STATE OF WASHINGTON
DOUGLAS COUNTY SUPERIOR COURT

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,

Plaintiffs,

v.

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

Defendants,

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, an individual; BURR MOSBY, an individual; CHRISTOPHER SENSKE, an individual; CATHERINE SENSKE,

NO. 21-2-00075-09
NO. 21-2-00087-09

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

Noted for February 4, 2022
10:00 a.m.

an individual; MATTHEW SONDEREN, an individual; WASHINGTON FARM BUREAU,

Plaintiffs,

v.

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

Defendants.

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

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I. INTRODUCTION

Plaintiffs are bringing the "most difficult" type of constitutional claim, a request that the court facially invalidate an entire law enacted by the Legislature. *United State v. Salerno*, 481 U.S. 739, 754, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). But "a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 282 n.14, 4 P.3d 808 (2000). And the Court must uphold the law unless there is no "reasonable doubt that the statute violates the constitution." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000). With every brief Plaintiffs file, their failure to meet these burdens grows clearer.

The capital gains tax applies to the voluntary sale or exchange of capital assets, making it an excise tax under a long line of Washington Supreme Court precedent. Plaintiffs' primary response is that the tax may occasionally apply to transactions they consider involuntary. Pls.' Opp. Defs.' Mot. Summ. J. (Pls.' Opp.) at 14. But this argument misunderstands the Court's precedent and, because it implicates only a tiny slice of the transactions taxed under ESSB 5096, highlights how obviously Plaintiffs' facial challenge fails.

Similarly misguided is Plaintiffs' claim that they have a fundamental right under the state's Privileges and Immunity Clause to any tax exemption available to others. There is no such right, but even if there were, the exemptions in ESSB 5096 are rationally aimed at addressing inequality in the state's tax code and do not violate article I, section 12.

As to the Commerce Clause, Plaintiffs now argue that the tax is unconstitutional on grounds they previously conceded. Their change of heart shows no constitutional problem.

Finally, Plaintiffs get the law backwards on standing. They say the State presented no evidence refuting their standing, but proving standing is their burden, and they offer no evidence that any Plaintiff has paid the capital gains tax or will soon pay it.

The bottom line is that each of Plaintiffs' arguments is contrary to established law. Under binding precedent, the Court should reject Plaintiffs' claims and uphold the law.

II. ARGUMENTS AND AUTHORITY

A. The Capital Gains Tax is an Excise Tax

For nearly a century, our Supreme Court has defined a property tax as "a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property," whereas a tax that applies to the sale, transfer, or use of property is an excise tax, not a property tax. *Morrow v. Henneford*, 182 Wash. 625, 631, 630, 47 P.2d 1016 (1935). Under Washington's capital gains excise tax, no one owes tax merely because they own property; rather, the tax applies only when a person earns over $250,000 from the sale or exchange of certain capital assets. Plaintiffs nonetheless offer three theories as to why the capital gains excise tax is supposedly a property tax: (1) they claim the tax could apply to involuntary activities in some hypothetical circumstances; (2) they claim that the tax is an unavoidable demand on property; and (3) they claim that the amount of the tax is not tied to the privilege being taxed. *See* Pls.' Opp. at 13-14, 14-15, 15-17. But the plain language of the tax and more than a century of Washington Supreme Court authority refute Plaintiffs' claims. The tax is tied to the amount of profit earned from the voluntary sale of long-term capital assets, RCW 82.87.040(1), which incontrovertibly is an excise tax under controlling law.

1. The capital gains tax is imposed on the voluntary sale of capital assets and is not an unavoidable demand on property

The capital gains tax imposed under RCW 82.87.040(1) applies to the sale or exchange of capital assets, making it an excise tax under an unbroken line of Washington Supreme Court cases. *See, e.g., Standard Oil Co. v. Graves*, 94 Wash. 291, 306, 162 P. 558 (1917) (oil inspection fee imposed "upon the contingency that the oil is sold" is an excise tax), *rev. on other grounds*, 249 U.S. 389, 39 S. Ct. 320, 63 L. Ed. 662 (1919); *Mahler v. Tremper*, 40 Wn.2d 405, 407, 243 P.2d 627 (1952) (tax on sale of real property is an excise because "a tax upon the sales of property is not a tax upon the subject matter of that sale"); *In re Estate of Hambleton*, 181 Wn.2d 802, 832, 335 P.3d 398 (2014) (estate tax on transfer of property at death is an excise tax).

