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, and 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.

APRIL CLAYTON, an individual; KEVIN BOUCHEY, an individual; RENEE BOUCHEY, an individual; JOANNA CABLE, an individual; ROSELLA MOSBY, and individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERIN 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.

ANSWER TO STATEMENTS OF GROUNDS FOR DIRECT REVIEW

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. NATURE OF CASE AND DECISION BELOW 3

A. The Legislature Imposes a Capital Gains Tax on Individuals 4

B. The Superior Court Found ESSB 5096 Unconstitutional. 8

III. ISSUES FOR REVIEW 10

IV. REASONS THIS COURT SHOULD DECLINE DIRECT REVIEW 12

A. This Court Need Not Decide Constitutional Issues in the First Instance 12

B. The Superior Court Carefully Applied Relevant Case Law to Determine the Correct Nature and Incidents of the Capital Gains Tax 15

C. This Case Does Not Require Prompt and Ultimate Determination By This Court 21

D. Intervenors' Invitation to Overrule Settled Precedent Is Without Merit And Does Not Support Direct Review .. 25

1. A request to overrule precedent is not a factor that supports direct review under RAP 4.2. 26

2. *Culliton* was not erroneous, and its under-pinnings remain sound. 29

3. The rule in *Culliton* is not harmful 34

V. CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

Cases

Aberdeen Savings & Loan Ass'n v. Chase,
157 Wash. 351, 289 F. 536 (1930),..... 29, 31

Bird v. Best Plumbing Grp. LLC, 175 Wn.2d 756,
287 P.3d 551 (2012)..... 35

Black v. State,
67 Wn.2d 97, 406 P.2d 761 (1965)..... 18

City of Seattle v. Kunath,
195 Wn.2d 1013, 460 P.3d 183 (2020)..... 15, 25, 26

Culliton v. Chase,
174 Wash. 363, 25 P.2d 81 (1933)..... *passim*

In re Estate of Hambleton,
181 Wn.2d 802, 335 P.3d 398 (2014)..... 19

Hayden v. Mut. of Enumclaw Ins. Co.,
141 Wn.2d 55, 1 P.3d 1167 (2000)..... 14

Jensen v. Henneford,
185 Wash. 209, 53 P.2d 607 (1936)..... 31, 32

Kunath v. City of Seattle,
10 Wn. App. 2d 205, 444 P.3d 1235 (2019)..... 25

Kunath v. City of Seattle,
No. 95295-7 (Wash. Jan. 22, 2018) 26

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351
(1973) 32

LK Operating, LLC v. Collection Grp.,
181 Wn.2d 48, 331 P.3d 1147 (2014) 13

Mahler v. Tremper,
40 Wn.2d 405, 243 P.2d 627 (1952) 17, 18

Quaker City Cab Co. v. *Pennsylvania*,
277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927
(1928) 32

State ex rel. Stiner v. Yelle,
174 Wash. 402, 25 P.2d 91 (1933) 19, 31

W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,
180 Wn.2d 54, 322 P.3d. 1207 (2014) 29, 34

Yim v. City of Seattle,
194 Wn.2d 651, 451 P.3d 675 (2019) 33

Statutes

RCW 82.87.010 et seq. 3

Engrossed Substitute Senate Bill ("ESSB") 5096 ..... *passim*

Other Authorities

Danny Westneat, *WA Democrats, You're Proving Your Tax Critics Right*, Seattle Times, Feb. 24, 2022 22

H.R.J. Res. 4 (Wash. 1942) 27

H.R.J. Res. 11 (Wash. 1934) 27

H.R.J. Res. 37 (Wash. 1973) 27

H.R.J. Res. 42 (Wash. 1970) 27

https://results.vote.wa.gov/results/20211102/advisory-vote-no-37.html (advisory vote in the November 2021 election) 28

https://results.vote.wa.gov/results/20101102/initiative-measure-1098-concerning-establishing-a-state-income-tax-and-reducing-other-taxes_bycounty.html (results for Initiative 1098) 28

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 (Advisory Vote No. 37). 28

RAP 4.2 ..... 10, 15, 20, 26

RAP 4.2(a)(2) 12

RAP 4.2(a)(3) 1, 15, 20, 21

RAP 4.2(e) 36

Report for Fiscal Year Ended June 30, 2021, Washington Office of Financial Management (Dec. 2021), https://ofm.wa.gov/sites/default/files/public/accounting/ report/CAFR/2021/ACFR21.pdf 23

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S.J. Res. 5 (Wash.1938) 27

S.J. Res. 7 (Wash. 1936) 27

Secretary of State, Elections,
https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx 27

