No. 100769-8

SUPREME COURT OF THE STATE OF WASHINGTON

CHRIS QUINN, *et al.*,
Respondents,
v.
STATE OF WASHINGTON, *et al.*,
Appellants,

APRIL CLAYTON, *et al.*,
Respondents,
v.
STATE OF WASHINGTON, *et al.*,
Appellants,
EDMONDS SCHOOL DISTRICT, *et al.*,
Intervenors.

BRIEF OF *AMICI CURIAE* NATIONAL TAXPAYERS UNION FOUNDATION, WASHINGTON POLICY CENTER, TAX FOUNDATION, GREGORY R. EVANS, RANDALL G. HOLCOMBE, JEREMY HORPEDAHL, JUSTIN M. ROSS, AND WILLIAM F. SHUGHART II ("TAX ECONOMISTS AND POLICY ANALYSTS") IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

National Taxpayers Union Foundation (NTUF) provides crucial, impactful research on fiscal issues and NTUF's Taxpayer Defense Center advocates for taxpayers in the courts. NTUF Executive Vice President Joe Bishop-Henchman authored a 2013 book on the definition of taxes, *How Is the Money Used? Federal and State Cases Distinguishing Taxes and Fees*.

Washington Policy Center (WPC) is an independent, non-profit think tank that promotes sound public policy based on free-market solutions. WPC's Center for Government Reform has actively researched the topic of capital gains income taxes.

Tax Foundation is an independent 501(c)(3) nonprofit that informs smarter tax policy at the federal, state, and global levels. Adam Hoffer is the Director of Excise Tax Policy at the Tax Foundation in Washington, D.C., and the co-editor of *For Your Own Good: Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century*. Jared Walczak is Vice President of State Projects at the Tax Foundation and the author of numerous

studies on excise taxes.

Gregory R. Evans is an adjunct professor at Marquette University, among other schools. His research has been published in *The Journal of Wealth Management*, *Public Personnel Management*, *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations*, and *The Journal of Nonprofit Education and Leadership*.

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Justin M. Ross is professor of public economics in Indiana University's Paul H. O'Neill School of Public & Environmental Affairs. His research has been featured in the *National Tax Journal, Journal of Public Economics, Public Finance Review,* and *Public Budgeting & Finance*.

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STATEMENT OF THE CASE

For almost 100 years, income taxes have been unconstitutional in the state of Washington. *See e.g., Culliton v. Chase*, 174 Wash. 363 (1933). Ballot measures to allow for an income tax have been rejected by voters in 1934, 1936, 1938, 1942, 1944, 1970, 1973, 1975, 1982, and 2010. To circumnavigate this constitutional command, the legislature in 2021 imposed what it calls an excise tax on capital gains income.

Laws of 2021, 67th Leg., Ch. 196 (Engrossed Substitute Senate Bill ("ESSB") 5096) § 5. Respondents challenged this as an income-tax-in-disguise. The Superior Court below determined this tax to be an income tax and thus unconstitutional. Appellants sought review in this Court.

ARGUMENT

I. CAPITAL GAINS TAXES SUCH AS WASHINGTON'S ARE INCOME TAXES, NOT EXCISE TAXES.

A. Terms Such as "Excise Tax" Have Real-World Meanings Based on How the Charge Operates, Which Should Not Change Because the Legislature Decided to Call an Income Tax an Excise Tax.

"What's in a name? That which we call a rose by any other name would smell as sweet," Shakespeare famously wrote. William Shakespeare, "Romeo and Juliet," act II, scene 2. Or as James Whitcomb Riley put it, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." James Whitcomb Riley, Poems & Prose Sketches (2017 ed.). Roses and ducks have defined characteristics and

functions inherent to what they are, and retain those even if a Legislature or an attorney chooses to call them by a different name.

Taxes are often the subject of definitional disputes. Americans have a historically-rooted antipathy to taxes, dating from the Boston Tea Party to the Whiskey Rebellion to the property tax revolt of the 1970s to today. Federal and state constitutional provisions and statutes impose substantive and procedural requirements specifically on revenue-raising measures. Elected officials consequently have an incentive to relabel even obvious taxes as other things.

This is not just a matter of semantics. Taxes that are mislabeled violate transparency by depriving taxpayers of information needed to make meaningful choices about policy. A good tax system is one where taxpayers easily understand what a tax is and how it operates, and subterfuge about these matters prevents that.