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Plaintiffs contend, however, that the capital gains tax cannot be an excise because in some hypothetical scenarios the tax might apply to transactions they view as involuntary, e.g., "an individual who is the beneficiary of a grantor trust will be subject to the capital gains tax when the trustee sells or exchanges long-term capital assets held by the trust." Pls.' Opp. at 14.

This argument fails for two reasons. First, this type of unusual hypothetical provides no basis for facially invalidating the tax, which will typically apply when an individual chooses to sell capital assets like stocks. *See, e.g.*, *Wash. State Republican Party*, 141 Wn.2d at 282 n.14 ("a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied"). Second, every tax our Supreme Court has deemed an excise—from the sales tax to the real estate excise tax to the estate tax—applies in some circumstances where the transaction being taxed would be involuntary under Plaintiffs' theory. Most obviously, death is rarely voluntary, yet the estate tax is an excise tax. *Hambleton*, 181 Wn.2d at 832. People owe sales tax on purchases even if they are making the purchase only because of a legal obligation, like buying a motorcycle helmet. And people owe real estate excise tax even if the decision to sell property was made over their objection, such as if they are the minority owner of a building, or the building was sold by a trust of which they are a beneficiary. These examples highlight that when our Supreme Court has described excise taxes as being "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," *Black v. State*, 67 Wn.2d 97, 99, 406 P.2d 761 (1965), the Court does not mean that the specific transaction being taxed was necessarily endorsed by the taxpayer. Rather, "[a] tax is an 'excise' . . . if the government is taxing 'a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.'" *Hambleton*, 181 Wn.2d at 832 (quoting *Fernandez v. Wiener*, 326 U.S. 340, 352, 66 S. Ct. 178, 90 L. Ed. 116 (1945)). That standard obviously is met here, where the tax applies to "the sale or exchange of long-term capital assets." RCW 82.87.040(1).

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Plaintiffs next claim that three so-called "characteristics" of the tax "combine to make [it] an 'absolute and unavoidable' demand on property . . . ." Pls.' Opp. at 15. Specifically, Plaintiffs first contend that a tax on gains recognized on an individual's federal income tax return from the sale or exchange of capital assets is somehow a property tax on those capital assets. *Id.* at 13-14. Plaintiffs next contend that the tax is a direct tax on property because the Legislature has declined to impose it on corporations "engaging in similar capital asset transactions." *Id.* at 14. Finally, Plaintiffs contend that the tax is a property tax because (according to Plaintiffs' mistaken belief) it can be imposed on transactions outside Washington's jurisdictional reach. But Plaintiffs cite no authority supporting these supposed "characteristics," which are either unfounded or have no bearing on whether a tax is a property tax under Washington law.

Beginning with the third "characteristic" offered by Plaintiffs, it is beyond dispute that Washington has jurisdiction to tax the full value of sales of tangible property occurring within its borders. *Morrow*, 182 Wash. at 631. Likewise, it has long been settled that intangible property is located in the state of the owner's domicile. *In re Eilermann's Estate*, 179 Wash. 15, 18, 35 P.2d 763 (1934). Consequently, Washington has jurisdiction to tax the sale or transfer of intangible property owned by individuals domiciled in the state. *In re Grady's Estate*, 79 Wn.2d 41, 43, 483 P.2d 114 (1971); *see also Graves v. Elliott*, 307 U.S. 383, 386, 59 S. Ct. 913, 83 L. Ed. 1356 (1939). Plaintiffs' misunderstanding of Washington law on this point is not a "characteristic" that can possibly invalidate the tax.

The other two "characteristics" offered by Plaintiffs are similarly misguided. The capital gains tax is imposed on the sale or exchange of capital assets located in the state and is measured by an individual's "Washington capital gains." RCW 82.87.040(1). The tax does not become an "absolute and unavoidable demand on property" simply because the computation of an individual's Washington capital gains starts with an amount reported on the taxpayer's federal income tax return. The Legislature had valid reasons for using federal terminology and federal tax concepts that have nothing to do with whether the tax is a property tax or an excise.

