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<sup>7</sup> See Letter from Joint Administrative Rules Review Committee, Washington State Legislature, to John Ryser, Acting Director, Department of Revenue (Nov. 7, 2022) (Ex. 1).

State should direct its arguments for redress in the context of specific claims and arguments for relief by tax opponents, *if and when any are filed*.

As for the online reporting system and online resources for taxpayers, the State provides no explanation—zero—of why it cannot develop a website without a stay from this Court. *See* Mot. 22-23; Fouts Decl. ¶ 8-10. There is simply no obstacle to the State updating its internet resources in anticipation of this Court’s ultimate ruling.

*Budgetary concerns.* Finally, the State asserts a stay is needed to ensure that any funding from the tax, if ultimately upheld, can be allocated in the budget process for the 2023-2025 biennium. The State professes concern that “absent a stay, opponents of the tax may seek to block the Governor and Legislature from allocating funding from the tax,” Mot. 26, but cites absolutely nothing to substantiate that entirely speculative

scenario.<sup>8</sup> Again, should that come to pass, the State should address its arguments to the court where specific claims and arguments are made.

In any event, the State admits that the revenues are not part of a current budget for 2021-23, and the future tax revenues are dedicated to two *trust* accounts: the first \$500,000,000 collected each fiscal year is to be deposited into the education legacy trust account and the remainder in the common school construction fund. ESSB 5096, §§ 1, 2. The education legacy

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<sup>8</sup> No stay is needed because the State’s revenues have been running billions ahead of forecasts. The “total four-year increase in projected revenue since lawmakers adopted the 2021-23 budget is at least \$10.538 billion.” Jason Mercier, \$10.5 billion increase in revenue forecast since last March, Washington Policy Center (Feb. 16, 2022), <https://www.washingtonpolicy.org/publications/detail/105-billion-increase-in-revenue-forecast-since-last-march> (calculations based on official Washington State Economic and Revenue Forecast Council sources). Any impact on 2023 capital gains tax revenues is relatively insignificant in the context of total state revenues for 2023-2025 of more than \$65.368 billion. Economic and Revenue Forecast Council, Revenue Review (Feb. 16, 2022), at 7, 24, <https://erfc.wa.gov/sites/default/files/public/documents/meetings/rev20220216.pdf>.



trust account is funded principally by the Washington estate tax and interest earnings,<sup>9</sup> plus substantial federal funding from the coronavirus response and relief supplemental appropriations act, P.L. 116-260, and the American Rescue Plan Act of 2021. ESSB 5237, § 2(9) (2021). And money deposited into the education legacy trust account and into the common school construction fund may only be spent after appropriation. *See* RCW 83.100.230; RCW 28A.515.320. In short, the uncertainty of which the State protests is irrelevant to the forecasted revenues of \$65 billion for 2023-25.<sup>10</sup>

The concrete harm that would result if a future budget were prepared based on anticipated 2023 revenues from the tax

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<sup>9</sup> Fund 08A - Education Legacy Trust Account, , Washington Office of Financial Management, <https://ofm.wa.gov/accounting/fund/detail/08A> (last visited Nov. 16, 2022).

<sup>10</sup> Outlook for the Enacted FY 2022 Supplemental Operating Budget (April 20, 2022) at 1, <https://erfc.wa.gov/sites/default/files/public/documents/budget/20220421%20FY%202022%20Enacted%20Sup%20Budget%20Outlook%20Adopted.pdf>.

and the superior court is ultimately affirmed—imposing unrecoverable administrative costs on taxpayers, upending budget allocations, and requiring the state to return payments with interest—outweighs any hypothetical harms to the State flowing from not collecting a tax that has been held unconstitutional pending final resolution of this appeal and budgeting for the upcoming biennium in a manner consistent with the superior court’s decision and long-settled taxpayer expectations.

#### **IV. CONCLUSION**

This Court should deny the State’s motion to stay.

This document contains 4,474 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 16th day of November, 2022.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing Motion for Extension of Time to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated November 16, 2022.

*s/Robert M. McKenna* \_\_\_\_\_  
Robert M. McKenna  
*Attorney for Clayton Respondents*

# EXHIBIT 1



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## Washington State Legislature

Representative My-Linh Thai,  
Chair

### Joint Administrative Rules Review Committee

Representative My-Linh Thai, Chair  
424 John L. O'Brien Building  
PO Box 40600  
Olympia, WA 98504-0600

November 7, 2022

John Ryser  
Acting Director  
Department of Revenue  
6500 Linderson Way Southwest  
Tumwater, WA 98501  
[johnr@dor.wa.gov](mailto:johnr@dor.wa.gov)

Dear Mr. Ryser:

The Joint Administrative Rules Review Committee (Committee) received a petition from the Citizen Action Defense Fund requesting that the Committee review the Department of Revenue's (Department) proposed rule concerning the capital gains tax provided in chapter 82.87 RCW (WSR 22-18-097).

As you are aware, the State appealed the Douglas County Superior Court's ruling which found ESSB 5096 unconstitutional and invalid. The Washington Supreme Court has accepted review. In addition, the State recently filed a motion to stay the lower court's ruling while the appeal is pending. Given the pending litigation, under the authority of RCW 34.05.655(5), the Committee will defer its final decision on the petition until after the adjournment sine die of the 2023 regular or special legislative session(s).

However, the Committee would like to address the petitioner's concerns and requests that the Department amend the proposed rule to include language that the rule serves as guidance and only applies if the capital gains tax authorized under chapter 82.87 RCW is ruled constitutional and valid by the Washington Supreme Court. The Committee appreciates your consideration and requests that the Department inform the Committee of its decision to incorporate this language.

If you have any questions, please contact Committee staff: Desiree Omli at (360) 786-7105 or Greg Vogel at (360) 786-7413. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'My-Linh Thai', with a long horizontal flourish extending to the right.

***Representative My-Linh Thai, Chair  
Joint Administrative Rules Review Committee  
State Representative, 41st District***

Cc: Joint Administrative Rules Review Committee (JARRC) Members  
Desiree Omli, JARRC Counsel, House of Representatives  
Greg Vogel, JARRC Counsel, Senate  
Frances Vail, JARRC Committee Assistant, House of Representatives  
Liza Weeks, JARRC Committee Assistant, Senate  
Atif Aziz, Department of Revenue  
Michael Hwang, Department of Revenue  
Steve Ewing, Department of Revenue



**ORRICK, HERRINGTON & SUTCLIFFE LLP**

**November 16, 2022 - 4:33 PM**

**Transmittal Information**

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**Appellate Court Case Title:** Chris Quinn et al. v. State of Washington et al.  
**Superior Court Case Number:** 21-2-00075-8

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**Comments:**

Answer to Motion for Stay of Lower Court's Order Pending Review

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