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; CATHERINE SENSKE, an individual; MATTHEW SONDEREN, an individual; JOHN MCKENNA, an individual; WASHINGTON FARM BUREAU; WASHINGTON STATE TREE FRUIT ASSOCIATION;
WASHINGTON STATE DAIRY FEDERATION,
Respondents,

vs.

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

Appellants,

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

Intervenors.

BRIEF OF *CLAYTON* RESPONDENTS

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I. INTRODUCTION

The Court should reject Intervenors' request to undo nearly a century of settled constitutional law and to overrule the wishes of the overwhelming majority of voters who have repeatedly and consistently elected to preserve the State's existing tax structure.[1] Under the Court's stare decisis jurisprudence, *Culliton* and the cases following it must be upheld, and the decision whether to change the state's tax system must be left to the voters. That is so for three distinct reasons.

First, stare decisis is at its apex and carries maximum force when the voters or the legislature have effectively ratified a judicial decision. Here, *Culliton*'s construction of the

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[1] For the reasons explained in the *Quinn* Respondents' brief, the capital gains tax violates existing state constitutional law as well as the dormant Commerce Clause of the U.S. Constitution. The *Clayton* Respondents adopt by reference the arguments in the *Quinn* Respondents' brief. *See* RAP 10.1(g). This brief addresses the Intervenors' alternative request to overrule *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933), and its progeny. *See* Intervenors' Opening Brief ("Int. Br.") 1-2, 5, 15-50.

Washington Constitution has been repeatedly reaffirmed and ratified by Washington's voters, who have rejected six proposed constitutional amendments that would have excluded "income" from the Constitution's definition of "property," and four ballot measures that would have imposed an income tax without amending the Constitution. In 2021, voters disapproved of the capital gains tax here by a margin of 61% to 39%. Further, small business owners and other Washingtonians have structured their affairs around this heretofore settled foundation of Washington constitutional law. This history of voter ratification and re-affirmance, together with citizen reliance, belies Intervenors' argument that *Culliton* should be overturned because it was either wrong when decided or is a relic of passing legal history. Even if those arguments were legally correct (and they are not), any amendment of the constitutional rule that income is property must and should come through the democratic process.

Second, *Culliton* does not merit reexamination. Intervenors concede that this Court does not upend precedent absent (1) a clear showing that an established rule is incorrect, or (2) a showing that the legal underpinnings have changed or disappeared. Neither of these tests is met here. Intervenors do not show that *Culliton*, *Jensen* and their progeny were incorrect when decided, or that subsequent legal developments have eroded their legal foundation. To the contrary: these holdings are soundly based in the "uniquely forceful" and unambiguous language of Amendment 14 that defines property as "everything" subject to ownership, including intangibles, and their foundation in state law remains sound today.

Third, to make a case for overturning precedent, Intervenors must also demonstrate that the existing rule causes harm. But the Intervenors made no evidentiary showing in the superior court to support this essential element. To the contrary, the record in this case is replete with evidence that people have domiciled in Washington in reliance on its tax

structure, that many built their retirement and family plans around *Culliton's* income tax restrictions, and many will face life-altering consequences if the Court summarily upends that system. For example, many individuals and businesses will inevitably be compelled to relocate to other states if *Culliton* is overruled, severing family, community, and business relationships. The voters' repeated decisions to preserve *Culliton* reflect the reality that Washington citizens rely on the existing tax policy in structuring their lives, their businesses, and their financial and retirement plans, and that overruling *Culliton* will cause significant harm to thousands of residents throughout the state for years to come. Under this Court's jurisprudence, citizens' settled expectations as to property—repeatedly and consistently preserved in popular referendums—give stare decisis maximal force here.

At most, Intervenors disagree with the settled tax law of the State. Their disagreement is properly aired not in this Court, but through the popular electoral process—in which, to

date, the voters have overwhelmingly opted to preserve *Culliton*. The Court should therefore decline Intervenors' remarkable invitation (not joined by the State) to wholly overturn the state's constitutional regime with respect to taxation of income and should respect stare decisis under this Court's controlling precedents.

II. STATEMENT OF ISSUES

1. Whether this Court should overturn its long-standing precedent, even though Intervenors' arguments that *Culliton* was incorrectly decided or based on later-undermined premises are incorrect as a legal and historical matter, where Washington voters have ratified the correctness of the *Culliton* decision consistently, repeatedly, and resoundingly?

2. Whether this Court should overturn its long-standing precedent absent admissible evidence that the continued application of *Culliton* and its progeny is harmful, where Washington citizens have relied on the decision in

structuring their lives, businesses, and financial affairs and will suffer harm if *Culliton* is overruled?

III. STATEMENT OF THE CASE

The voters adopt Amendment 14 prohibiting non-uniform taxes on all property.

In 1930, Washington voters passed Amendment 14 to the state constitution, which prohibits non-uniform taxes on all forms of property. The Amendment provides: "All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax and shall be levied and collected for public purposes only." Amend. 14 to Const. art. VII, § 1 (1930). And the amendment defines property broadly: "The word 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." *Id*.

This Court holds in* Culliton *that income is a form of property under Amendment 14 to the state constitution.

In 1933, this Court decided *Culliton v. Chase*, holding that the state constitution's broad definition of "property"

includes personal income and striking down a proposed income tax. 174 Wash. 363. The Court reasoned that because the state constitution defines property to encompass "*everything*, whether tangible or intangible, subject to ownership," and "[n]o more positive, precise, and compelling language could have been used," the definition plainly includes income. *Id*. at 374 (emphasis added). And because "'income' is property and a tax upon income is a tax upon property," any tax on income must be uniform. *Id*. at 374-78.

In reaching this conclusion, the court noted that Washington's "constitutional definition" of property was "particularly forceful" when compared with that of other states with different "constitutional authorization[s] or restriction[s]," and thus held that any non-uniform tax on income would be contrary to "the fundamental law of the state." *Id*. at 374, 379.

The Court repeatedly reaffirms that income is a form of property.

The Court squarely reaffirmed this holding just three years later, rejecting arguments that *Culliton* was wrongly

decided and should be overruled. In *Jensen v. Henneford*, reviewing a newly enacted tax law, the Court again confronted "the question whether an income tax is, under the provisions of the Fourteenth Amendment of the State Constitution, a property tax, as the respondents contend, or whether it is an excise tax, as appellants contend." 185 Wash. 209, 215, 53 P.2d 607 (1936). The Court explained that "[t]hat question has recently been squarely presented to this court and has been definitely determined by it" in *Culliton*, where "the question was exhaustively brief and discussed by an array of eminent counsel," and the relevant constitutional rules were "fully analyzed, discussed, and defined." *Id*. at 215-16, 219. The Court reiterated that "a tax on net income" is "a property tax" subject to the Fourteenth Amendment's uniformity requirement. *Id*. at 219; *see also Petroleum Nav. Co. v. Henneford*, 185 Wash. 495, 496, 55 P.2d 1056 (1936) (tax on a "corporation's net income" is "a property tax" and "subject to the uniformity clause of the Fourteenth Amendment").