See In re Estate of Bracken, 175 Wn.2d 549, 583, 290 P.3d 99 (2012) (Madsen, C.J., concurring/dissenting). By using federal tax amounts as the starting point to compute the "Washington taxable" amount, the Legislature "avoided having to duplicate congressional effort involved in explaining all the possible inclusions, exemptions, and deductions necessary to reach the taxable [amount], and also helped to avoid the complication and confusion that a different set of state rules might create." *Id*. The Legislature's choice to use federal terminology and tax forms did not convert the estate tax into a property tax, *Hambleton*, 181 Wn.2d at 832, and it likewise does not do so here.

Finally, the Legislature's decision to apply the tax to some sales but not others does not make it an "absolute and unavoidable demand on property." As discussed below, our Supreme Court has consistently held that there is no constitutional problem with imposing excise taxes on certain persons or transactions while exempting others. *Supply Laundry Co. v. Jenner*, 178 Wash. 72, 76-77, 34 P.2d 363 (1934); *Morrow*, 182 Wash. at 633-34; *Black v. State*, 67 Wn.2d 97, 100-01, 406 P.2d 761 (1965).

Supply Laundry involved (among other things) an excise tax measured by wages earned by public employees while exempting wages earned by private employees. 178 Wash. at 75, 78. The Court upheld that distinction without any dissent, explaining that it is the duty of the courts "to sustain the classification adopted by the Legislature" unless it is "palpably arbitrary." *Id*. at 76 (quotation marks and citation omitted). The distinguishing features between the classes "need not be great," *id.*, and the Legislature's choice to treat public employees less favorably than private employees was rational "because of the fact that private employees are, to a great extent, connected with business activities already taxed, while public employees are not." *Id.* at 78.[1]

[1] The Court also rejected arguments that the occupation tax at issue was invalid because it applied to self-employed individuals but not private employees, and because it applied to the business of renting office buildings but not to the business of operating hotels or warehouses. *Id*. at 77, 78. In rejecting the argument that these classifications were improper, the Court reiterated that "it is not necessary for us to draw fine distinctions between classifications . . . which in some degree may shade into each other or which in some respects may have some common affinity. It is only necessary to determine whether, in the exercise of a broad discretion, the Legislature has abandoned reason and resorted to a wholly arbitrary selection." *Id*. at 78-79.

The Court was equally forceful in *Morrow*. There, the taxpayer (a restaurant owner) argued that the sales tax was unconstitutional because it taxed prepared food served at restaurants but exempted food "sold by retailers for consumption off premises." 182 Wash. at 633. The Court unanimously rejected the argument, explaining that the Legislature has wide latitude in classifying transactions upon which an excise tax can be imposed. *Id*. at 634.

Years later, in *Black*, the Court unanimously rejected the claim that imposing the sales tax on the lease of a vessel as a floating hotel but not on land-based hotels was impermissible. 67 Wn.2d at 100. Explaining that "[t]he law in this state is . . . clear in this area," the Court held that classifications in excise taxes must be respected so long as they are not "capricious nor arbitrary, and rest[] upon some reasonable consideration of difference or policy." *Id*. (quoting *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 527, 79 S. Ct. 437, 3 L. Ed. 2d 480 (1958)).

As these cases confirm, the Legislature did not overstep its authority when it imposed a capital gains tax on an individual's Washington capital gains while excluding capital gains recognized by non-natural persons. One of the primary purposes of the tax is to address the state's regressive tax code that disproportionately favors wealthy individuals over low and middle-income individuals. *See* RCW 82.87.010 (statement of legislative purpose). Addressing this inequality by requiring the wealthy few to contribute more is undeniably within the proper scope of our legislative branch of government. *See Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 444, 495 P.3d 808 (2021) (upholding tax law that "asked the wealthy few to contribute more to funding essential services and programs to the benefit of all Washingtonians"). And that valid policy choice is not a "characteristic" that transforms the capital gains tax into a property tax.

2. The capital gains tax is measured by value derived from selling Washington capital assets

Plaintiffs next claim that the capital gains tax cannot be an excise tax because it allegedly is not measured by the extent to which the taxpayer engages in the taxed activity. They contend that the capital gains tax must be characterized as a property tax because it is not applied to every

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individual transaction, but rather is based on total capital gains over the course of a year. Pls.' Opp. at 16. Plaintiffs cite no authority to support this argument, which ignores how other Washington excise taxes operate.

