FILED
SUPREME COURT
STATE OF WASHINGTON
10/7/2022 4:28 PM
BY ERIN L. LENNON
CLERK

No. 100769-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CHRIS QUINN, an individual; CRAIG LEUTHOLD, an individual; SUZIE BURKE, an individual; LEWIS and MARTHA RANDALL, as individuals and the marital community comprised thereof; RICK GLENN, an individual; NEIL MULLER, an individual; LARRY and MARGARET KING, as individuals and the marital community comprised thereof; and KERRY COX, an individual,

Respondents,

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,

Appellants,

EDMONDS SCHOOL DISTRICT, TAMARA GRUBB, 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, an individual; MATTHEW SONDEREN, an individual; JOHN McKENNA, an individual; WASHINGTON FARM BUREAU, WASHINGTON STATE TREE FRUIT ASSOCIATION, WASHINGTON STATE DAIRY FEDERATION,

Respondents,

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,

Appellants,

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

Intervenors.

INTERVENORS' REPLY BRIEF

PACIFICA LAW GROUP LLP
Paul J. Lawrence, WSBA #13557
Sarah S. Washburn, WSBA #44418
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
(206) 245-1700
Paul.Lawrence@pacificalawgroup.com
Sarah.Washburn@pacificalawgroup.com

Attorneys for Intervenors

TABLE OF CONTENTS

I INTRODUCTION 1

II. ARGUMENT IN REPLY 2

A. The Capital Gains Tax Is a Valid Excise Tax and Violates No Provision of the State or Federal Constitutions 2

B. An Income Tax Is Not a Property Tax, and the *Culliton* Line of Authority Should Be Overruled 2

1. Whether an Income Tax Is a Property Tax Is a Constitutional Question Properly Before This Court 3

2. *Stare Decisis* Is Not a Straightjacket Preventing Correction of Erroneous Understandings of the Constitution 8

a) *Stare Decisis* Does Not Bar Reexamination of *Culliton*'s and *Aberdeen*'s "Income Is Property" Statements 8

b) Treating an Income Tax as a Property Tax Results in Harm 21

c) Plaintiffs' Reliance Arguments Provide No Basis to Continue an Error in Constitutional Interpretation................................29

d) The Lochner Era Principles On Which *Culliton* Was Based Have Been Rejected 33

III. CONCLUSION 34

TABLE OF AUTHORITIES

Federal Cases

Ferguson v. Skrupa,
372 U.S. 726, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963)............. 33

Kimble v. Marvel Entm't, LLC,
576 U.S. 446, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015)....... 31

Lehnhausen v. Lake Shore Auto Parts Co.,
410 U.S. 356, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)........... 12

Lochner v. New York,
198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905).................... 33

Patterson v. McLean Credit Union,
491 U.S. 164, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)......... 5

People of the State of New York ex rel. Cohn v. Graves,
300 U.S. 308, 57 S. Ct. 466, 81 L. Ed. 666 (1937)............ 16, 18

Quaker City Cab Co. v. Pennsylvania,
277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928)...... 10, 11, 12

State Oil Co. v. Khan,
522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)............. 31

United States v. Carlton,
512 U.S. 26, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994)........... 30

Washington Cases

Aberdeen Sav. & Loan Ass'n v. Chase,
157 Wash. 351, 289 P. 536 (1930).................................... passim

Amalgamated Transit Union Local 587 v. State,
142 Wn.2d 183, 11 P.3d 762 (2000) 6

Buchanan v. Int'l Bhd. of Teamsters,
94 Wn.2d 508, 617 P.2d 1004 (1980)................................ 4, 5

Chaplin v. Sanders,
100 Wn.2d 853, 676 P.2d 431 (1984).................................... 7

City of Tacoma v. O'Brien,
85 Wn.2d 266, 534 P.2d 114 (1975)..............................passim

City of Tacoma v. Tax Comm'n,
177 Wash. 604, 33 P.2d 899 (1934) 30

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

Deggs v. Asbestos Corp. Ltd.,
186 Wn.2d 716, 381 P.3d 32 (2016)..................................... 31

Everett v. Adamson,
106 Wash. 355, 180 P. 144 (1919) 29

In re Estate of Hambleton,
181 Wn.2d 802, 335 P.3d 398 (2014).................................. 29