After *Jensen* and *Petroleum Nav. Co*., *Culliton*'s holding became even more entrenched and fundamental to Washington's tax system. In 1951, the Court explained: "It is no longer subject to question in this court that income is property." *Power, Inc. v. Huntley*, 39 Wn.2d 191, 194, 235 P.2d 173 (1951). Citing *Culliton*, the Court concluded that it has been "definitely decided in this state that an income tax is a property tax, which should set the question at rest." *Id*. at 195.

In the decades since then, the Court has reaffirmed *Culliton*'s basic rule again and again, recognizing its status as settled law. *See Apartment Operators Ass'n of Seattle, Inc. v. Schumacher*, 56 Wn.2d 46, 47, 351 P.2d 124 (1960) ("'Is the tax [on rental income] an excise tax or a property tax?' The question is foreclosed by prior decisions of this court."); *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 608, 989 P.2d 542 (1999) (relying on *Jensen* to hold a tax on rental income is a tax on property that violates constitutional prohibition against non-uniform taxation); *Dean v. Lehman*,

143 Wn.2d 12, 25, 18 P.3d 523 (2001) (citing *Jensen* for rule that income is property); *see also Kunath v. City of Seattle*, 10 Wn. App. 2d 205, 444 P.3d 1235 (2019) (City of Seattle's graduated tax on residents' income violates Article VII), *review denied sub nom. City of Seattle, v. Kunath*, 195 Wn.2d 1013, 460 P.3d 183 (2020); *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 650 & n. 12, 62 P.3d 462 (2003) (collecting cases acknowledging that income is property and taxes on the receipt of income are property taxes). Today, *Culliton* stands for the now-axiomatic proposition that "income [is] "property" under amendment 14 of the state constitution." *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc*., 196 Wn.2d 506, 550, 475 P.3d 164 (2020) (Stephens, C.J., dissenting) (explaining that "[p]roperty takes many forms" and citing *Culliton* in a context unrelated to taxation).

The voters ratify* Culliton *and reject efforts to allow graduated income taxes ten times.

The voters have also rejected efforts to change *Culliton*'s basic rule *ten times*. On six occasions, the voters declined to

adopt proposed constitutional amendments that would have allowed income taxation free from the constitution's uniformity provision. Each time, the proposal was voted down resoundingly, with 77% of voters statewide rejecting the most recent proposed amendment. *See* 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%).

On four other occasions, the voters overwhelmingly rejected ballot initiatives that would have imposed statewide graduated income taxes, with the most recent 2010 initiative being voted down by a margin of 64% to 36%. *See* Initiative 158 (Wash. 1944) (3% tax on gross income) (rejected 70%-30%); Initiative 314 (Wash. 1975) (corporate excise tax measured by income) (rejected 67%-33%); Initiative 435 (Wash. 1982) (corporate franchise tax measured by income)

(rejected 66%-34%); Initiative 1098 (Wash. 2010) (personal income tax rejected 64%-36%).[2]

Intervenors ask this Court to reverse nearly a century of law.

In 2021, the Legislature imposed the tax on the long-term capital gains of individuals at issue here. *See* Laws of 2021, 67th Leg., Ch. 196 (Engrossed Substitute Senate Bill 5096) ("ESSB 5096"). Notably, in November 2021, the people in an advisory vote disapproved of this proposed tax by more than a 20% margin. *See* Washington Advisory Vote 37, Nonbinding Question on Capital Gains Tax to Fund Education and Child Care (2021) (expressing disapproval of proposed tax by 61%-39% margin). In defending ESSB 5096 in this Court, Intervenors seek to overrule *Culliton* and upend its long-

[2] Secretary of State, Income Tax Ballot Measures, https://www.sos.wa.gov/elections/research/income-tax-ballot-measures.aspx. Structured similarly in some ways to the capital gains tax, the defeated 2010 ballot "measure would [have] tax 'adjusted gross income' above $200,000 (individuals) and $400,000 (joint-filers), reduce state property tax levies, reduce certain business and occupation taxes, and direct any increased revenues to education and health." *Id.*

standing, repeatedly reaffirmed, and many times ratified constitutional rule.

The State of Washington has not joined in Intervenors' request to overturn stare decisis.[3]

IV. ARGUMENT

Stare decisis requires the Court to reject this assault on *Culliton*. Because Washington voters have repeatedly elected to preserve the rule announced in *Culliton*, and because citizens rely on the present taxation rules in structuring the basics of their lives and businesses, the Court's jurisprudence affords the decision the highest protections of stare decisis. For this reason alone, the Court should uphold *Culliton* and leave the question of whether to alter the basic tax structure of the State to the voters via the democratic process.

[3] The *Clayton* Respondents here adopt and incorporate the *Quinn* Respondents' statement of the case regarding the passage and operation of ESSB 5096 as well as the procedural history of this case at previous stages of litigation.

Even ignoring these special considerations, however, *Culliton* does not merit reconsideration. Intervenors cannot establish the baseline showing under the doctrine of stare decisis that is required to overrule this Court's settled precedent. As the Court has explained, "[w]hen a party asks this court to reject its prior decision, it is an invitation" this Court does not "take lightly." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (internal quotation marks and citation omitted). "The question is not whether" the Court "would make the same decision if the issue presented were a matter of first impression." *Id.* "Instead, the question is whether the prior decision is so problematic that it *must* be rejected, despite the many benefits of adhering to precedent." *Id.* As a result, "there must be a clear showing that the rule is incorrect and harmful, or that the legal underpinnings have changed or disappeared altogether." *In re Ali*, 196 Wn.2d 220, 242 n.6, 474 P.3d 507 (2020).

Intervenors fall well short of making the requisite showing: They do not make a persuasive argument that the decision was wrong when it was decided, that its legal foundations have been eroded by intervening decisions, or that *Culliton* causes harm. *See Deggs v. Asbestos Corp.*, 186 Wn.2d 716, 729, 381 P.3d 32 (2016) (The Court can reconsider precedent only "when it has been shown to be incorrect and harmful" or "when the legal underpinnings … have changed or disappeared altogether"); *State v. Pierce*, 195 Wn.2d 230, 240, 455 P.3d 647 (2020) (same) (quoting *Deggs*). This Court should affirm.