As an initial point, permitting taxpayers to report sales occurring over a specified time period instead of reporting each sale is a common feature of excise taxes. Washington's retail sales tax, use tax, business and occupation (B&O) tax, and public utility tax all permit taxpayers to report taxable transactions occurring over a monthly, quarterly, or annual time period. RCW 82.32.045(1)-(3). Plaintiffs cite no authority suggesting that the reporting frequency of a tax has any bearing on whether it is an excise tax or a property tax. Plaintiffs emphasize that the federal income tax is calculated on an annual basis, but that analogy does not help them because the federal tax, under controlling federal law, is an excise tax. *See Brushaber v. Union Pac. R.R. Co.*, 240 U.S. 1, 17, 36 S. Ct. 236, 60 L. Ed. 493 (1916) (recognizing that an income tax is "in its nature an excise entitled to be enforced as such"); *Hale v. Iowa State Bd. of Assessment & Revenue*, 302 U.S. 95, 105-06, 58 S. Ct. 102, 82 L. Ed. 72 (1937).

The only authority Plaintiffs cite for their claim that an excise tax cannot be measured by "an individual's total, annual long-term Washington capital gains" is *Trinova Corp. v. Michigan Department of Treasury*, 498 U.S. 358, 111 S. Ct. 818, 112 L. Ed. 884 (1991), but that case supports the State, not Plaintiffs. *See* Pls.' Opp. at 16-17 (citing *Trinova*). *Trinova* involved a constitutional challenge to an annual Michigan "value added tax" that the challenger claimed discriminated against out-of-state firms. 498 U.S. at 361. The measure of the tax was computed under a reporting method referred to as the "addition method" that started with the taxpayer's federal taxable income and "adds other elements that reflect consumption of labor and capital . . . ." *Id*. at 367. In upholding the tax, the Court explained that it was properly imposed even though its computation started with the taxpayer's federal taxable income. The difference between the "addition method" employed by Michigan and an alternative method that did not rely on the taxpayer's federal income tax return "is one of form and lacks constitutional significance.

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1 Michigan chose the addition method of calculating value added *as a convenience to taxpayers,*
2 *for whom federal taxable income provided an easy starting point*. The Constitution does not
3 require a formalistic analysis resulting in a penalty for Michigan's selection of an easier
4 calculation method for its taxpayers." *Id*. at 377 (citation omitted) (emphasis added).

5 In the same way that federal taxable income provided a convenient and constitutionally
6 appropriate starting point for computing the Michigan tax, using long-term capital gains reported
7 by a Washington taxpayer on his or her federal return provides a convenient and constitutionally
8 appropriate starting point for computing the Washington capital gains tax. Selecting an easier
9 calculation method for Washington taxpayers does not render the capital gains tax
10 unconstitutional, and the Legislature did not overstep its authority when it enacted an excise tax
11 on "Washington capital gains" that uses federal net long-term capital gain as a convenient
12 starting point. *Cf. Bracken*, 175 Wn.2d at 583 (using federal tax amounts as the starting point for
13 computing Washington estate tax helps "avoid the complication and confusion that a different set
14 of state rules might create") (Madsen, C.J., concurring/dissenting).

15 **3. Stare decisis supports the State, not Plaintiffs**

16 Plaintiffs assert this Court must follow controlling authority, yet they ignore the pertinent
17 controlling precedent. For over a century, our Supreme Court has distinguished between excise
18 taxes imposed on the sale or transfer of property and annual, unavoidable taxes on the receipt of
19 net income. *Compare Standard Oil*, 94 Wash. at 306 (upholding oil inspection fee imposed "only
20 upon the contingency that the oil is sold or offered for sale"), *Morrow*, 182 Wash. at 631
21 (upholding retail sales tax), *Mahler*, 40 Wn.2d at 410-11 (upholding real estate excise tax), and
22 *Hambleton*, 181 Wn.2d at 832 (upholding tax on transfer of all forms of property) *with Jensen*
23 *v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936) (invalidating annual net income tax), and
24 *Power, Inc. v. Huntley*, 39 Wn.2d 191, 235 P.2d 173 (1951) (invalidating annual corporate net
25 income tax). Because the capital gains tax is imposed only on the sale of long-term capital assets,
26 the tax is an excise tax under controlling law. Under vertical *stare decisis*, that ends this dispute.