United States Constitution Commerce Clause 8, 9, 11

Wade J. Newhouse, 2 *Constitutional Uniformity & Equality in State Taxation* § 4.04 (2d ed. 1984) 30

Washington State Constitution ..... *passim*

I. INTRODUCTION

Appellants' request for direct review should be denied and the appeal transferred to the Court of Appeals for consideration in the first instance. This appeal raises multiple federal and state constitutional grounds on which the decision invalidating ESSB 5096 may be affirmed, only one of which was addressed in the Superior Court's declaratory judgment invalidating the statute. The prudential benefit of allowing the Court of Appeals to consider those arguments to the extent necessary in the first instance outweighs any benefit or justification for direct review.

Nor is direct review warranted based on an inconsistency in the decisions of this Court or the Courts of Appeals, as would be necessary to satisfy RAP 4.2(a)(3). Appellants cannot demonstrate that the Superior Court's decision conflicts with its precedents defining excise and property taxes, but even to the extent they contend otherwise, there is no compelling reason the Court of Appeals should not consider those arguments in the first instance.

While this case raises substantial constitutional issues, Appellants' arguments about public importance justifying direct review also miss the mark. Both the State and Intervenors emphasize that the capital gains tax would apply to fewer than one in 1,000 Washington residents, representing less than a tenth of one percent of the state's population. And although both sets of Appellants focus heavily on the alleged regressivity of Washington's tax policy, neither argues that ESSB 5096 will reduce the tax burden on lower-income Washington residents. They also fail to show that denying direct review will cause hardship to the State Treasury or education funding, particularly given $10 billion in windfall tax collections the State now projects it will receive through 2025.

Intervenors' separate request to reconsider and overrule nearly a century of precedent on taxes on income does not go to any of the RAP grounds for direct review, and notably, has not been joined by the State. Nor can Intervenors justify their request under this Court's doctrine of stare decisis, which requires a

showing that Intervenors cannot come close to making. Court of Appeals review will be sufficient for prompt determination of these issues, given the clear unconstitutionality of the tax and the lack of a substantial constitutional issue or conflict that would warrant Supreme Court review. Given the number of federal and state constitutional issues that were not addressed in the trial court, the better course is to transfer this matter to the Court of Appeals in the first instance to frame and develop the appellate record on federal and state constitutional issues not addressed below, as appropriate. Direct review should be denied.

II. NATURE OF THE CASE AND DECISION BELOW

This case concerns Engrossed Substitute Senate Bill 5096 ("ESSB 5096"), which levies a tax on the long-term capital gains of individuals.[1] The State and Intervenors focus largely on the Legislature's policy motivations in describing the case. *See* State's Statement of Grounds ("Stmt.") at 4-8; Intervenors' Stmt.

[1] Now codified at RCW 82.87.010 et seq. To mirror the record below, Respondents cite to the session law as adopted by the Legislature. A copy is available at CP 450-466.

at 3-6. It is, however, the nature and the structure of the tax that drive the issues in this case and which lead to the statute's infirmities.

A. The Legislature Imposes a Capital Gains Tax on Individuals

ESSB purports to impose on individuals a seven percent (7%) tax on "Washington capital gains" received from the sale or exchange of long-term capital assets, beginning January 1, 2022. ESSB 5096 § 4(13) (defining "Washington capital gains" as "adjusted capital gains"); § 5 (imposing the tax). "Long-term capital assets" are those assets defined in the Internal Revenue Code that are subject to the federal capital gain income tax and which have been held more than one year. § 4(2), (6) (defining "Capital asset" and "long-term capital asset."). "Only individuals are subject to payment of the tax." § 5. Capital gains incurred by pass-through entities (e.g., partnerships, limited liability companies, S corporations, and grantor trusts) will be taxed against the entity's "legal or beneficial owner" to the extent of the individual's ownership interest in the entity "as reported for

federal income tax purposes." § 5(1), (4). In other words, to be subject to the capital gains tax, a taxpayer need not voluntarily act to sell or exchange any long-term capital asset; mere legal or beneficial ownership of the asset is sufficient.

The starting point for determining an individual's tax liability begins with identifying the taxpayer's "Washington capital gains," which are derived directly from the individual's "federal net long-term capital gain" reported for "federal income tax purposes" on the taxpayer's IRS tax return. § 4(1), (3).