This Court, the U.S. Supreme Court, and courts in all except two states have frequently confronted the question of whether the *label* of a tax decides what it is, or whether *how the charge operates* is what matters, and the answer has been consistent that substance matters and label does not. *See, e.g.*, *Hillis Homes, Inc. v. Shohomish County*, 650 P.2d 193, 194-95 (Wash. 1982) (concluding that development charges were taxes "although characterized by the Counties as fees"); *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996) ("On a number of occasions, this Court considered whether a particular exaction, whether or not called a 'tax' in the statute creating it, was [an excise tax], and in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question."); JOSEPH HENCHMAN, HOW IS THE MONEY USED? FEDERAL AND STATE CASES DISTINGUISHING TAXES AND FEES (2013) https://tinyurl.com/taxesandfees

(reciting cases and listing all but two states as defining taxes based on how the charge operates rather than label used).

This Court has also joined most other states in holding that any ambiguity as to meaning in a tax statute should be construed in favor of the taxpayer. *See, e.g.*, *Ski Acres, Inc. v. Kittitas County*, 827 P.2d 1000, 1003 (Wash. 1992) ("If any doubt exists as to the meaning of a taxation statute, the statute must be construed most strongly against the taxing power and in favor of the taxpayer."); HOW IS THE MONEY USED? at 10-11 ("All states except one (Oregon) interpret ambiguity in tax statutes in favor of the taxpayer."); *Fang Lin Ai v. United States*, 809 F.3d 503, 506 (9th Cir. 2015) ("We have held that taxing statutes must be construed most strongly in favor of the taxpayer and against the government [although not every] doubtful question should be resolved in favor of the taxpayer."). This long-standing canon of interpretation prevents harm by a taxpayer caught unaware by the state taking a position not discernible in advance.

The definition of "income tax" or "excise tax," or how an excise tax inherently operates, are not mere differences of state rules. Words have meaning. Washington's Legislature may call this tax an excise tax, but because it operates like an income tax, it is an income tax and all the applicable taxpayer protections relevant to income taxes should apply.

B. An Excise Tax is an Indirect Tax Imposed on Particular Goods, Services, or Activities, Generally Levied Per Unit, and Generally Justified as Limiting Negative Externalities or as a Proxy for a User Payment System.

Excise taxes and income taxes are different things. As taxes, they both collect revenue and are economically borne by individuals in some fashion. But each type of tax is measured differently, paid differently, and affect the economy differently. As a result, the terms "income tax" and "excise tax" have each taken on clear definitions that have been consistently applied in the economic literature, in court cases, and in ordinary language.

An excise tax is an indirect tax on a specific good, service, or privilege, which is generally[1] levied per unit, capable of being

[1] Most excise taxes are levied per unit: gasoline (18.3¢ federal+30.5¢ median state rate) cigarettes ($1.0066/pack federal+$1.70/pack median state rate), alcohol ($13.50/gallon federal+$5.98/gallon median state rate), wine ($1.09/gallon federal+87¢/gallon median state rate), beer (58¢/gallon federal+26¢/gallon median state rate), international air travel ($18.90 per person), etc.

A minority of excise taxes are levied as a percentage, while still being considered excise taxes as they satisfy all the other four features described herein. Namely, that they are levied indirectly and passed forward to an ultimate end consumer, rather than being imposed directly on the end consumer or income-earner alone, are levied on specific goods or activities rather than generally on individual income, and are justified as a "user tax" on business forms perceived to be enjoying special privileges. Examples include excise taxes on banks, insurance companies, or transfers of real estate or inherited property, generally imposed as a percentage of gross receipts, as well as the federal corporate income tax, originally justified as an indirect excise tax on entities doing business in a special form that was accompanied by special privileges such as perpetual life and free transferability of ownership shares. *See, e.g.*, *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151-62 (1911) ("The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i.e., with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies."); Message of President Taft, 44 CONG. REG. 3344 (Jun. 16, 1909) ("This is an excise tax upon the privilege of doing business as an

artificial entity and of freedom from a general partnership liability enjoyed by those who own stock."); Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate Income Tax, 66 IND. L.J. 53, 122 (1990). Notably, although being levied *ad valorem*, these taxes still retain all the other features of excise taxes, namely, that they are levied indirectly and passed forward to an ultimate end consumer, rather than being imposed directly on the end consumer or income-earner alone, are levied on specific goods or activities rather than generally on individual income, and are justified as a "user tax" on business forms perceived to be enjoying special privileges. Note also that these taxes are imposed on the entirety of gross receipts or the sales price of each asset, not the net of gains and losses across all aggregated investments, as here.