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B. The Capital Gains Tax Does Not Violate Article I, Section 12

Plaintiffs also seek to invalidate the capital gains excise tax under the state Privileges and Immunities Clause. That claim is contrary to controlling law.

As discussed in prior briefing, courts apply a two-step analysis, asking first whether the law at issue involves a privilege or immunity and, if so, whether the Legislature had "reasonable ground" for granting the privilege or immunity. *See* Defs.' Mot. Summ. J. at 18; Defs.' Opp. at 22–23. Article I, section 12's "privileges" or "immunities" are only "those fundamental rights which belong to the citizens of [Washington] by reason of such citizenship." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 813, 83 P.3d 419 (2004) (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)).

Analogizing to the federal right "to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens *of some other state* are exempt from," *Grant Cnty.*, 150 Wn.2d at 813 (emphasis added), Plaintiffs claim a right to be exempt from taxes that *other Washington citizens or corporations* are exempt from. Pls.' Opp. at 21. That simply is not the law. Importantly, *Grant County* does not hold or suggest that Washington citizens have a fundamental right to be exempt from state taxes merely because the Legislature has enacted exemptions available to "other Washington citizens or corporations." To the contrary, our Supreme Court has consistently upheld tax laws that apply only to some citizens or corporations without any suggestion that the tax implicates a privilege or immunity. *See, e.g., Supply Laundry,* 178 Wash. at 78; *Morrow*, 182 Wash. at 634; *Black*, 67 Wn.2d at 100.

What Plaintiffs miss in their reading of *Grant County* is that the privilege the Court mentioned in passing is the right of *nonresidents* to enter the state and compete for business on equal footing with residents. *See Shaffer v. Carter*, 252 U.S. 37, 56, 40 S. Ct. 221, 64 L. Ed. 445 (1920)) (federal Privileges and Immunities Clause protects the right of a citizen of any State to "remove to and carry on business in another without being subjected in property or person to taxes more onerous than the citizens of the latter state are subjected to"). The capital gains tax

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1 does not infringe on that privilege, and it is not undone by Plaintiffs' misreading of *Grant*
2 *County*. *See Peterson v. Dep't of Revenue*, 9 Wn. App. 2d 220, 234, 443 P.3d 818 (2019),
3 (rejecting plaintiff's reliance on *Grant County* because there was no allegation that disparate
4 treatment was the result of "citizenship in another state") *aff'd on other grounds* 460 P.3d 1080
5 (2020).

6 Moreover, even if the Court were to accept Plaintiffs' misreading of *Grant County*, the
7 capital gains tax would still satisfy constitutional requirements. The tax applies alike to "all
8 persons within a designated class," which are individuals with non-exempt capital gains
9 exceeding the $250,000 annual threshold. And the Legislature had a reasonable ground for
10 distinguishing between those who fall within the class and those who do not: to addresses a
11 genuine concern that Washington's low and middle-income families pay a disproportionate share
12 of their incomes in taxes as compared to its wealthiest residents. Imposing a capital gains tax on
13 individuals incurring taxable gains over a quarter million dollars annually is a small but
14 reasonable step toward equalizing the tax burdens between individuals. Because the tax
15 reasonably advances a legitimate public policy, it does not violate article I, section 12.

16 The Legislature has broad "power to make reasonable and natural classifications for
17 purposes of taxation." *Hemphill v. Wash. State Tax Comm'n*, 65 Wn.2d 889, 891, 400 P.2d 297
18 (1965). In exercising that authority, the "'legislature is not bound to tax every member of a class
19 or none.'" *Id.* at 892–93 (quoting *Carmichael v. S. Coal & Coke Co.*, 301 U.S. 495, 509, 57 S.
20 Ct. 868, 81 L. Ed. 1245 (1937)). Additionally, the difference between classes "need not be great"
21 and a particular tax classification is permissible "if it is reasonably related to some lawful taxing
22 policy of the state, such as greater ease or economy in the administration or collection of a tax,
23 the selection of a fruitful source of revenue with the exemption of sources less promising, or the
24 equalization of the burdens of taxation." *Texas Co. v. Cohn*, 8 Wn.2d 360, 386-87, 112 P.2d 522
25 (1941). Despite this precedent, Plaintiffs ask the Court to step in and invalidate the capital gains
26 tax because Plaintiffs disagree with the Legislature's policy of "rebalancing the state's tax code"

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1 by asking wealthy individuals to contribute more to funding essential education programs that
2 benefit all Washingtonians. RCW 82.87.010. The Court should reject Plaintiffs' effort to
3 substitute their personal interests for the policy adopted by our elected legislative branch.