A. The Court Should Uphold *Culliton* Because Voters Have Ratified It And The Court Has Uniformly Followed It.

1. The voters have decided to preserve *Culliton* on numerous occasions by overwhelming margins.

The Intervenors ask this Court not only to overrule its own precedents, but to substitute its judgment for the will of Washington's people. Since constitutional Amendment 14 was passed in 1930, large margins of Washington voters have

rejected six attempts to amend the constitution to pave the way to graduated taxes on income.[4] Over roughly the same period, Washington voters also rejected four statewide votes to codify an income tax by statute.[5] The most recent effort was I-1098 in 2010, a statewide initiative to levy a "progressive," graduated tax on income. Washington voters rejected the proposed income tax by a decisive margin—64% opposed it.[6] And the November 2021 advisory vote, in which the voters disapproved of ESSB 5096's capital gains tax by a more than 20% margin confirms this long-standing popular will.[7] As reflected by their

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[4] H.R.J. Res. 11 (Wash. 1934); S.J. Res. 7 (Wash. 1936); S.J. Res. 5 (Wash. 1938); H.R.J. Res. 4 (Wash. 1942); H.R.J. Res. 42 (Wash. 1970); H.R.J. Res. 37 (Wash. 1973).

[5] 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).

[6] *See* Washington Secretary of State, Initiative Measure 1098 *concerning establishing a state income tax and reducing other taxes* (last updated Nov 29, 2010, 9:49 AM), https://perma.cc/J79S-9R9W.

[7] Washington Advisory Vote 37, Nonbinding Question on Capital Gains Tax to Fund Education and Child Care (2021).

ballots, the people of Washington have said, over and over, that Amendment 14 must remain in its current, popularly adopted form, and that the law prohibiting non-uniform (i.e., graduated) income taxes correctly captures the will of the people and should not be changed. In these circumstances, stare decisis is of paramount importance, and the "power to change [the Court's] decision rest[s] solely" with the voters. *See State v. Blake*, 197 Wn.2d 170, 191, 481 P.3d 521 (2021) (recognizing importance of legislative acquiescence).

In the statutory interpretation context, this Court has repeatedly affirmed prior decisions challenged on grounds similar to those put forward here—even decisions the Court came to believe were wrong—where the legislature had acquiesced to a settled judicial construction by declining to amend a statute. For example, last year in *State v. Blake*, the Court declined to reconsider a prior decision interpreting a drug possession statute—even though "every state to have interpreted the model statute holds" differently, and even

though the Court expressly stated that "we would interpret the statute" differently "[i]f we were interpreting [it] for the first time." 197 Wn.2d at 190 n.13; *see id*. at 195 (Stephens, J., concurring). The Court followed stare decisis because the legislature had declined to change the law in response to the Court's decision, despite amending other parts of the statute in question eleven times. *See id*. at 191. The Court reasoned that where the legislature was "aware of judicial interpretation of its enactments, and where statutory language remains unchanged after a court decision, the court will not overrule clear precedent interpreting the same statutory language." *Id*. (internal quotation marks and citation omitted). Thus, "[g]iven the interpretive principles of legislative acquiescence and stare decisis, only the legislature, not the court, can now change the statute's" construction. *Id*. at 174.

Although the issue here is one of state constitutional law, not statutory interpretation, that same reasoning applies with even stronger force: Washington voters have not merely

acquiesced in the constitutional rule of *Culliton*, but actively considered whether to preserve it and voted by overwhelming margins to do so on multiple occasions. *Supra* 10-12. This history "show[s] that it was and is the policy of [the voters] to concur in [the Court's] prior ruling," *cf. Blake*, 197 Wn.2d at 191 (internal quotation marks and citation omitted), so only the voters, "not the court," should decide whether to change the law. *Id*. at 174.[8]

2. This Court has reaffirmed and followed *Culliton* without questioning its vitality.

Stare decisis is especially important where, as here, the Court has repeatedly reaffirmed the rule at issue in a series of decisions. Because stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the

[8] *See also Buchanan v. Int'l Brotherhood of Teamsters*, 94 Wn.2d 508, 511, 617 P.2d 1004 (1980) ("failure of the legislature to amend the statute in the 17 years since the [challenged] decision was rendered convinces us that it was and is the policy of the legislature to concur in that result.").

actual and perceived integrity of the judicial process," *City of Federal Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)), such repeatedly reaffirmed precedents must be afforded particular weight.

Culliton is such a precedent. The Court has repeatedly applied it over the past 89 years and consistently refused requests to overrule it. Since *Culliton*, this Court's decisions interpreting the plain language of Amendment 14 have remained consistent. This long line of cases reaffirming *Culliton* signals the Court's continuing and redoubled commitment to the decision, which Washingtonians have appropriately come to regard as settled law, and enhances the importance of stare decisis here.

Just three years after *Culliton*, the Washington Attorney General urged the Supreme Court to abandon stare decisis based on many of the same arguments Intervenors make here. Citing the need to adhere to previous case law, the Court

rejected the Attorney General's arguments, recognizing that *Culliton* was based on language of the Washington constitution that the court had "fully analyzed, discussed, and defined." *Jensen*, 185 Wash. at 215-19. Justice Millard, who had originally dissented in *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P.536 (1930), felt bound to respect stare decisis in *Jensen*:

> We held in [*Aberdeen* and *Culliton*], that, under our Constitution, income is property, and that an income tax is a property tax. From that declaration this court has never departed, and the people have not seen fit to amend the Constitution to permit us to hold otherwise. …Surely, the rule of stare decisis—a rule whereby uniformity, certainty, and stability in the law are obtained—should now apply.

Id. at 225 (Millard, J., concurring).[9]

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[9] *Jensen* also puts to rest any suggestion that *Culliton* is inconsistent with another case decided the same day as *Culliton*, *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 25 P.2d 91 (1933), among other cases concerning excise taxes. *See* State's Opening Br. 28-29. *Jensen* explained why under Washington law a tax on the right to receive income, untethered to any state-conferred privilege to engage in business activity within state boundaries, is a property tax, not an excise tax. 185 Wash. at 216-17.

Arguments to ignore stare decisis and abandon the rule that income is property were again rejected in the 1951 *Huntley* decision. 39 Wn.2d at 196-97. There, the Court had "no hesitancy" in finding that a tax on "almost any income from almost every source," not based on the amount of "any business in this state," and "geared throughout to the Federal income tax legislation as it relates to corporations," is "a mere property tax 'masquerading as an excise.'" *Id.* Like the tax invalidated in *Huntley*, ESSB 5096 also taxes capital gains on intangible property "from almost every source" by levying an excise on certain transactions in intangibles occurring anywhere in the world, notwithstanding the absence of any arguable substantive privilege Washington confers to permit the transactions.[10] The

[10] *See Huntley*, 39 Wn.2d at 197 ("[excise] tax must be, 'in truth levied for the exercise of a substantive privilege granted or permitted by the state'") (quoting *Jensen*, 185 Wash. at 218). Intervenors argue that states may tax individuals' income for the "privilege" of "enjoying [the] benefits" of state citizenship, Int. Br. 42-43. While this might be true under different circumstances, ESSB 5096 purports to levy a tax on the

rulings in *Culliton*, *Jensen*, and *Huntley* have been acknowledged and followed by this Court numerous times. *See supra* 9-10.