Appellants claim that "an income tax is generally considered an excise tax under federal law." Appellants Br. at 38. This is an incorrect description of *Brushaber v. Union Pac. R. Co*, 240 U.S. 1 (1916), which upheld the federal individual income tax following the passage of the Sixteenth Amendment. If the Supreme Court really considered income taxes to be excise taxes, as Appellants claim, the Sixteenth Amendment would have been unnecessary since the U.S. Constitution authorized excise taxes since the beginning. *See* U.S. CONST., art. I, sec. 8 cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and *Excises* . . . .") (emphasis added). Indeed, in *Pollock v. Farmers' Loan & Trust Company*, 158 U.S. 601 (1895), the Court held the opposite of what Appellants' claim: that income taxes were not authorized by the Constitution, because such taxes were not excise taxes, are direct, and must be apportioned. The quotation Defendants use in *Brushaber* is a truncated quotation from *Pollock*, the full context of which is that the Court should presume a claimed excise tax to be within Congress's power unless how it operates demonstrates that it is not a true excise tax. *See Brushaber*, 240 U.S. at 17, *citing Pollock*, 158 U.S. at

passed forward to an ultimate consumer, and justified to limit a negative externality (*e.g.*, excise taxes on tobacco) or as a proxy for a user payment system (*e.g.*, excise taxes on gasoline as a "user tax" to pay for road maintenance and construction). Income taxes are imposed directly on individuals, and paid directly by individuals to the government, levied as a percentage, and justified as increasing the progressivity of the tax code or raising revenue.

Thus, the distinctions between excise taxes and income taxes are (1) excise taxes are levied indirectly, capable of being passed forward to an ultimate consumer, while income taxes are levied directly on people; (2) excise taxes are levied narrowly on a specific good, service, or privilege while income taxes are

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637 ("[T]axation on income was in its nature an excise entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as to apportionment of direct taxation was adopted to prevent, in which case *the duty would arise to disregard form and consider substance alone, and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it*.") (emphasis added).

levied on income earned in a certain way, often with deductions and credits subtracting a *de minimis* level of income and legislatively favored sources of income; (3) excise taxes are generally levied per unit and income taxes are generally levied as a percentage of income; (4) excise taxes are generally justified as limiting a negative externality or as a proxy for user payment system, while income taxes are justified as a way of increasing progressivity in the tax system or raising general tax revenue. Black's Law Dictionary defines excise tax as "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." "Excise Tax," Black's Law Dictionary (11th ed. 2019).[2] "It is typically levied against the manufacturer or producer for sale of the select product or good; because it is narrowly based, it is often described as a 'selective sales tax.'" J.

[2] "The Dictionary juxtaposes 'excise tax' with 'income tax' and 'property tax.'" *Hughes Communications India Private Ltd. V. The DirecTV Group, Inc.,* No. 20 CIV. 2604 (AKH), 2021 WL 5359662 at *4 (S.D.N.Y. Nov. 16, 2021).

Fred Giertz, "Excise Taxes" in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY at 125 (2005). Webster's Dictionary defines excise tax as "a tax on certain things that are made, sold, or used within a country." "Excise Tax," Webster's Dictionary, https://www.merriam-webster.com/dictionary/excise%20tax. Samuel Johnston, author of the first comprehensive English dictionary, defined "excise" as "a hateful tax levied upon commodities, and adjudged not by the common judges of property, but wretches hired by those to whom excise is paid" and more recently Professors Gant and Ecklund defined excise tax as "simply a per unit tax on the consumption of a selected good or service." *See* "Excise," Samuel Johnson, A Dictionary of the English Language (1755); Paula A. Gant & Robert B. Ekelund, Jr., "Excise Taxes, Social Costs, and the Consumption of Wine," TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 251 (1997).