4 **C. The Capital Gains Tax Meets Dormant Commerce Clause Requirements**

5 Plaintiffs' final push to invalidate the capital gains tax theorizes that the tax violates the
6 dormant Commerce Clause. Pls.' Opp. at 22. The claim fails as a matter of established law.

7 First, Plaintiffs are wrong when they claim that Washington lacks sufficient "nexus" to
8 tax capital gains derived from the sale of tangible and intangible property. Washington
9 undeniably has nexus to tax tangible property located in the state. *See Okla. Tax Comm'n v.*
10 *Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) ("It has long
11 been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is
12 consummated to be treated as a local transaction taxable by that State."). Additionally, it is settled
13 law that Washington has nexus to tax intangible property owned by persons domiciled in the
14 state. *In re Grady's Estate*, 79 Wn.2d at 43. The United States Supreme Court has held that the
15 power to sell or dispose of intangible property "is the appropriate subject of taxation at the place
16 of domicile of the owner of the power." *Graves v. Elliott*, 307 U.S. at 386. In sum, Washington
17 has jurisdiction to tax the sale or exchange of property that has a physical or legal situs in the
18 state. Consistent with this jurisdictional principle, the capital gains tax expressly excludes from
19 its reach the sale of property that is appropriately allocated to another state or conclusively
20 located in another state under established constitutional law. RCW 82.87.020(1)(d); *see also*
21 RCW 82.87.060(2) (deduction allowed for amounts the state is constitutionally prohibited from
22 taxing). Plaintiffs offer no reasoned response, *see* Pls.' Opp. at 22-23, and fail to meet their heavy
23 burden of establishing a facial constitutional defect.

24 Plaintiffs are also wrong when they claim that the capital gains tax is not "fairly
25 apportioned." Both the United States Supreme Court and the Washington Supreme Court have
26 consistently held that the sale of property is "inherently apportioned" to the state where the sale

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occurs. For example, in *Jefferson Lines* the United States Supreme Court explained that it had "consistently approved taxation of sales without any division of the tax base among different States" because a sale is "viewed as a discrete event facilitated by the laws and amenities of the place of sale." 514 U.S. at 186. Consequently, the state where the sale occurs may properly tax the full amount of the transaction. *Id*. The Washington Supreme Court follows this same principle, explaining that a sale of property or services is "inherently apportioned" without the need for any further division. *Chicago Bridge & Iron Co. v. Dep't of Revenue*, 98 Wn.2d 814, 830, 659 P.2d 463 (1983). The Court has repeatedly rejected claims that in-state sales must be apportioned by a formula, calling these arguments "[m]eritless." *W.R. Grace & Co. v. Dep't of Revenue*, 137 Wn.2d 580, 596, 973 P.2d 1011 (1999). Plaintiffs cite no authority suggesting that a different rule should apply to the capital gains tax.

Additionally, the Legislature structured the tax to avoid the risk of multiple taxation by allowing a credit for taxes lawfully paid to another state, RCW 82.87.100(2)(a), thereby satisfying the "internal consistency test." That test analyzes whether a state tax, if imposed by every other state, would result in multiple taxation. *Goldberg v. Sweet*, 488 U.S. 252, 261, 109 S. Ct. 582, 102 L. Ed. 2d 607 (1989). Although Plaintiffs now contend that Washington's tax fails this test, their opening brief properly conceded otherwise. Pls.' Mot. Summ. J. at 12 n.8, 13. Providing a credit for taxes paid to another state, as Washington does, is a common method of satisfying internal consistency. *D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 31, 108 S. Ct. 1619, 100 L. Ed. 2d 21 (1988); *Goldberg*, 488 U.S. at 264. While the circumstance of two states taxing the same sale is unlikely to occur, the Legislature has built a constitutionally sound remedy into the capital gains tax.