Nearly nine decades have now elapsed since *Culliton* was decided. Intervenors do not cite a single majority decision of any Washington court that questions whether *Culliton* was either "incorrect," or suggests that it has been undermined by an eroded legal foundation. The absence of court opinions expressing concerns about *Culliton*'s legal soundness or continued viability further undermines Intervenors' arguments that it is erroneous or that its underpinnings have disappeared.[11]

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privilege of engaging in *transactions*, RCW 82.87.010 (a "tax on the voluntary sale or exchange of stocks, bonds, and other capital assets"), not on individuals' privilege of living in the state and enjoying its protections. Intervenors cannot rewrite the statute to support this otherwise unfounded argument.

[11] Similarly, the failure of any court to adopt Professor Spitzer's critique of *Culliton* in the last three decades, Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. Puget Sound L. Rev. 515 (1993), further indicates that those arguments missed the mark and cannot justify suddenly abandoning stare decisis now.

B. Intervenors Cannot Demonstrate That *Culliton* Was Wrongly Decided Or That Its Underpinnings Have Eroded.

The Court need go no further to decide this case: The voters' consistent ratification of *Culliton* and citizens' long-settled expectations and particularly strong reliance interests give stare decisis its maximum force here, and the voters—not the Court—should decide whether to revise the State's constitutional taxation system. However, the decision should also be upheld under the ordinary test this Court applies when asked to overrule any prior precedent. Intervenors concede that this Court, in order to take that step, requires either (1) a "clear showing that an established rule is incorrect and harmful," or (2) a showing that the legal underpinnings have "changed or disappeared altogether." Int. Br. 17-18 (citation omitted); *see also Ali*, 196 Wash. 2d at 242 n.6; *Pierce*, 195 Wash. 2d at 240. Neither of these tests is met here. Intervenors do not show that *Culliton* and *Jensen* were incorrect when decided, or that

subsequent legal developments have eroded its legal foundation.

Intervenors argue that this Court's rule that income is property is built on the purportedly incorrect reasoning and eroded foundation of *Culliton*. Int. Br. 18-31. Intervenors' arguments focus on three alleged errors: (1) that *Culliton* was wrong to rely on *Aberdeen*; (2) that *Culliton* mischaracterized the law in other states; and (3) that *Culliton* misinterpreted the "peculiarly forceful constitutional definition of property" in Article VII, § 1. Intervenors misread *Culliton* and the authorities on which the Court relied and fail to prove the elements necessary to overturn stare decisis.

In *Culliton*, the Court held that it has been "definitely decided in this state that an income tax is a property tax, which should set the question at rest here." 174 Wash. at 376. Intervenors argue that "the sole authority" *Culliton* cited in support of this statement was the 1930 decision in *Aberdeen Savings & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536

(1930), but, in Intervenors' view, "*Aberdeen* did not so hold." Int. Br. 25. The main problem with the Intervenors' claim that *Aberdeen* was the "sole authority" of legal authority for the rule in *Culliton* is that it is demonstrably untrue. Article VII § 2 of the State Constitution did not define property at all when this Court decided *Aberdeen* in 1930. The voters passed Amendment 14 to the Constitution in November 1930, but did so ***after*** *Aberdeen* was decided. As the Court in *Culliton* observed,

> [a]fter the decision by this court in [*Aberdeen*] deciding that income was property for the purpose of taxation, the people adopted the Fourteenth Amendment, supra, which made it part of the fundamental law of the state.

Id. at 377. The bulk of the majority analysis in *Culliton* was thus devoted to distinguishing the expansive definition of "property" in newly amended Article VII, Section 1 from language in other States' constitutions in which the courts had ruled that income was not "property." *Id.* at 374-77 (explaining that cases upholding income taxes flowed from differences in

Wisconsin, Idaho, and Montana constitutions). Anticipating arguments the Intervenors now make here—that *Culliton* was out of step with decisions of other states (i.e., "incorrect")—the Court concluded that "[n]one of the decisions from other states have any bearing upon the law before us because of *our peculiarly forceful constitutional definition* and the difference in their constitutional authorization or restriction." *Id.* at 374 (emphasis added). Thus, *Culliton's* constitutional analysis of Amendment 14 was not based solely on *Aberdeen* because Amendment 14 had not been enacted and was not at issue in *Aberdeen*.

1. The rule that income is property remains grounded in the State Constitution, and the legal underpinnings of *Culliton* and similar rulings have not disappeared.

Intervenors argue that the legal underpinnings of *Culliton*—which they maintain were based on this Court's earlier decision in *Aberdeen*—have disappeared as a result of a 1973 decision of the U.S. Supreme Court, which in turn overruled a 1928 U.S. Supreme Court decision that *Aberdeen*

had cited. *See* Int. Br. 27-31 (discussing *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928), and *Lehnhausen v. Lake Shore Auto Parts*, Co., 410 U.S. 356, 360-65, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)). But this convoluted argument fails for multiple reasons.

First, and most important, *Aberdeen* was decided before Amendment 14 was enacted, and did not purport to interpret the broad definition of "property" therein. Second, Intervenors cannot show that *Culliton*'s underpinnings have been eroded by subsequent decisions of the U.S. Supreme Court, because *Culliton*'s definition of income as property is a matter of state constitutional law that is not dictated by federal precedent. The sole change in *federal* law that Intervenors do identify—the 1973 U.S. Supreme Court reversal of a federal Equal Protection decision in *Quaker City*—has nothing to do with the definition of property to include income under Washington *state* law, and therefore provided no "underpinnings" for *Culliton* that a federal court was capable of eroding.

Intervenors argue that when the U.S. Supreme Court overruled the *equal protection* holdings of *Quaker City* in 1973, *Aberdeen's* legal foundation disappeared, also undermining *Culliton*. Int. Br. 27-28. Even if *Culliton* had relied on *Aberdeen* to interpret the definition of property under Amendment 14 (it did not), Intervenors' argument would still fail. In *Aberdeen*, this Court held that a tax measured by net income imposed solely on financial corporations but not other entities and individuals conducting the same business was an arbitrary classification that denied these taxpayers the equal protection of the laws. *See* Int. Br. 25-26 (citing *Aberdeen*, 157 Wash. at 353, 360–61). While the Intervenors acknowledge that *Aberdeen* was ultimately decided on *federal* equal protection grounds, the Intervenors make no mention of the *state* law that was essential to decide that federal question in favor of plaintiffs. *Id*. The *Aberdeen* majority found a violation of *federal* equal protection guarantees, but its characterization of the subject tax on income as a tax on

property rather than an excise tax under *state* law was essential to finding discriminatory treatment.[12] There was no jurisprudential basis for this Court to turn to *federal* case law to construe Washington state tax statutes, and it did not do so. By the same token, federal cases overruling federal decisions applying the constitutional guaranty of equal protection could not erode the "underpinnings" of Washington state law defining income as property.