Next, long-term capital gains that are exempted from Washington's capital gains tax, including gains derived from real estate, certain retirement plans, and other assets,[2] are subtracted from the individual's adjusted capital gain. § 4(a). Then, amounts of long-term capital gains that are not allocated to Washington

[2] Other exempt assets include livestock used primarily in farming or ranching if the gains constitute more than 50 percent of the taxpayer's gross income for that year; timber; depreciable property used in trade or business; commercial fishing privileges; and goodwill in sales of auto dealerships. § 6.

under the statute are subtracted. § 4(1)(a). Long-term capital gains derived from *tangible* personal property (e.g., physical capital assets) are allocated to Washington if either (1) the property was located in this state at the time of sale or exchange; or (2) the property was located in Washington at some time during the taxable year, the taxpayer was a resident of Washington at the time of the sale or exchange, and the taxpayer is not otherwise subject to the payment of an income or excise tax on the long-term capital gains by another state. § 11(1)(a). Long-term capital gains derived from *intangible* personal property (e.g., stocks, bonds, goodwill) will be taxed by Washington if the taxpayer was domiciled in Washington at the time the sale or exchange occurred, regardless of whether the assets are located outside Washington and the transaction occurs elsewhere. § 11(1)(b). A credit is allowed against the tax equal to the amount of any income or excise tax paid to another taxing jurisdiction but only if the gains are derived from assets "within" the other jurisdiction. § 11(2)(a).

After the initial "Washington capital gains" are calculated, the taxpayer may deduct from the amount (1) a standard deduction of $250,000, for single individuals, spouses and domestic partners; (2) an adjusted deduction for gains derived from the sale or transfer of certain family-owned small businesses; and (3) a $100,000 deduction for charitable donations over $250,000 made to certain Washington-based nonprofit organizations. § 7. The sum of the final "Washington capital gains" is then multiplied by seven percent to determine the ultimate tax liability. § 5.

The tax, as structured by the Legislature, will require all individuals both inside and outside the State who incur Washington capital gains to go through this calculation each year to determine if they are liable for the tax. §§ 5, 12. Individuals owing the capital gains tax to Washington must report and pay the amount due on or before the date that their federal income tax return must be filed. § 12(1). In addition to filing a Washington return, the taxpayer must file a copy of their federal income tax

return along with all schedules and supporting documentation for the federal return. § 12(2). Failure to comply subjects the taxpayer to civil and criminal penalties. § 15.

B. The Superior Court Found ESSB 5096 Unconstitutional

The Quinn Respondents and Clayton Respondents filed separate lawsuits in Douglas County Superior Court seeking declaratory judgments that ESSB 5096 is invalid under both the federal and state constitutions. CP 16-24 (Quinn Am. Compl.); CP 607-25 (Clayton Am. Compl.). Respondents asserted that ESSB 5096 (1) violates Article VII, Sections 1 and 2, of the Washington Constitution because it imposes a non-uniform tax 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.*[3] The cases were later consolidated. CP 107-111. Certain entities and individuals representing education interests were also allowed to intervene. CP 136-40. After the State unsuccessfully sought to dismiss the Respondents' lawsuits and to transfer venue, *see* CP 189-97, the parties cross-moved for summary judgment. CP 227-31.

After considering the "wealth of material" filed by both sides, CP 866, the Superior Court granted summary judgment for the Respondents. CP 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 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

[3] Respondents did not move for a ruling on their privacy claim under Article I, Section 7, of the Washington Constitution so that claim is not at issue on appeal.

incidents. CP 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 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 872. The Superior Court did not reach Respondents' other constitutional arguments for the invalidity of ESSB 5096, having found the law invalid under Article VII. *Id.*

The State and Intervenors appealed and now seek direct review by this Court.

III. ISSUES FOR REVIEW

This Court should not accept direct review of the Superior Court's decision under RAP 4.2, but leave the Court of Appeals to decide the following issues:

1. Does the capital gains tax levied in ESSB 5096 impose a property tax because it taxes the annual, aggregate net

capital gains income of an individual resident regardless of whether the taxpayer engages in any voluntary activity to accrue such income?

2. If the capital gains tax is a property tax, does ESSB 5096 violate Article VII, Sections 1 and 2 of the Washington Constitution because (a) it levies a non-uniform tax and (b) its rate exceeds one percent without supermajority approval of the people?

3. Does ESSB 5096—regardless of the nature of the tax—violate Article I, Section 12, of the Washington Constitution because it (a) subjects only certain persons to the capital gains tax while exempting other persons within the same class and (b) provides no rational basis for granting the privilege or immunity from taxation to select persons?