Many courts, including the U.S. Supreme Court, cite the influential treatise by Professor Thomas M. Cooley, a Dean of

the University of Michigan Law School and later justice of the Michigan Supreme Court and chair of the Interstate Commerce Commission. Referencing Blackstone, Cooley wrote that excise taxes are "taxes laid upon the manufacture, sale or consumption of commodities within the country, upon licenses to pursue, certain occupations and upon corporate privileges." 1 T. COOLEY, THE LAW OF TAXATION § 42 (1924); *see, e.g.*, *Flint*, 220 U.S. at 151 (citing Cooley definition with favor); 85 CJS TAXATION § 1806 (same); *Black v. State*, 406 P.2d 761, 762 (Wash. 1965) (same); *Morrow v. Henneford*, 47 P.2d 1016, 1017 (Wash. 1935)*, citing Pacific Ins. Co. v. Soule*, 74 U.S. 433 (1868) ("[An excise tax] is defined by the Supreme Court of the United States to be an inland imposition, sometimes upon the consumption of the commodity and sometimes upon the retail sale; sometimes upon the manufacturer and sometimes upon the vendor."); *Larson v. Seattle Popular Monorail Auth*., 131 P.3d 892, 903 (Wash. 2006) *citing Arborwood Idaho, LLC v. City of Kennewick*, 89 P.3d 217, 222 (Wash. 2004) ("A tax is an excise

where "(1) the obligation to pay ... is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation ... and (2) the element of absolute and unavoidable demand is lacking.").[3]

Maryland's highest court identified rulings by other state supreme courts that concluded as they did, that excise taxes are imposed without regard to the assets of the taxpayer, which distinguishes them from income and property taxation:

> In *Continental Motors Corp. v. Township of Muskegon*, 376 Mich. 170, 135 N.W.2d 908, 911 (1965), an excise was defined as "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.". . . Indeed, an excise is said to embrace every form of taxation that is not a burden directly imposed on persons or property.

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[3] The "absolute and unavoidable demand" is a reference to the indirect nature of excise taxes as opposed to the direct nature of property and income taxes, where a property or income taxpayer cannot avoid the demand to pay the tax by passing the cost forward to another. *See also* 71 AM. JUR.2D, STATE AND LOCAL TAXATION § 28 ("The obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand is lacking.").

> Finally, the property tax and the excise tax may be differentiated by the methods used to impose them and to fix their amount. Thus, it has been held that where a tax is levied directly by the Legislature without assessment and is measured by the extent to which a privilege is exercised by a taxpayer without regard to the nature or value of his assets, it is an excise. Where, however, the tax is computed upon a valuation of the property and is assessed by assessors, and where the failure to pay the tax results in a lien against the property, it is a property tax, even though a privilege might be included in the valuation.

Weaver v. Prince George's County, 379 A.2d 399, 404 (Md. 1977); *accord City of Alamogordo v. Walker Motor Co.*, 616 P.2d 403, 405 (N.M. 1980) ("An excise tax is defined as: A tax imposed directly by (the) Legislature without assessment and measured by amount of business done, income previously received, or by extent to which (the) privilege may have been enjoyed or exercised by the taxpayer, irrespective of (the) nature or value of his assets or his investments in business."); *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989) ("The term 'excise tax' has come to mean and include practically any tax which is not an *ad valorem* tax."); *Emerson Coll. v. City of*

Boston, 462 N.E.2d 1098, 1107 (Mass. 1984) ("The mere right to hold and own…property cannot be made the subject of an excise.").

The *direct* nature of income and property taxes and *indirect* nature of excise taxes is a key contrast between the two types of taxes. As Jared Walczak of the Tax Foundation observed:

> The income tax is a direct tax because it falls directly on people. The legal incidence is on particular people, and tax liability is assessed per person, not per sale or activity. . . .
>
> Consider the gas tax, for instance. There is no question that you 'pay' the gas tax when you fuel up, even though the service station remits the tax on your behalf. But the government is not imposing a tax on you specifically, and the tax is owed based on where the fuel is purchased or used, not based on the fuel's ultimate 'owner.' You don't file a tax return at the end of the year detailing how much fuel you purchased and paying accordingly—and even if you did (a vehicle miles traveled tax, VMT, would be somewhat more aggregated, because it's on an activity rather than a transaction), the taxable event would be the activity, not the person.

Jared Walczak, "Why Washington State Can't Claim Its Capital Gains Tax Is an Excise Tax," Tax Foundation Tax Policy Blog

(Dec. 16, 2021) https://taxfoundation.org/washington-state-capital-gains-tax/; *see also* ENCYCLOPEDIA OF TAXATION AND TAX POLICY at 125 (noting that excise taxes are ultimately imposed on a transaction rather than on a person or corporation); *Cosro, Inc. v. Liquor Control Bd.*, 733 P.2d 539, 544 (Wash. 1987) ("An excise tax is a tax on the right to use or transfer items, while a property tax is a tax on the items themselves."); *United States v. King Mountain Tobacco Co., Inc.*, 899 F.3d 954, 962-63 (9th Cir. 2018) ("[Q]uite unlike a property or income tax, the cost of an excise tax is easily—and in the case of tobacco products, virtually always—passed along to consumers.").