The U.S. Supreme Court's decision overruling *Quaker City* in 1973 did not need to address, let alone overrule, decisions under state law defining income as property, and it

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[12] Defining income as property under Washington state law was essential to finding an equal protection violation because a *property* tax could "be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation." *Aberdeen*, 157 Wash. at 364-65. If the *Aberdeen* court had accepted the Legislature's characterization of the tax as an excise on the *privilege* of operating a *franchise*, which it did not, there would have been no discrimination because *individuals* could not "franchise" their operations. As the *Aberdeen* dissent makes clear, the property tax characterization was *not* dependent in any way on federal law. *Id.* at 379-91 (Fullerton, J., dissenting).

did not do so. *Lehnhausen* overruled *Quaker City* on a point of federal constitutional law: namely, that legislatures may exercise legislative judgment to levy taxes on corporations that differ from the taxes levied on other "persons," particularly individuals, without violating *federal* equal protection. Because *Lehnhausen*'s overruling was limited to an issue of federal equal protection law, nothing about that decision undermines the state-law basis of *Culliton*'s holding that income is property. Indeed, in the 50 years since *Lehnhausen* was decided, it is telling that *no* court decision has suggested that *Culliton*'s "underpinnings" disappeared with the reversal of the equal protection rule of *Quaker City* by *Lehnhausen.* It would be surprising for so important a development to lie dormant and unnoticed for a half century.

Thus, Intervenors' contention that "the legal underpinnings of *Aberdeen* (and therefore *Culliton*) have been

overruled and are no longer valid," Int. Br. 28, is mistaken.[13] Intervenors have pointed to no erosion of the underpinnings of state law defining property for purposes of the Fourteenth Amendment. Indeed, because this Court, rather than the U.S. Supreme Court, is "unquestionably the ultimate expositor" of its own law, *Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 170 L. Ed. 2d 837 (2008) (quotation marks and citation omitted), it simply does not make sense to point to an

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[13] To amplify this unfounded argument, Intervenors mischaracterize this Court's order on denying rehearing in *Aberdeen*, inserting a purported reference to *Quaker City* that appears nowhere in the order. *Compare* Int. Br. 27 (*Aberdeen* "was based solely on 'the decisions of the Supreme Court of the United States [(*Quaker City*)],' which treated the tax at issue as attempting 'to establish a property and not an excise or corporation franchise tax'"), *with Washington Mutual Savings Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930) (without citation to or mention of *Quaker City*, clarifying that "the opinions above cited were rendered with a view to determining the questions presented by the cases at bar, and those questions only"). *Aberdeen* did not rely on *Quaker City* for its holding with respect to income as property under Washington state law, and the Court should disregard Intervenors' arguments based on their selective misrepresentation of a quote from *Washington Mutual Savings Bank v. Chase* suggesting otherwise.

intervening decision of the U.S. Supreme Court as a development capable of eroding this Court's independent interpretation of Washington's Constitution. In consequence, this case is not one of those "'"relatively rare" occasions when a court should eschew prior precedent in deference to intervening authority' where 'the legal underpinnings of our precedent have changed or disappeared altogether.'" *W.H. v. Olympia Sch. Dist.*, 195 Wn.2d 779, 787, 465 P.3d 322 (2020) (quoting *W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014)).

In sum, because interpretation of Amendment 14 is a matter of state law that does not implicate federal issues, and because Intervenors have identified no intervening federal authority that overruled authority on which *Culliton* relied in defining income as property, Intervenors have not shown that *Culliton* is one of the "relatively rare occasions" in which federal legal underpinnings on federal issues have

disappeared.[14] Indeed, voters' rejections of ten attempts to overturn *Culliton* or levy income taxes has strongly reenforced the underpinnings of *Culliton.*

[14] In *W.G. Clark*, this Court limited the inquiry into erosion of legal underpinnings to cases in which the United States Supreme Court has overruled or substantially altered controlling federal case law. Recognizing that "this court must have the flexibility to consider emerging United States Supreme Court case law when considering earlier decisions on federal issues," the Court held that "[t]he doctrine of stare decisis should not keep this court from fully considering all *United States Supreme Court guidance* on federal issues…." *W.G. Clark Constr. Co*., 180 Wn.2d at 66 (emphasis added). This Court again recognized this same limiting principle in *Yim v. City of Seattle*, 194 Wn.2d 651, 451 P.3d 675 (2019), where the court observed that "[b]ecause our prior definition of regulatory takings was not based on independent state law, we need not decide whether it is incorrect and harmful." 194 Wn.2d at 668 (holding that evolving federal precedent regarding regulatory takings eroded underpinnings of prior cases); *see generally State v. Lupastean*, 513 P.3d 781, 790-92 (Wash. 2022) (citing U.S. Supreme Court decisions regarding equal protection challenges to misuse of peremptory challenges in finding that legal underpinnings had eroded).

2. *Culliton* also did not rely erroneously on the "overwhelming weight of judicial authority" from other states to interpret Amendment 14's uniquely forceful language

Intervenors next argue that *Culliton* derived its ruling from an erroneous assumption that the "'overwhelming weight of judicial authority'" in other states held that a tax on income is a property tax. Int. Br. 31 (quoting *Culliton*). But that quote from *Culliton* did not purport to describe court decisions from *other* states; instead, it commented on Washington's *own* decisional authority. *Compare* Int. Br. 31-34 *with Culliton*, 174 Wash. at 374 (referring to judicial interpretations of the language of "our Fourteenth Amendment.").

Far from misunderstanding the legal landscape outside of Washington, the *Culliton* court expressly disavowed any intention to be guided by the decisions in other state courts. Observing differences in the language and structure of constitutions from other states, the *Culliton* court flatly stated that "[n]one of the decisions from other states have any bearing upon the law before us." 174 Wash. at 374. Instead, *Culliton*

rested on this Court's interpretation of recently amended, Washington-specific constitutional language that it deemed "peculiarly forceful." *Id*. Far from erroneously relying on out-of-state authority, *Culliton* largely disregarded it in focusing on the unique language of Amendment 14 to the Washington Constitution. Intervenors' account of *Culliton* as purporting to follow the lead of other states grossly misreads this Court's actual reasoning, and certainly cannot establish a substantial error sufficient to depart from stare decisis.