4. Does ESSB 5096—regardless of the nature of the tax—violate the Commerce Clause of the United States Constitution because it (a) imposes a tax on capital gains earned from activities occurring outside the state based solely on the

taxpayer's residency or domicile; (b) is not fairly apportioned to activities occurring only within the state; and (c) discriminates against interstate commerce by subjecting income earned outside the state to a higher tax burden (via the risk of multiple taxation) than on gains earned solely in the state?

IV. REASONS WHY THIS COURT SHOULD DECLINE DIRECT REVIEW

A. This Court Need Not Decide Constitutional Issues in the First Instance

The State and Intervenors both assert that direct review is warranted under RAP 4.2(a)(2) because the Superior Court held ESSB 5096 unconstitutional. State's Stmt. at 14; Intervenors' Stmt. at 12-13. None of the Appellants, however, provides this Court with any meaningful argument for *why* the Court should exercise its discretion to accept direct review under this criterion. *See id.* There are, in fact, sound reasons why this Court should decline and allow the Court of Appeals to decide the issues on appeal in the normal course.

In the Superior Court, Respondents asserted multiple constitutional grounds for invalidating the statute under the state and federal constitutions. The State and Intervenors focus on the trial court's invalidation of ESSB 5096 under Article VII of the State Constitution because that is the only issue reached by the lower court. Where "an issue of law is raised, briefed, and argued by the parties, but not decided by the trial court," however, the appellate courts may resolve the issues on review. *LK Operating, LLC v. Collection Grp.*, 181 Wn.2d 48, 70-71, 331 P.3d 1147 (2014). Appellate resolution of Respondents' other grounds for invalidating ESSB 5096 may be both necessary and prudent here.[4]

While the appellate courts may affirm the Superior Court's invalidation of ESSB 5096 under Article VII, or on any ground supported by the record, *see id.* at 73, in order to *reverse* the

[4] To be clear, Respondents fully support the trial court's reasoning and conclusion with respect to ESSB 5096's invalidity under Article VII of the State Constitution.

Superior Court, each constitutional ground for invalidation raised by Respondents must be analyzed and decided. The case could thus be very narrowly decided. *Cf. Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) ("Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case," the courts should "resolve the case on that basis without reaching any other issues that might be presented.") (citation omitted). Alternatively, an appellate court could require consideration of multiple different federal and state constitutional issues that have not been framed and addressed by any lower court. Petitioners provide no reason for why this Court, instead of the Court of Appeals in the normal course, should be the first appellate court to address the various constitutional issues raised in this case.

The better course is to decline direct review, transfer the case to the Court of Appeals to undertake full appellate review,

and based on review of that opinion, decide whether Supreme Court review should be granted.[5]

B. The Superior Court Carefully Applied Relevant Case Law to Determine the Correct Nature and Incidents of the Capital Gains Tax

The State also asserts that this Court should accept review because of a purported "flawed constitutional analysis," suggesting this case merits review under RAP 4.2(a)(3). *See* State's Stmt. at 14; *see also id.* at 16 (arguing that the Superior Court's decision is "inconsistent with" a "long line of Washington Supreme Court precedent"). As a threshold issue, RAP 4.2(a)(3) permits a party to seek direct review only if there is a "conflict among" decisions of the Courts of Appeals or an "inconsistency in decisions" of *this* Court. The State's claim that the Superior Court's analysis of ESSB 5096 is inconsistent with this Court's decisions is not a ground for direct review, but a simple claim of legal error. *See generally* RAP 4.2. Moreover,

[5] This is precisely the course this Court followed in *City of Seattle v. Kunath*, 195 Wn.2d 1013, 460 P.3d 183 (2020).

the Superior Court carefully applied well-established case law regarding whether a tax is an excise tax or a property tax to the plain text of the statute to determine the nature and incidents of the capital gains tax. *See* CP 869-71.

Both the State and Intervenors assert here (echoing their arguments below) that the capital gains tax is imposed only on an individual's voluntary sale of long-term capital assets. *See* State's Stmt. at 2, 13, 15; Intervenors' Stmt. at 9, 12. This is an inaccurate characterization.[6] The plain language of the tax in fact "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," when the taxpayer recognizes the gains on their federal income tax forms. ESSB §5(4); *see also* § 4(1), (3), (13)

[6] For example, without taking any voluntary action, a Washington resident may receive gains as the beneficial owner of stock, legally owned by another party, when the stock is sold in a cash-out merger transaction between two corporations that have no connections to Washington, and in which the resident has no direct participation.