Japan Line, Ltd. v. McCaffree,
88 Wn.2d 93, 558 P.2d 211 (1977)....................................... 29

Jensen v. Henneford,
185 Wash. 209, 53 P.2d 607 (1936) 3, 6, 9, 33

Key Design Inc. v. Moser,
138 Wn.2d 875, 983 P.2d 653 (1999).................................. 31

Moran v. State,
88 Wn.2d 867, 568 P.2d 758 (1977).................................... 34

State ex rel. Egbert v. Gifford,
151 Wash. 43, 275 P. 74 (1929) 31

State ex rel. Stiner v. Yelle,
174 Wash. 402, 25 P.2d 91 (1933) 17

State v. Berlin,
133 Wn.2d 541, 947 P.2d 700 (1997) 21

State v. Blake,
197 Wn.2d 170, 481 P.3d 521 (2021) 4, 5

State v. McCuistion,
174 Wn.2d 369, 275 P.3d 1092 (2012) 23, 26

State v. Siers,
174 Wn.2d 269, 274 P.3d 358 (2012) 21, 22

State v. Wooster,
163 Wash. 659, 2 P.2d 653 (1931) 31

W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters,
180 Wn.2d 54, 322 P.3d 1207 (2014) 13

Wash. Bankers Ass'n v. State,
198 Wn.2d 418, 495 P.3d 808 (2021) 25

Wash. Mut. Sav. Bank v. Chase,
157 Wash. 351, 290 P. 697 (1930) 10, 11

Wash. Off Highway Vehicle All. v. State,
176 Wn.2d 225, 290 P.3d 954 (2012) 24, 25

Wash. State Highway Comm'n v. Pac. Nw. Bell Tel. Co.,
59 Wn.2d 216, 367 P.2d 605 (1961) 4, 5

Yim v. City of Seattle,
194 Wn.2d 682, 451 P.3d 694 (2019) 7

Other Cases

Bachrach v. Nelson,
182 N.E. 909 (Ill. 1932) 13, 14

Sims v. Ahrens,
271 S.W. 720 (Ark. 1925) 16, 17

Thorpe v. Mahin,
250 N.E.2d 633 (Ill. 1969) 14

Washington Statutes and Constitutional Provisions

Const. art. VII……………………………………………passim

RCW 82.87.010 22

RCW 82.87.040(1) 17, 30

RCW 82.87.070 32

Washington Rules

RAP 10.1(g).. 2

Other Authorities

Brief of Amici Curiae Allen et al., *Culliton v. Chase*, 174 Wash. 363 (1933) (No. 24491) 14

Brief of Respondents Culliton, *Culliton v. Chase*, 174 Wash. 363 (1933) (No. 24491) 14

Brief of Respondents McKale's, Inc., et al., *Culliton v. Chase*, 174 Wash. 363 (1933) (No. 24491) 14

Charles Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889-1991* (1992)....... 34

Hugh D. Spitzer, *A Washington State Income Tax—Again?,*
16 U. Puget Sound L. Rev. 515 (1993) 7, 11, 33, 34

Tax Structure Work Group Meeting (Mar. 30, 2022),
https://www.washingtonpolicy.org/library/docLib/FINAL-Mar-30-TSWG-Meeting-Slidesv2.pdf. 27

I. INTRODUCTION

Both the Quinn and Clayton Plaintiffs ask this Court to affirm the trial court, but their respective arguments contradict each other. Quinn argues policy is irrelevant and criticizes the State for allegedly making a policy argument. Clayton fundamentally argues policy choices made by voters should control the outcome here. But neither the State nor the Intervenors argue this case should be decided based on policy considerations. This is a constitutional case that should be decided based on this Court's characterization of what constitutes an excise tax. Alternatively, if this Court believes a capital gains tax is a form of property tax under this Court's precedent, then it should conduct a hard substantive evaluation of the weaknesses inherent in the underpinnings of *Culliton v. Chase*, 174 Wash. 363, 25 P.2d 81 (1933) and its progeny, the true meaning of our Constitution's 14th Amendment as understood by the voters and legislators who adopted it, and the near-unanimous holdings of courts around the country that have

recognized that even broad-based income taxes are not property taxes. Either way, the trial court erred. This Court should reverse and uphold the capital gains tax.