Even taken on its own terms, Intervenors' arguments about other states' holdings fail to support its invitation to upend precedent. Intervenors contend that "by the 1930s the majority of courts held that an income tax is not a property tax." Int. Br. 31 (citing Wade J. Newhouse, *Constitutional Uniformity & Equality in State Taxation* (1984)). Consistent with *Culliton*'s observation about the "peculiarly forceful" language of Amendment 14 by comparison to other states, the treatise relied on by Intervenors actually shows that a wide

variety of state uniformity provisions existed, identifying 12 "types" of state uniformity provisions, and then showing on a state-by-state basis that few of the uniformity provisions fall squarely into one type or another. *See* Newhouse, § 4.04, at 1764-1767.[15]

Because Intervenors fail to cite *any* state court holding that a constitutional definition of "property" as "everything" subject to ownership—as in Amendment 14—was interpreted to exclude income, their references to the Newhouse treatise or decisions of other state courts cannot prove that *Culliton* was erroneous when it interpreted Amendment 14.[16] Here again, the

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[15] Newhouse classified the Washington Constitution's uniformity provision as a "very limited form of a modified" uniformity. Newhouse, § 4.04, at 1766.

[16] In addition to blithely eliding these critical differences in constitutional language, Intervenors also conveniently ignore that many states enacted constitutional amendments that expressly permitted income taxes—an effort Washington voters were asked to approve but rejected both at the time and many times since. *See* Jason Mercier, *Washington's constitution has broadest definition of property in the country*, Washington Policy Center (Aug. 29, 2022),

question whether income is within the definition of property for state constitutional purposes is purely a matter of state law based on the language of each state's constitution.

Intervenors similarly argue that the United States Supreme Court rejected the definition of income as property, but this argument fails for the same reasons—federal law does not control this issue of state law. To this end, in *Hale v. Iowa State Board of Assessment & Review*, 302 U.S. 95, 105, 58 S. Ct. 102, 82 L. Ed. 72 (1937), the U.S. Supreme Court recognized that defining property under state constitutions was a matter of state law on which courts disagree. In its observation, the Supreme Court specifically acknowledged *Culliton* and *Jensen*, and their reliance on Washington's unique constitutional definition of property. 302 U.S. at 105 n.8.

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https://www.washingtonpolicy.org/publications/detail/washingtons-constitution-has-broadest-definition-of-property-in-the-country.

In particular, Intervenors cite *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 59 S. Ct. 595, 83 L. Ed. 927 (1939), for the proposition that "the U.S. Supreme Court has explicitly rejected the concept … that a tax on income is inherently the same as a property tax." Int. Br. 29-30. But that case simply held that New York state could validly tax the income of an employee of a federal government agency because taxing the employee's income was not a proxy for impermissibly taxing the federal government itself. *Graves*, 306 U.S. at 480. If anything, *Graves* undermines the State's claim because the Court recognized that "income … becomes the property of the taxpayer when received as compensation for his services." *Id*. So, too, do capital gains become the property of the taxpayer when received.

In short, *Culliton* and its progeny are firmly rooted in the law interpreting the Constitution of *this* State, and as discussed above, Washington courts and voters have embraced it and reaffirmed it many times since. As for Washington, "[t]he

Constitution of this state, so far as it bears upon the characterization of property, is *sui generis*." *Stiner*, 174 Wash. at 416-17. That other courts reach different conclusions under their respective state constitutions and laws—*see* Int. Br. 36—cannot establish that *Culliton* was clearly erroneous in its interpretation of a Washington constitutional amendment defining "property," then or now. As *Culliton* itself explained, "[n]one of the decisions from other states have any bearing upon the law before us, because of our peculiarly forceful constitutional definition and the difference in their constitutional authorization or restriction." 174 Wash. at 374. Intervenors' reliance on the Newhouse treatise and decisions of other states interpreting dissimilar constitutional provisions simply cannot prove that *Culliton* was incorrect or unfounded, as Intervenors admit they must do to overcome stare decisis.

3. Intervenors' historical context proves income taxes were considered taxes on property, subject to Article VII limitations.

The historical context of Amendment 14 underscores that

Culliton was correctly decided. Recounting the state's crisis and need for additional revenue in 1930, Intervenors assert that "Washington voters passed Amendment 14 to the Constitution to capture intangible property in the definition of 'property' …" Int. Br. 21. In particular, Intervenors zero in on income taxes:

> "At the time of the 1930 amendment's passage, many of its supporters believed that the new classification authority would allow the state to impose personal and corporate income taxes." Indeed, groups that favored income taxes were among the strongest supporters of Amendment 14. With this understanding, in 1931, the Legislature passed a personal, graduated income tax and a business income tax to create revenue streams that did not rely on real property taxes.… After the governor vetoed both measures, the people enacted the personal income tax by initiative in 1932.

Id. at 23-24 (citations and footnotes omitted). The personal income tax enacted in 1930 was the tax *Culliton* held to be unconstitutional.

Contrary to Intervenors' contention, the problem *Culliton* identified was not that a tax was levied on income, but that the income tax violated the uniformity provisions adhering to the

very constitutional provisions that purported to make a tax on income—a form of intangible property—permissible. Although the legislature could determine "the different rates upon which different classes of property shall be taxed," an income tax remained subject "to the limitations found in the new constitutional provisions." *See* Int. Br. 22 (quoting *State v. Wooster*, 163 Wash. 659, 663, 2 P.2d 653 (1931)).

Similarly here, the paradox that dooms Intervenors' reliance on the political history behind Amendment 14 to overrule *Culliton* is, again, the uniformity provision in Amendment 14 itself. *Culliton* did not rule that all taxes on income are prohibited. Rather, it ruled that taxes on income under the then-newly expansive definition of property must also comply with Article VII limitations applicable to other property taxes. Intervenors' historical recitation is useful, however, to show that at the time of its passage, Amendment 14's sweeping new language was generally understood to include income within intangible property.

4. The Court should decline Intervenors' invitation to conjure an unworkable definition of "income" out of whole cloth.

Intervenors' invitation to overrule *Culliton* should be rejected for the additional reason that they seek to replace a clear, well-functioning rule with a cumbersome and unworkable one with no textual basis. *See Otton*, 185 Wn.2d 683 (declining to overrule precedent where the party seeking to reject stare decisis "does not propose a workable analytical framework for future cases").

In seeking to overrule the constitutional definition of income as property here, Intervenors propose a new definition that is unworkable and factually inaccurate as to capital gains. Drawing support from century-old cases from several other states, Int. Br. 36, Intervenors ask the Court to redefine income as "something in motion, something that can either cease moving and itself become an income-producing asset (i.e., 'property') or that can alternatively be consumed and disappear." Int. Br. 35-36 (quoting Spitzer, 16 U. Puget Sound

L. Rev. at 570). The Court should decline these metaphysical musings on the nature of income and retain established constitutional law that has been applied for nearly a century.