(defining "adjusted capital gains," "federal net long-term capital" and "Washington capital gains."). Thus, for the tax to apply, the taxpayer must possess only a legal or beneficial interest in long-term capital assets that are sold or exchanged and recognize the gains. CP 871-72; *see also* CP 693-95. A taxpayer may have taken no voluntary action with respect to an asset that is sold or transferred to be subject to the tax, and often will not even be a party to the asset sale transaction.

The Superior Court thus correctly found that the capital gains tax is imposed based on the taxpayer's "ownership," not their voluntary activity, and thus the tax is "absolute and unavoidable" just as property taxes are. CP 871-72 (citing *inter alia Jensen v. Henneford*, 185 Wash. 209, 219, 53 P.2d 607 (1936)). As the Superior Court recognized, the tax at issue here is fundamentally different than the taxes that this Court has upheld as true excise taxes in prior cases. In *Mahler v. Tremper*, 40 Wn.2d 405, 243 P.2d 627 (1952), for example, this Court upheld the constitutionality of the real estate excise tax, a tax that

applies upon the sale of property and is based on the property's sale price. *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965), involved a sales tax imposed on a lease and, similar to *Mahler*, was based on the lease's value. Here, as the Superior Court explained, the tax "is levied not on the gross value of the property sold in a transaction (like an excise tax as demonstrated by the examples cited by the State [in *Mahler* and *Black*], but on an individual's net capital gain (like an income tax)." CP 870. And the tax under ESSB 5096 is not triggered "upon the act or incidence of transfer," but instead, like a property tax, is imposed upon the owner "merely because he is the owner of the property involved." *Mahler*, 40 Wn.2d at 410.

The State also suggests that the Superior Court should have found the capital gains tax to be equivalent to the business and occupation ("B&O") excise tax, which is imposed on the state-conferred privilege of doing business in Washington and is assessed on a business's "gross proceeds of sales, or gross income" which is the measure of a business's engagement in the

privilege of doing business in the State. State's Stmt. at 15 (citing *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933)). Similarly, the estate tax upheld in *In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014)), was based on the value of each asset transferred and "apportioned to the extent any of the property was located outside Washington." CP 870 n.2.

The Superior Court correctly recognized that, unlike the taxes discussed in the cases cited by the State, the capital gains tax established by ESSB 5096 is not measured based on the gross value of the property sold or exchanged. *See* CP 870; *accord* ESSB 5096 §§ 4(1), 4(13), 5, 7-9. The capital gains tax is measured by annual net income after accounting for statutory deductions and exemptions, which is not the measure by which the taxpayer engages in any privilege conferred by the State. *See Stiner*, 174 Wash. at 406-07 (distinguishing an excise tax on the privilege of engaging in business from a tax on income).

Moreover, each of the taxes cited by the State are levied on activity within Washington that the State possesses

jurisdiction to permit, regulate, and tax, whereas ESSB 5096 reaches gains realized from transactions to which the taxpayer may not be a party, that may occur in any jurisdiction. Neither federal nor state law has ever held that the State can validly impose an excise on extra-territorial transactions over which it lacks jurisdiction. The Superior Court's opinion was not inconsistent with tax law precedent.

The State does not even allege "an inconsistency *in* decisions of the Supreme Court," RAP 4.2(a)(3) (emphasis added), as would be required to support direct review. Instead, the State maintains that the above-cited cases are internally *consistent*, describing them as a "long line" of precedents that impose an overarching legal rule. State's Stmt. at 16. The State's claim that the Superior Court's decision violated the principles drawn from these cases is, again, a garden-variety plea for error correction of the sort that could be asserted in nearly any appeal.

The correctness of the Superior Court's analysis of ESSB 5096 is not a ground for direct review by this Court. RAP 4.2.

The Court of Appeals can apply the same case law and the same legal principles to the statute's plain language and application to determine the proper characterization of the tax as could this Court. This Court should reject the State's attempt to shoehorn the straightforward application of tax law into RAP 4.2(a)(3) when the provision plainly does not apply.

C. This Case Does Not Require Prompt and Ultimate Determination By This Court

The Superior Court correctly applied settled precedent distinguishing income taxes from excise taxes to conclude that ESSB 5096 is a disguised property tax that violates the Washington Constitution's uniformity and rate limitations requirements. That application of law has been followed consistently for nearly a century, and repeatedly re-affirmed both in the courts and in voter referendums to amend the Constitution. The State's and Intervenors' attempts to circumvent or overturn that law do not present a fundamental and urgent issue of public importance that justifies bypassing the Court of Appeals' review.

First, as the State and Intervenors have pointed out, the capital gains tax is expected to apply to "roughly 1 in 1,000 Washingtonians" (0.1%) each year.[7] All parties agree that the number of persons directly affected by the tax each year is relatively small.