II. ARGUMENT IN REPLY

A. The Capital Gains Tax Is a Valid Excise Tax and Violates No Provision of the State or Federal Constitutions.

For the reasons stated in the State's Opening and Reply Briefs, the capital gains tax is a valid excise tax not subject to article VII's restrictions on property taxes. Nor does the tax violate the state Privileges and Immunities Clause or the federal dormant Commerce Clause. Intervenors adopt by reference the arguments in the State's briefs, and respectfully request that this Court reverse the trial court and uphold the tax. *See* RAP 10.1(g).

B. An Income Tax Is Not a Property Tax, and the *Culliton* Line of Authority Should Be Overruled.

In the event the Court instead rules the capital gains tax is a tax on income that should be treated as a property tax under this Court's cases, it should overturn the line of cases characterizing income as "property" for purposes of article VII. Plaintiffs'

arguments to the contrary are grounded largely in political rather than legal arguments and inapposite authorities. The legal underpinnings of *Culliton* were always flawed, have since disappeared, and the *Culliton* line of authority is incorrect and harmful. *Stare decisis* does not control.

1. Whether an Income Tax Is a Property Tax Is a Constitutional Question Properly Before This Court.

In referring repeatedly to popular votes on income tax proposals, Plaintiffs mischaracterize their position as a request that the Court leave tax decisions to the legislative or political process. In reality, Plaintiffs are trying to prevent voters and the Legislature from making tax decisions. This Court's decisions in *Culliton* and *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936), struck down voter- and Legislature-enacted statewide income taxes and created a barrier to voter control over state tax policy. Only this Court can correct those erroneous decisions, and it must do so based on constitutional considerations, not policy ones. Whether article VII, section 1's requirement that

property taxes be uniform applies to income taxes is purely a legal question. "The construction of the meaning and scope of a constitutional provision is exclusively a judicial function." *Wash. State Highway Comm'n v. Pac. Nw. Bell Tel. Co.*, 59 Wn.2d 216, 222, 367 P.2d 605 (1961). Deciding whether an income tax is a property tax for uniformity purposes falls squarely within this Court's exclusive authority to interpret the Constitution.

Citing *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021) and *Buchanan v. Int'l Bhd. of Teamsters*, 94 Wn.2d 508, 617 P.2d 1004 (1980), Plaintiffs claim *stare decisis* is of "paramount importance" here because voters have "acquiesced" in *Culliton*'s holding. Clayton Br. at 17–19. But their attempt to apply the "legislative acquiescence" principle articulated in those cases is unsupported and contrary to those and other cases from this Court.

Buchanan and *Blake* declined to overrule judicial interpretations of **statutes** on the grounds that the Legislature acquiesced in those interpretations by declining to amend the

statutes after this Court construed them. *Buchanan*, 94 Wn.2d at 511; *Blake*, 197 Wn.2d at 190–92. But the present case involves constitutional, not statutory, interpretation. In *Blake*, this Court expressly distinguished these two contexts in noting that *stare decisis* holds particular sway where **statutory interpretation** is concerned: "This is why '[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, **unlike in the context of constitutional interpretation**, the legislative power is implicated, and Congress remains free to alter what we have done.'" *Blake*, 197 Wn.2d at 190–91 (emphasis added) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)).

Legislative enactments (or lack thereof) are inapplicable to constitutional interpretation: "The constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision." *Wash. State Highway Comm'n*, 59 Wn.2d at 222. The same is

true for the people acting in their legislative capacity. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 204, 11 P.3d 762 (2000) (in exercising the initiative power, the people are subject to the same constitutional mandates as the Legislature). Accordingly, whether the people have approved or disapproved income tax measures provides no insight into the meaning of the Constitution. Indeed, under Plaintiffs' reasoning, *Culliton* and *Jensen* were wrongly decided because they thwarted popular and legislative attempts to levy income taxes. Regardless, none of the votes Plaintiffs reference involved a capital gains tax.