When interpreting a constitutional provision, this Court presumes that "language carries its ordinary and popular meaning, unless shown otherwise" and that the language's context should also be considered. *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994). Referring to the definition of "property" in Amendment 14, Intervenors do not seriously contest that income is *not* encompassed within the term "everything," or that income is *not* "intangible." Instead, applying inapposite dictionary definitions, Intervenors ask the Court to rule that Washington citizens do not "own" income and so it cannot constitute property. Int. Br. 34-40. As to capital gains that have necessarily already been received by a Washington citizen in the prior calendar year—the gains that ESSB 5096 taxes—this contention is simply wrong.

Applying the "nature of income" concepts Intervenors themselves propose, *id.* at 35, capital gains are indeed a static asset that are not recurring because each capital transaction occurs one time and does not recur. Moreover, once capital gains are received, they are indisputably subject to taxpayer ownership, to be retained or disposed of as with any form of cash.

In proposing a vague definition of income as "something in motion,"[17] Intervenors also ignore the fact that, by operation of both RCW Chapter 82.87 and the federal income tax laws on which the State's tax is based, *see* RCW 82.87.020, income in the form of capital gains is no longer in "transit." Unlike an individual's entitlement to receive income *in the future* for past

[17] Intervenors quote *Sim v. Ahrens*, 271 S.W. 720, 732 (Ark. 1925), but that case discussed income "'during [the] period and process of its making,'" Int. Br. 37, in other words, income as an expectancy after it is earned but *before it is transferred.* Thus, an employee may have worked to *earn* income, but she only *realizes* income as salary and comes into ownership upon transfer *and receipt* of funds, at which time she certainly "owns" her income.

labor or services, taxable capital gains are not an expectancy but have necessarily been "realized" in the prior calendar year and subjected to taxpayer's "ownership."[18] Thus, Intervenors' invitation to adopt Professor Spitzer's impossibly vague definition of income as "something in motion" is both factually inaccurate and legally irrelevant to the statutory framework, which levies a tax on income previously received and subjected to ownership.

C. Intervenors Cannot Demonstrate That Maintaining *Culliton* Is Harmful.

Even if Intervenors could show that *Culliton* was wrongly decided, they cannot make a credible argument for disregarding stare decisis unless they also demonstrate that the existing rule causes "harm." *See Otton*, 185 Wash. 2d at 678 ("[T]his court will reject its prior holdings only upon 'a clear

[18] Nor are capital gains of a "*fluctuating and indeterminate nature,*" Int. Br. 37 (citation omitted), but they are received into ownership as a fixed sum in the calendar year before Washington taxes are assessed, and are subject to mathematically precise calculation.

showing that an established rule is incorrect *and harmful*.'") (quoting *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)) (emphasis added); *State v. Barber*, 170 Wn.2d 854, 871, 248 P.3d 494 (2011) ("It is not enough that a decision is incorrect for us to overrule it; we must also find that it is harmful."). The Intervenors have not shown harm sufficient to justify departing from stare decisis here, and the balance of harms unquestionably tips in favor of respecting citizens' settled expectations as to constitutional limits on taxing income.

In *Deggs*, for example, this Court decided that prior rulings on certain statutes of limitations "may have been incorrect," but the Court honored stare decisis because the *Deggs* plaintiff "ha[d] not shown that they are harmful" even though the rulings had the effect of barring some wrongful death claims. 186 Wash. 2d at 728. By contrast, the Court has also recognized harm sufficient to overcome stare decisis where the existing rule interferes with constitutional rights or

undermines otherwise applicable law. *See, e.g.*, *State v. W.R.*, 181 Wn.2d 757, 769, 336 P.3d 1134 (2014) (rule harmful because it violated due process protections); *Barber*, 170 Wn.2d at 871 (rule harmful because it was inconsistent with separation of powers principles and "undermine[d] the main purposes" of applicable law").[19]

Culliton is simply not harmful in a way that licenses the Court to overrule it. As a threshold matter, the voters are the best judges of what rules are "harmful" to them and their interests. In repeatedly and decisively electing to retain *Culliton*'s rule, *supra* 10-12, the voters have expressed their clear judgment that the decision is *not* harmful. This Court

[19] Cases overruling precedent on the ground that the underpinnings of the prior decision have disappeared also typically find harm from the overturned rule. *E.g.*, *State v. Lupastean*, 513 P.3d 781 (Wash. 2022) (racial discrimination in selection of juries); *Pierce*, 195 Wn.2d at 240-41 (death-qualification with racially disproportionate impact on juror selection); *W.G. Clark*, 180 Wn.2d at 61 ("blatant forum shopping and … inconsistent and unjust results for parties in Washington").

should not upend that consensus judgment and substitute its own evaluation of harm as a license to invalidate the very rule that the voters elected to retain. That is especially so because, as described below, overruling the decision would directly harm citizens who rely on *Culliton*, and Intervenors cannot show harm from maintaining the status quo.

1. Overruling *Culliton* would harm Washingtonians who have justifiably relied on *Culliton* and its progeny in structuring their lives and businesses.

As reflected by voters' repeated reaffirmations of *Culliton*, they rely on that case's settled rule in ordering their affairs. Stare decisis jealously protects citizens' personal reliance interests. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 457, 135 S. Ct. 2401, 192 L. Ed. 463 (2015) (Stare decisis is critical where citizens "rely on such precedents when ordering their affairs."). "Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision." *Deggs*, 186 Wn.2d at 729 n.9 (quoting *Hilton v. S.C. Pub. Rys.*

Comm'n, 502 U.S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991)). As the Court has recognized, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Key Design Inc. v. Moser*, 138 Wn.2d 875, 881-82, 983 P.2d 653 (1999) (citation omitted) (refusing to overrule 50-year-old rule regarding real property conveyances even though it was "harsh and outdated and produce[d] inconsistency and uncertainty"). And for these same reasons, stare decisis has particular force when property rights are threatened. *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (concerns of stare decisis are "at their acme" in cases involving contract and property rights); *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 45, 275 P. 74 (1929) (same).

In asking this Court to abandon *Culliton*, the Intervenors invite a holding that would upend the foundations of a tax system upon which Washingtonians have relied on for decades,

with devastating consequences for the State and its economy. If *Culliton* is overruled so that the tax can go into effect, residents who planned to fund retirements from selling or transferring businesses that have been in their families for generations must now consider altering their family and estate plans, and for many, even moving out of the state to preserve capital gains on which they had planned to retire. *See, e.g.*, CP 702, 716-17, 739-40, 798-99. Thousands will be required to alter long-standing retirement, family, and estate plans to account for a tax liability they understood to be constitutionally prohibited. *See, e.g.*, CP 688, 691, 698, 702, 705, 708, 716, 721, 739-40.