Second, the State and Intervenors rest on misguided and irrelevant assertions about the supposedly "regressive" nature of Washington's tax system, while exaggerating the fiscal impact of ESSB 5096. Although the Appellants profess concern about tax regressivity, they do not argue that existing tax burdens on any group of Washington taxpayers, including less well-off or marginalized communities, will be reduced by the capital gains tax legislation, or by any other legislation for that matter.[8] This Court should disregard appeals to the need to address regressivity

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[7] State's Stmt. at 1; *see also* Intervenors' Stmt. at 5-6.

[8] *See* Danny Westneat, *WA Democrats, You're Proving Your Tax Critics Right*, Seattle Times, Feb. 24, 2022, *https://www.seattletimes.com/seattle-news/politics/wa-democrats-youre-proving-your-tax-critics-right/*.

as lacking substance and evidentiary foundation in the record. For present purposes, because ESSB 5096 does nothing, by itself or in combination with any other legislation, to lower the tax burden on less wealthy Washingtonians, alleged regressivity is not a factor justifying direct review.

Third, the State and Intervenors have also attempted to justify direct review by citing the need for additional funds for education, without mentioning that the State has projected a windfall of more than $10 billion in surplus revenues over original revenue estimates for the period 2021 through 2025.[9] In addition, whether additional taxes may be used for particular

[9] 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. Tax revenue increased by $2.80 billion in 2021 as compared to 2020. Annual Comprehensive Financial Report for Fiscal Year Ended June 30, 2021, Washington Office of Financial Management (Dec. 2021), https://ofm.wa.gov/sites/default/files/public/accounting/ report/CAFR/2021/ACFR21.pdf

expenditures like education is not a ground for direct review of the constitutionality of the statute.

Last, even crediting Appellants' arguments that the validity of ESSB 5076 presents an issue of public importance, it still does not follow that direct review is needed to bring this matter to a prompt resolution. Adhering to the normal course of Court of Appeals review is consistent with that aim, and that Court is fully capable of resolving the appeal by April 2023—when individuals will first have to pay the capital gains tax. If the tax is validated in a decision after April 2023, the State has not indicated it will be unable to collect back taxes and has not established a financial hardship justifying direct review.

The State and Intervenors assume that the Court of Appeals proceedings will be a mere "interim trip" that cannot suffice to provide definitive resolution. Intervenors' Stmt. at 13; see State's Stmt. at 16. But that assumption is unfounded, as recently illustrated by the successful challenge to the City of Seattle's attempt to impose a graduated income tax. There, as

here, the Superior Court ruled that the tax was invalid, and the City of Seattle (along with intervenors who supported the tax) sought this Court's direct review. This Court denied direct review, despite claims that the invalidation of the tax involved urgent issues of broad public import, and transferred the case to the Court of Appeals. Applying settled law, the Court of Appeals then affirmed, *Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 444 P.3d 1235 (2019), and this Court thereafter denied petitions for review of these long-settled principles. *See Kunath*,195 Wn.2d 1013. There is every reason to believe the same result should and would obtain here, further demonstrating that direct review is unnecessary to bring this matter to a prompt and definitive resolution.

D. Intervenors' Invitation to Overrule Settled Precedent Is Without Merit And Does Not Support Direct Review

Intervenors claim that direct review is necessary to overrule this Court's precedents holding that income is a form of property for purposes of Article VII, Section 1, of the Washington Constitution, including the seminal case of *Culliton*

v. Chase, 174 Wash. 363, 25 P.2d 81 (1933). This is the same argument that the City of Seattle made in seeking direct review in *Kunath*.[10] This Court correctly declined to grant direct review in *Kunath*, 195 Wn.2d 1013, and it should follow the same course here.

1. A request to overrule precedent is not a factor that supports direct review under RAP 4.2.

As an initial matter, a desire to overrule precedent is not a ground for direct review under RAP 4.2. Indeed, it would be perverse to allow a party to leapfrog the normal appellate process simply because they disagree with this Court's precedent. Notably, the State has not joined in this invitation to upend *stare decisis*, instead contending that *Culliton* is inapposite. CP 679. While the parties disagree about *Culliton*'s vitality and application to this case, that disagreement is not a justification

[10] Appellant City of Seattle's Statement of Grounds for Direct Review, *Kunath v. City of Seattle*, No. 95295-7 (Wash. Jan. 22, 2018).

for direct review. In any event, Intervenors' arguments to overrule *Culliton* are both meritless and contrary to *stare decisis*.