Plaintiffs' suggestion that a constitutional amendment is the only appropriate path forward similarly misses the point. Clayton Br. at 2, 24. A constitutional amendment is unnecessary if *Culliton* was wrongly decided (as it was). If *Culliton* is overturned, the Legislature and the people will have the option to enact various income taxes to address, among other policy choices, the regressive nature of Washington's tax code. And

Plaintiffs' citation to the handful of cases that have re-affirmed *Culliton* does not change this. If *Culliton* is no longer good law, then the line of authority relying on it is no longer good law. This Court has previously overruled much more substantial lines of authority deemed incorrect, and should do the same here. *See Chaplin v. Sanders*, 100 Wn.2d 853, 860–62 & n.2, 676 P.2d 431 (1984) (overruling dozens of cited cases "and any other Washington cases" contrary to Court's ruling on adverse possession hostility determination); *Yim v. City of Seattle*, 194 Wn.2d 682, 692–93, n.3, & Appendix, 451 P.3d 694 (2019) (providing "nonexclusive list" of over 60 cases that can no longer be interpreted as requiring heightened scrutiny in article I, section 3 challenges).[1]

[1] Plaintiffs also claim the critique of *Culliton* in Hugh D. Spitzer, *A Washington State Income Tax—Again?*, 16 U. Puget Sound L. Rev. 515 (1993), "missed the mark" because no court has adopted it. Clayton Br. at 23 n.11. But Plaintiffs identify no case in which this Court (the only court that can overrule *Culliton*) considered the merits of Professor Spitzer's article.

In sum, Plaintiffs' claim that *Culliton* and progeny are not subject to change absent legislative action or constitutional amendment is groundless. This Court can and should correct prior erroneous constitutional interpretations. Of course, doing so does not mean income taxes are enacted into law. Whether the Legislature or the people chose to enact some form of income tax in addition to a capital gains tax is a matter subject to politics and is not inevitable.

2. ***Stare Decisis*** **Is Not a Straightjacket Preventing Correction of Erroneous Understandings of the Constitution.**

a.) ***Stare Decisis*** **Does Not Bar Reexamination of** ***Culliton*'s and *Aberdeen's*** **"Income Is Property" Statements.**

Plaintiffs' attempt to preserve *Culliton* through the rigid application of *stare decisis* should be rejected. First, Plaintiffs mischaracterize Intervenors' argument regarding *Aberdeen Sav. & Loan Ass'n v. Chase*, 157 Wash. 351, 289 P. 536 (1930). Intervenors argue that *Culliton* relied solely on *Aberdeen* for the statement that it had been "'definitely decided in this state that

an income tax is a property tax, which should set the question at rest here,'" not that *Culliton*'s constitutional analysis of **Amendment 14** was based solely on *Aberdeen*. Int. Br. at 25 (quoting *Culliton*, 174 Wash. at 376); Clayton Br. at 27. Plaintiffs do not dispute that *Aberdeen* is the sole authority cited in support of that direct quote in *Culliton*. When *Aberdeen* was decided, Amendment 14 had not been ratified and there was no definition of property in the Constitution. Nevertheless, *Culliton* (and later *Jensen*) cited *Aberdeen* as precedent for their holdings. 174 Wash. at 376; 185 Wash. at 217–18. Though *Culliton* also relied on what it considered the "weight of judicial authority" and Amendment 14's definition of property in reaching its holding (see *infra*), *Aberdeen* was of obvious importance in the Court's "income is property" conclusion.

Second, Plaintiffs are incorrect that *Aberdeen*'s holding (and thus *Culliton*'s conclusion that it had already been decided "that an income tax is a property tax," citing *Aberdeen*) were based on separate state law underpinnings. *Aberdeen*'s only

substantive analysis was of the federal Equal Protection Clause under federal case law. This Court was clear when it denied rehearing in *Aberdeen*: "In order to clarify the situation, the court now states that the opinions above cited were rendered with a view to determining the questions presented by the cases at bar, and those questions only; that the majority of the court was of the opinion that the legislation therein attacked must be held, **under the decisions of the Supreme Court of the United States**, to attempt to establish a property and not an excise or corporation franchise tax . . . ." *Wash. Mut. Sav. Bank v. Chase*, 157 Wash. 351, 392, 290 P. 697 (1930) (emphasis added).[2] The Court made this clarification to address a concern that *Aberdeen* could be