The *narrow* base of excise taxes is consistent in their history, as applying not directly to aggregated income but indirectly to the production or sale of selected items. The first federal excise tax was on whiskey in 1794, and a collection of federal excise taxes on "luxury" items was routinely imposed in wartime and repealed afterward. By the mid-1990s, there remained seven federal excise tax categories: (1) sales of

automobiles; (2) production or wholesaling of gasoline, sporting goods, firearms and ammunition, alcohol, and tobacco; (3) facilities "user" payment proxy taxes on telephone service and air transportation; (4) documentary stamp taxes on insurance; (5) annual license taxes on bookmakers and lottery operators; (6) a highway vehicle use tax on truckers; and (7) environmental taxes on chemicals and related products. *See* Brenda Yelvington, "Excise Taxes in Historical Perspective," in TAXING CHOICE. Long-time congressional tax staffer Norman Ture explained that excise taxes are "imposed at differing rates on selected products and services rather than being levied at the same rate on all." Norman B. Ture, "Chairman Packwood's Excise Tax and Tariff Changes," 31 TAX NOTES 65 (Apr. 7, 1986). A tax on *aggregated* annual capital gains income from a *person* does not resemble excise taxes in the slightest.

The *justification* for excise taxes as taxing away harms or collecting revenue from "users" who benefit from a service or privilege also distinguishes excise taxes from income taxes,

which are generally justified as advancing progressivity or raising revenue for general programs. Professor Shughart, editor of a definitive collection of academic articles on excise taxes, observes that excise taxes have three justifications: (1) raising revenue from product taxation where consumers are not price-sensitive, the so-called Ramsey rationale; (2) serving as a proxy for user fees where proceeds are dedicated to providing public services uniquely to the payor, the so-called user tax rationale; (3) corrective taxes to curtail production of a negative externality by forcing individuals to take account of the costs their consumption choices impose on others, the so-called Pigouvian rationale. *See* William F. Shughart II, TAXING CHOICE 13-14 (1997); *see also* CONG. RESEARCH SERV., FEDERAL EXCISE TAXES: BACKGROUND AND GENERAL ANALYSIS 2, https://sgp.fas.org/crs/misc/R46938.pdf (defining the purpose of an excise tax as to discourage negative externalities, to offset costs, as a proxy for user fees, or luxury taxes on certain products).

An excise tax may be justified under all three rationales; the excise tax on gasoline, for instance, can be justified simultaneously as not likely to deter behavior (driving) much, as a "user tax" to generate funds for road maintenance and construction, and as reducing societal harm from traffic and air pollution. Or it can be justified under only one, such as an excise tax payer receiving additional privileges provided by the taxing entity. *See, e.g.*, *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002) (describing an excise tax as "a tax imposed on a transaction or as a condition to the exercise of a privilege"); *Knowlton v. Moore*, 178 U.S. 41 (1900) (upholding the federal estate tax as an indirect tax on the action of distributing property after the death from the person who earned it) ("The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."); *Cincinnati, Milford & Loveland Traction Co. v. State*, 113 N.E. 654, 655 (Ohio 1916)

("An excise tax is a tax assessed for some special privilege or immunity granted to some artificial or natural person, based upon the grant of such privilege or immunity.").

Each of these definitions, while differing slightly, describe excise taxes as indirectly on a producer or licensee enjoying special privileges who will then pass the tax onward to end users, as imposed on a narrow tax base and often on a particular product or activity, and in contrast to income taxes and property taxes imposed directly on the taxpayer, as a percentage, and with a broad tax base subject to legislatively-enacted credits and de minimis exemptions such as income exclusions, standard deductions, and homestead exemptions. Excise taxes are regularly contrasted as distinct from taxes on income or property.

C. The Washington Capital Gains Tax is an Income Tax.

Taxes on capital gains are taxes on income. Excise taxes do not have exemption levels, nor are they imposed on annual totals, nor do they track the filing deadlines and requirements of the federal income tax. Income taxes do all those things.