Culliton's rule of constitutional construction has been repeatedly reaffirmed and ratified by Washington's voters, who have rejected six proposed constitutional amendments that would have excluded "income" from the State Constitution's definition of "property." All were voted down resoundingly, with at least 64% opposition to every proposed amendment since 1940; the most recent was rejected by 77% of voters statewide.[11] They have also rejected four ballot measures that would have imposed an income tax without amending the Constitution. [12] The most

[11] H.R.J. Res. 37 (Wash. 1973) (rejected 77-23); H.R.J. Res. 42 (Wash. 1970) (rejected 68-32); H.R.J. Res. 4 (Wash. 1942) (rejected 66-34); S.J. Res. 5 (Wash.1938) (rejected 67-33); S.J. Res. 7 (Wash. 1936) (rejected 78-22); H.R.J. Res. 11 (Wash. 1934) (rejected 57-43). For vote totals, *see* Secretary of State, Elections, https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx.

[12] 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).

recent effort was I-1098 in 2010, where 64 percent of Washington voters rejected establishing a state income tax and reducing other taxes.[13] Indeed, in an advisory vote in the November 2021 election, the voters expressed disapproval of the capital gains tax created by ESSB 5096 by a margin of 61 percent to 39 percent.[14]

This history of voter ratification, re-affirmance, and rejection belies the argument that *Culliton* must be overturned because it was either wrong when decided or is a relic of passing legal history. The voters have repeatedly, resoundingly and recently rejected the argument that lack of a graduated income tax is harmful. As a result, any amendment of the constitutional rule that income is property should come through the democratic

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[13] 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.

[14] Advisory Vote No. 37. https://voter.votewa.gov/ genericvoter guide.aspx?e= 871&c=99#/measure/5068. The results are tallied at https://results.vote.wa.gov/results/ 20211102/advisory-vote-no-37.html.

process, not by judicial fiat. This Court should decline to accept review of *Culliton*.

2. *Culliton* was not erroneous, and its underpinnings remain sound.

Washington law requires a precedent to be upheld unless it is both erroneous and harmful, or its underpinnings have fundamentally changed or disappeared. *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 322 P.3d. 1207 (2014). The Intervenors argue that "the primary case law relied on for the holding that income is property was incorrect and unfounded, and its underpinnings have disappeared." Intervenors' Stmt. at 16. They are wrong on both arguments.

Intervenors' arguments focus on three alleged errors: (1) that *Culliton* was wrong to rely on *Aberdeen Savings & Loan Ass'n v. Chase,* 157 Wash. 351, 289 F. 536 (1930), Intervenors' Stmt. at 17; (2) that *Culliton* mischaracterized the law in other states, *id*. at 18-19; and (3) that *Culliton* misinterpreted the

"peculiarly forceful constitutional definition of property" in Article VII, § 1, *id.* at 19-20.

The *Culliton* decision rested on this Court's interpretation of Washington-specific constitutional language that it deemed "peculiarly forceful." *See id.* at 19 (quoting *Culliton*). Observing differences in the language and structure of constitutions from other states, the *Culliton* Court stated that "[n]one of the decisions from other states have any bearing upon the law before us."[15] 174 Wash. at 374. Far from erroneously relying on out-of-

[15] Intervenors rely on information from a treatise by Prof. Newhouse to argue that "[a] majority of those courts … have characterized the income tax as a nonproperty tax." Intervenors' Stmt. at 18-19 (citation omitted). Consistent with *Culliton's* observation about the "peculiarly forceful" language of Amend. 14, the treatise shows that a wide variety of state uniformity provisions exists, identifying 12 "types" of state uniformity provisions, and then showing state-by-state that few uniformity provisions fall squarely into one type or another. Wade J. Newhouse, 2 *Constitutional Uniformity & Equality in State Taxation* § 4.04, at 1764-1767 (2d ed. 1984). Intervenors also ignore that many states enacted constitutional amendments that expressly permit income taxes. Intervenors' reliance on decisions of other states interpreting dissimilar constitutional provisions proves nothing.

state authority, *Culliton* largely disregarded it in focusing on the unique language of Washington's Amendment 14.[16]

The *Culliton* court's passing mention of *Aberdeen*,[17] an equal protection case that pre-dated Washington's adoption of its unique definition of "property" in Amendment 14, also did not render its holding "incorrect." *See* Intervenors' Stmt. at 16-17. *Jensen* rejected similar attacks based on *Aberdeen*, recognizing that *Culliton* was based on language of the Washington Constitution that the court had "fully analyzed, discussed, and defined." *Jensen*, 185 Wash. at 219.[18]

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[16] The allegedly erroneous language quoted in Intervenors' Statement, that "[t]he overwhelming weight of judicial authority is that 'income' is property and a tax upon income is a tax upon property," does not even relate to judicial authority in *other* states, but rather comments on Washington's *own* case authority. *Compare* Intervenors' Stmt. at 18 *with Culliton*, 174 Wash. at 374 (referring to judicial interpretations of the language of "our Fourteenth Amendment.")