---

[2] Plaintiffs claim Intervenors mischaracterize this quote by referring in brackets to the federal Equal Protection case *Aberdeen* relied upon, *Quaker City Cab Co. v. Pennsylvania,* 277 U.S. 389, 48 S. Ct. 553, 72 L. Ed. 927 (1928). Not so. This Court was referring to decisions of the Supreme Court, specifically *Quaker City*, as the basis for its conclusion that the tax at issue was a property and not an excise tax. *See Aberdeen*, 157 Wash. at 361–65; *Wash. Mut. Sav. Bank*, 157 Wash. at 391–92. No Washington authorities were cited for that principle.

construed to apply to other taxes—i.e., a state income tax. *Id*. at 391; *see also* Spitzer, 16 U. Puget Sound L. Rev. at 550–51. This Court cautioned that *Aberdeen* "should not be construed as determining any question which was not before the court, and the language of the opinions should be limited to the matters expressly decided." *Wash. Mut. Sav. Bank*, 157 Wash. at 392. This express limitation of *Aberdeen* confirms that the Court did not hold income is property under Washington law, much less under the Washington Constitution.

This Court's denial of rehearing undermines Plaintiffs' claim that defining income as property under Washington law was "essential" to finding an Equal Protection violation. *See* Clayton Br. at 30 & n.12.[3] And Plaintiffs' citation to Justice

[3] *Aberdeen* characterized the tax at issue solely by comparing it to the one invalidated in *Quaker City*: "The tax here sought to be levied is, as was stated by the Supreme Court of the United States in the case of [*Quaker City*], as above quoted, 'one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. . . .'" 157 Wash. at 364 (quoting *Quaker City*, 277 U.S. at 402); *see also id.* at 364–65 ("the principles upon which the Supreme Court of the United

Fullerton's dissent in *Aberdeen* supports Intervenors. Though Justice Fullerton stated he had "difficulty in understanding" the majority's reasoning, he made clear his view that the majority relied on federal case authority in holding the tax was on property and not franchises. *Aberdeen*, 157 Wash. at 380–90 (Fullerton, J. dissenting); *see also id*. at 376–79 (Holcomb, J., dissenting).

There is no dispute that *Quaker City* was overturned. *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 365, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973). Thus, *Quaker City*'s federal Equal Protection analysis, the only basis for the result in *Aberdeen*, is no longer good law. Plaintiffs claim *Lehnhausen* does not undermine the "state-law basis of *Culliton*'s holding that income is property." Clayton Br. at 31. But as noted above, *Culliton* cited only *Aberdeen* in holding it had "been definitely decided in this state that an income tax is a property tax"—a conclusion that guided the remainder of the Court's analysis.

States held the statute of the state of Pennsylvania unconstitutional are extremely pertinent here").

In sum, the legal underpinnings for the conclusion in *Aberdeen* (and thus *Culliton* and its progeny) that income is property have been rejected. *Stare decisis* does not require this Court to adhere to such precedent. *See W.G. Clark Constr. Co. v. Pac. Nw. Reg'l Council of Carpenters*, 180 Wn.2d 54, 66, 322 P.3d 1207 (2014).

Third, Plaintiffs erroneously claim the *Culliton* Court was referring to "Washington's *own* decisional authority" in stating "[t]he overwhelming weight of judicial authority" is that income is property. Clayton Br. at 35; *Culliton*, 174 Wash. at 374. But prior to *Aberdeen*, Washington courts did not hold income was property.[4] Nor, prior to *Culliton*, had any court applying Amendment 14 so held. There simply was no Washington authority supporting this premise. The *Culliton* briefing makes clear that the Court's statement derived from a misstatement in *Bachrach v. Nelson*, 182 N.E. 909, 914–15 (Ill. 1932), where the

[4] As argued above, nor did *Aberdeen* hold income is property under state law.