Plaintiffs cannot cite a single case in which a court has invalidated a state tax imposed on the sale of property with a physical or legal situs in the taxing state where, as here, the tax includes a credit mechanism ensuring that the sale will be taxed by only one state. *See* Pls.' Opp. at 33-34 (citing no applicable case). They instead speculate about a person "domiciled in

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Washington and also a resident of another state," *id*. at 33, but a limited, hypothetical possibility of multiple taxation "is not sufficient to invalidate" a state tax. *Goldberg*, 488 U.S. at 263-64.

Finally, Plaintiffs' unsupported allegation of "discrimination" is merely a rehash of their "fair apportionment" claim, *see* Pls.' Opp. at 35, and fails for the same reasons discussed above.

In sum, Plaintiffs' facial challenge under the dormant Commerce Clause fails. Properly analyzed, the capital gains tax satisfies all dormant Commerce Clause constraints.

D. Plaintiffs Have Failed to Meet Their Burden to Prove Standing

Plaintiffs' standing arguments misrepresent the law and the facts.

Plaintiffs first claim that the Court already resolved this issue in denying the State's motion to dismiss, Pls.' Opp. at 6, but the Court emphasized that it was resolving that motion under CR 12, not CR 56. Sept. 10, 2021 Letter Decision at 1. Surviving summary judgment requires actual evidence, not just hypothetical assertions. *See, e.g.*, *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Next, Plaintiffs suggest that the Court should find standing because "the State submits no evidence" disproving standing, Pls.' Opp. at 6, but the burden of proving standing rests entirely on Plaintiffs. *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

To meet their burden, Plaintiffs claim that their choice to spend money hiring lawyers and accountants to determine if the tax will apply to them, and to minimize their tax burden if it will, constitutes harm. But Plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013).

Some of the Plaintiffs also claim they "know" they will owe the tax in the near future, Pls.' Opp. at 8, but their declarations do not support this claim. For example, Plaintiff Mueller says he owns capital assets valued at over one million dollars and will owe the tax when those assets are sold. Decl. of Neil Mueller. But he says nothing about when this will occur, what he paid for the assets, or what his capital gains will be, so any future gains may be below the law's

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1 $250,000 threshold. *Id.* Similarly, Plaintiff Cable says that her husband "will receive a
2 distribution based on his ownership equity" in a business in 2022, but she says nothing about
3 whether it will exceed the $250,000 threshold. Amended Decl. of Joanna Cable. Plaintiff Quinn
4 says that he is currently selling some "long-term investment assets" and "expect[s] to realize
5 capital gains." Decl. of Chris Quinn. But he says nothing about whether those assets are exempt
6 from the tax (such as real estate, or retirement accounts) or whether he will earn more than the
7 threshold $250,000 in gains. *Id.* In short, none of the Plaintiffs can meet their burden of proving
8 an "immediate, concrete, and specific" injury. *Knight v. City of Yelm*, 173 Wn.2d 325, 341, 267
9 P.3d 973 (2011).

10 Plaintiffs next claim that they have standing because at least one member of Plaintiff
11 Washington Farm Bureau will owe the tax. Pls.' Opp. at 8. But the Farm Bureau's declaration
12 offers no evidence of any such taxpayer, Decl. of Washington Farm Bureau, and the tax exempts
13 sales of real estate (including farmland). RCW 82.87.050.

14 Three Plaintiffs claim "taxpayer standing," but under that doctrine "[t]he taxpayer must
15 show that the action complained of interferes with the taxpayer's legal rights or privileges. If
16 not, the taxpayer has no standing to challenge the action." *Greater Harbor 2000 v. City of Seattle*,
17 132 Wn.2d 267, 281-82, 937 P.2d 1082 (1997). Plaintiffs fail to clear this bar.

18 Finally, Plaintiffs' invocation of the "public importance exception" to standing fails
19 because "[f]or the public importance exception to apply, the dispute must be ripe . . . ." *League*
20 *of Educ. Voters v. State*, 176 Wn.2d 808, 820, 295 P.3d 743 (2013). Here, Plaintiffs' claim is not
21 ripe because they cannot allege any concrete harm from ESSB 5096. Consequently, they fail to
22 overcome their burden of proving standing.

23 ## III. CONCLUSION

24 The Court should grant summary judgment to Defendants for the reasons provided
25 herein and in the State's previous summary judgment briefs.

26 DATED this 21st day of January, 2022.

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

DATED this 21st day of January, 2022, at Tumwater, WA.

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