Intervenors' assurance that only the wealthiest will be taxed is demonstrably false. This is not a billionaire's tax, as Intervenors imply. In any given year, thousands of residents of relatively modest annual income who have worked their whole lives to build successful businesses will face tax liabilities on gains from one-time sales of those closely held family business interests—unless they relinquish the "privilege" of living in

Washington by first moving out of state. Several of the Plaintiffs-Respondents are facing exactly this decision. *See* CP 702, 716, 739-40, 798-99. Residents who move out of Washington will sever the most important relationships in their lives—family, community, educational, religious, and cultural organizations—to avoid a graduated tax on capital gains income that had been unconstitutional for their entire lives. *See, e.g.*, CP 716, 739-40, 798-99.

Stare decisis is therefore at its zenith in this case—which concerns the basic economic contract between state and citizen, and upon which individuals and businesses rely to "order[] their affairs." *See Kimble*, 576 U.S. at 457. Intervenors are, in essence, asking the Court to undermine citizens' "reliance on judicial decisions," and call into doubt "the actual and perceived integrity of the judicial process." *Key Design*, 138 Wn.2d at 882. And they are doing so in a context where the challenged constitutional rule has been repeatedly sustained by the voters whose reliance is at stake. In a democratic society

organized under a constitutional government of limited powers, the Court should not sanction that effort. If sentiment about taxes on income has changed, it is the voters who must express a will to change their Constitution through an initiative.

2. Intervenors failed to demonstrate that *Culliton* causes harm.

In any event, the arguments Intervenors make to this Court regarding harm are unsupported by evidence and are unpersuasive. Intervenors primarily argue that "*Culliton* is detrimental to the public interest in equitable taxation." Int. Br. 41. Intervenors argue that existing tax structures "exacerbate ***harm*** to low- and moderate-income earners and limit the State's ability to meet increasing demand for services." *Id.* at 43 (emphasis added). Intervenors submitted no admissible or persuasive evidence in the superior court that regressivity harms low-to-moderate income residents, and this court should not step into the breach by making findings of fact in the first instance on appeal, particularly in the absence of admissible evidence. On its face, RCW Chapter 82.87 does nothing to

reduce the tax burden on *any* of its low- and moderate-income residents, so maintaining the rule in *Culliton* cannot be a source of "harm" to these groups.

Although the Intervenors 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. Indeed, in 2017, the Washington State Legislature established the Tax Structure Work Group (TSWG) to identify options to make the Washington State tax code more fair, adequate, stable, and transparent.[20] The TSWG was created to facilitate public discussions throughout the state about the advantages and

[20] Tax Structure Work Group, Overview, https://taxworkgroup.org/overview (last visited Sept. 9, 2022). As of 2019, the TSWG is composed of bipartisan Washington State legislators, as well as representatives from the Governor's Office, the Washington State Department of Revenue, the Washington State Association of Counties (WSAC), and the Association of Washington Cities (AWC). *Id.*

disadvantages of the state's current and potential tax structure to inform recommendations to improve Washington State's tax structure to benefit individuals, families, and businesses in Washington State.[21]

Notwithstanding this alleged regressivity, in 2022, the TSWG recommended that the state *not* include a statewide income tax as a tax policy option.[22] Across all groups, "respondents did not feel that taxing income would be fairer than solely taxing retail spending and home value," and in particular, many people of color felt an income tax would be less fair.[23] Given the historic opposition to income taxes in Washington over the last century, the strong message citizens sent to the Tax Structure Work Group does not support the assertions made by Intervenors about the "need" for taxing

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[21] *Id.*

[22] Tax Structure Work Group, Meeting (Mar. 30, 2022), https://www.washingtonpolicy.org/library/docLib/FINAL-Mar-30-TSWG-Meeting-Slides-v2.pdf.

[23] *Id.* at 22, 46 ("People of color have a strong preference for the sales tax relative to their white counterparts.").

income to redress regressivity, and directly rebuts Intervenors' unfounded contentions about support for income taxes among "less well-off or marginalized communities."

For evidence, Intervenors rely primarily on legislative findings that the state tax system is "regressive." Int. Br. 43. Legislative findings made "as an incident to the process of making law" may be given deference, but legislative findings on elements of subsequent judicial determination—such as the element of "harm" under the test for overruling precedent—are not. *See City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270, 272, 534 P.2d 114 (1975) (collecting cases rejecting legislative determinations of facts that constitute an "element of adjudication"). Because "[t]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function," the legislature's findings cannot suffice to demonstrate "harm" that would warrant departure from *stare decisis* when constitutional issues are involved. *Id*. at 271. Accepting legislative declarations as sufficient evidence of

"harm" would undermine constitutional stability and government of the people, while at the same time eroding the separation of powers and impinging on this Court's sole prerogative to decide whether stare decisis should be maintained.

As to the legislative declaration that the tax will make Washington's tax structure less regressive, given that the State has taken no action to reduce the tax burden on less wealthy individuals, Intervenors' protests about a "regressive" tax structure are not only irrelevant to the constitutional issues presented, but they are entitled to no weight in assessing "harm."

Moreover, the Intervenors' declarations focus on the indisputable—that the Legislature must adequately fund education—but it is equally indisputable that taxes on income are not the sole source for education funding. As a result, Intervenors fail to make a direct connection between harm to education funding and the rule in *Culliton*. Indeed, Intervenors

do not mention the projected windfall of more than $10 billion in surplus revenues over original revenue estimates for the period 2021 through 2025, which belies the need for additional revenue.[24]

Further, as a matter of logic, the rule in *Culliton* does not itself prevent the State from meeting its paramount duty to fund education, and so long as other sources of tax revenue are available, which they are, it cannot cause the "harm" that is required to overrule even erroneous precedent. That additional taxes may be used for popular expenditures like education is not a ground for overturning long-settled law. Finding harm here justifying departure from stare decisis would make every precedent imposing constitutional limits on the Legislature's taxing powers vulnerable to the demands of state budgets and convenient declarations of the state legislature.

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[24] 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.

In the end, Intervenors' policy disagreements cannot dislodge the reality that the balance of harms tilts sharply in favor of maintaining *Culliton* because Washington citizens have structured their personal affairs, financial plans, and businesses in reliance on the continuity of the present constitutional order with respect to taxation, and the People have repeatedly voted to reject attempts to overturn *Culliton*.

V. CONCLUSION

For the reasons described above, the Court should maintain stare decisis and reject the invitation to overturn the basic constitutional law of this State with respect to taxation.

This document contains 9,908 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted September 8, 2022,

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CERTIFICATE OF SERVICE

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

Dated September 8, 2022.

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