Washington taxpayers will fill out a return due the same day as the federal income tax, and the base of the tax will be derived from capital gains taxed under the federal income tax and state income taxes. The IRS joins every state and every tax expert in agreeing that capital gains are income. *See, e.g.*, Letter from Internal Revenue Service to Rep. Dan Newhouse, Sep. 25, 2018, *cited in* "IRS: Capital gains tax is an income tax," Washington Policy Center, https://tinyurl.com/yret4tz3x ("You ask whether tax on capital gains is considered an excise tax or an income tax? It is an income tax.").

The Washington capital gains tax is imposed *directly* on people who bear the economic incidence of the tax, as is the case with income taxes and not with excise taxes. The vast majority of excise taxes are imposed on producers or businesses that sell selected taxed products or services and collect the tax and pass it forward to their customers who bear the ultimate economic burden, which is what makes excise taxes indirect. For example, insurance premium taxes are remitted by the insurance company

but borne by the insured. Gasoline taxes are collected from retailers but borne by drivers. Even estate taxes are collected from the estate before distribution to the heirs. Here, the economic burden of the capital gains tax is borne by the taxpayer owning and selling the asset, making it a direct tax—unlike any excise tax.

The Washington capital gains tax is not a per unit consumption tax on individual transactions but on the *aggregate total income* itself, measured as a percentage of income and imposed broadly on all economic gains. The tax includes exemptions and deductions to limit the scope of the tax to certain individuals, rather than applying universally to an activity. The tax is not based on *a transaction*, but on the net aggregate capital gains earned by *a person* in a year. These are all features of income taxes, not excise taxes. *See, e.g.*, Jared Walczak, "Washington Capital Gains Proposal Not Helped by Analogy to Real Estate Excise Tax," Washington Policy Center (Mar. 7, 2019) https://tinyurl.com/22pzyh23 ("Capital gains taxes are on

the net of gains and losses, across many transactions. As we've observed in the past, if there were an excise tax on the privilege of buying or selling stocks or other investment assets, it would fall on the entirety of the sale price of each asset, not on the net of gains and losses across all investments.").

The primary *justification* for the capital gains tax offered by the legislators is to increase progressivity, which is a strong indication that this tax is not an excise tax.[4] Excise taxes are generally regressive and income taxes are generally progressive, a fact understood as early as 1937 when the Roosevelt

[4] The main source for the claim that Washington's existing tax system is unduly regressive is a study by the Institute on Taxation and Economic Policy (ITEP), that reaches its conclusion by excluding highly progressive elements of the existing tax code (significant portions of corporate income taxes on shareholders, preferential treatment of retiree income, and federal income taxes), and failing to adjust lifetime earnings of high-income people who may be low-income for the year of the analysis. By these omissions ITEP is thus able to turn data suggesting that the total tax system is progressive into a conclusion that all but five states are regressive. *See, e.g.*, Jared Walczak, "Who Pays? Doesn't Tell Us Much About Who Actually Pays State Taxes," Tax Foundation Tax Policy Blog, Oct. 2018, https://taxfoundation.org/itep-who-pays-analysis/.

Administration sought to boost progressivity by reducing excise taxes and increasing income taxes on high-earners. *See, e.g.*, George Haas, U.S. Treasury Dept. Div. of Research, "Tax Revision Studies: Excise Taxes" (Sep. 1937) https://tinyurl.com/bdhm8uav (stating that excise taxes are "less desirable than progressive direct taxes and, so far as possible, should be replaced by a system of direct taxes.").

The Washington capital gains tax is an income tax, not an excise tax. To the extent Washington's Constitution or precedents preclude a graduated non-uniform income tax, this tax should be precluded.

CONCLUSION AND CERTIFICATE OF COMPLIANCE

For the foregoing reasons, the lower court's decision should be affirmed.

This document contains 4,964 words, excluding the parts of the document exempted from the word count by Rule of Appellate Procedure 18.17.

Respectfully submitted,

s/ Joseph Henchman
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Dated: December 12, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief of *Amici Curiae* of National Taxpayers Union Foundation, Washington Policy Center, Tax Foundation, Gregory R. Evans, Randall G. Holcombe, Jeremy Horpedahl, Justin M. Ross, and William F. Shughart II In Support of Respondents to be served on counsel for all parties in this matter via the Court's e-filing platform.

Dated 12th day of December, 2022.

s/ Joseph Henchman

Joseph Henchman
Counsel for Amici Curiae