[17] *Culliton* was decided after and had the benefit of the opinion in *Washington Mutual Savings Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930), which clarified the scope of the ruling in *Aberdeen*.

[18] *Jensen* also puts to rest any suggestion that *Culliton* is inconsistent with *Stiner*, 174 Wash. 402, among other cases

Nor have the "underpinnings" of *Culliton* or *Jensen* changed. The only alleged change in the law that Intervenors identify occurred *forty-seven* years ago, in 1973, when the United States Supreme Court overruled an equal protection case, *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928). *See* Intervenors' Stmt. at 17-18 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)) (holding federal equal protection did not prohibit Illinois from taxing personal property of corporations differently from individuals). Nothing in *Lehnhausen* even purported to address whether income is properly defined as "property" under Washington *state* law, and it is telling that Intervenors cite no subsequent authority from the ensuing half-century that supports their interpretation.

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concerning excise taxes. *See* State's Stmt. at 16. *Jensen* explained why under Washington law a tax on the right to receive income is a property tax, not an excise tax, in comparison to the B&O tax which is measured in relation to the gross income generated from exercising the privilege of doing business. 185 Wash. at 216-17.

This case is also a far cry from the decision in *Yim v. City of Seattle*, 194 Wn.2d 651, 661, 451 P.3d 675 (2019), where *stare decisis* did not dictate this Court's decision because Washington regulatory takings law had "always" been based on an "attempt[] to discern and apply the federal definition of regulatory takings," and had to be changed to reflect changes in that federal definition. Washington tax law is based on *state* constitutional law, but Intervenors offer no argument that the underpinnings of state tax law have changed.

Ultimately, Intervenors propose that this Court accept review to redefine "income." Offering no citation to any federal or state constitutional or judicial authority, Intervenors offer an apparently philosophical suggestion that "income is better characterized as money in motion, a non-transferrable expectancy …" Intervenors' Stmt. at 19 (offering no citations to authority). In light of the unwavering history of this Court's decision and its reliance on the peculiarly forceful language of the state Constitution as ratified repeatedly by Washington

voters, it would be imprudent to accept direct review for the purpose of considering adopting a new definition of income lacking any precedential support in state law.

3. The rule in *Culliton* is not harmful

Demonstrating actual "harm" from an incorrect precedent is also a core requirement of this Court's *stare decisis* doctrine. *W.G. Clark* 180 Wn.2d at 66. Intervenors ignore the requirement entirely. Other than their empty appeal to a less regressive tax policy, the only "harmful" effect Intervenors identify is that "[t]he erroneous and harmful concept—that it is well-settled that 'income is property'—has been repeated throughout Washington's income tax caselaw without question." Intervenors' Stmt. at 20. This bald assertion amounts to a complete failure to identify the harm necessary to consider whether to overturn *Culliton*.

Even if *Culliton* had been incorrectly decided, after decades of reliance on Washington's fundamental tax structure, and given resounding statewide public support for it after votes

on multiple constitutional amendments and initiatives, continuing to adhere to that structure cannot be harmful. Changing the *Culliton* rule would cause unknown impacts on state and local tax policies, all of which are part of a complex state and local structure that raises revenue while incentivizing desirable economic and other activity. After the voters have repeatedly rejected numerous attempts to overturn *Culliton* at the ballot box, it would be inappropriate for this Court to trample democratic processes and do that which the voters have refused allow. The harm would come from changing more nearly 90 years of precedent, not in allowing it to stand.

V. CONCLUSION

This Court has said in another context that it should avoid "render[ing] decisions in advance of such necessity." *See Bird v. Best Plumbing Grp.* LLC, 175 Wn.2d 756, 775, 287 P.3d 551 (2012). It should likewise do so here. The Court should avoid taking the case before it is ripe for review, when no recognized grounds for direct review justifies it. The Court should transfer

this case to the Court of Appeals to determine the issues on appeal in the first instance. RAP 4.2(e).

This document contains 6,095 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted May 10, 2022,

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answer to Statement of Grounds for Direct Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated May 10, 2022.

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