Illinois Supreme Court held income is property based on a mistaken claim that the "overwhelming weight of judicial authority" so held. *See* Br. of Amici Curiae Allen et al. at 9–10, *Culliton*, 174 Wash. 363 (No. 24491) (quoting from *Bachrach*); Br. of Respondents Culliton at 7–10, *Culliton*, 174 Wash. 363 (No. 24491) (same); Br. of Respondents McKale's, Inc. et al. at 57–62, *Culliton*, 174 Wash. 363 (No. 24491) (discussing cases, including *Bachrach*, that invalidated graduated income taxes). Subsequently, the Illinois Supreme Court definitively overruled that statement in *Thorpe v. Mahin*, 250 N.E.2d 633, 635 (Ill. 1969), finding "the weight of authority to be that an income tax is not a property tax." *Culliton*'s erroneous statement regarding the weight of authority, however, has never been reexamined and corrected.[5]

---

[5] Plaintiffs claim *Culliton* "largely disregarded" out of state authority. A closer read indicates the Court disregarded authority that conflicted with its view of income as property. *See Culliton*, 174 Wash. at 374–77 (distinguishing cases from Wisconsin, Idaho, and Montana upholding income taxes). The Court did not

Professor Wade Newhouse also examined the jurisprudence and found that the majority of courts in the *Culliton* era held an income tax is not a property tax. *See* Int. Br. at 31–34. Plaintiffs offer no authority refuting this conclusion. Rather, Plaintiffs cite differences in constitutional language as well as what *Culliton* termed Washington's "peculiarly forceful" definition of property. Clayton Br. at 36–40. But these observations do not refute Intervenors' point here: *Culliton*'s statement that the weight of authority characterized income as property was incorrect and unfounded. Similar to the Court's misplaced reliance on *Aberdeen*, this is yet another leg of *Culliton* that collapses under scrutiny.

Fourth, Plaintiffs assume that because the constitutional definition of property—"everything, whether tangible or intangible, subject to ownership"—is broad, it must include income. Intervenors do not deny the definition is broad. But it

---

disregard what it erroneously believed was the "weight of judicial authority" holding income is property. *Id*. at 374.

does not answer the question whether income is subject to ownership in the same way as a tangible asset like real estate, automobiles, or artwork, or an intangible asset like stocks, bonds, goodwill, or trademarks—things that can be valued and assessed as property. Income can certainly be used to acquire assets like real estate or stocks. But it is well established that income itself is distinct from property, and is necessarily taxed differently. Income, for example, is measured and taxed as earned over a defined period of time (i.e. a calendar year). It is not subject to fluctuation in value such as from the impact of inflation. Property is measured at a value assessed at a point in time (i.e. the assessment date for valuation of real property) reflecting market impacts, inflation, and other indicia of value. *See, e.g., People of the State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 314, 57 S. Ct. 466, 81 L. Ed. 666 (1937) (income taxes and property taxes "are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date"); *Sims v. Ahrens*,

271 S.W. 720, 732 (Ark. 1925) ("a tax on the right to own and enjoy the use of property is one thing, while a tax on the income derived from such use is an entirely different thing"). This Court recognized the distinction between income and property in *State ex rel. Stiner v. Yelle*, 174 Wash. 402, 407, 25 P.2d 91 (1933), upholding the 1933 occupation tax and explaining that whether a tax "is measured by . . . income in no way affects" whether it is a tax on property for purposes of article VII.

Plaintiffs challenge this understanding of income as "unworkable and factually inaccurate as to capital gains" on the theory that capital gains are "realized" and subjected to the taxpayer's "ownership" in the prior calendar year before the tax becomes due. Clayton Br. at 43-46. But this argument makes no sense. The capital gains tax is imposed at the time the capital asset is sold, RCW 82.87.040(1), not at the time the tax is reported and collected. That income—just like income from wages—may be used to acquire assets (property) prior to the tax coming due, does not make a tax on the receipt of capital gains

"unworkable." To the contrary, it is settled law that the government may impose a tax measured by the amount of income received over a period of time and separately impose a tax on property purchased with that income. *Cohn*, 300 U.S. at 314–15. There is nothing peculiar about the receipt of income from the sale of capital assets that precludes this Court from reexamining *Culliton* or the outdated notion that "income is property."

Moreover, Plaintiffs do not challenge the general premise that states may impose income taxes based on the privilege of enjoying the benefits of state citizenship, but claim the capital gains tax "purports to levy a tax on the privilege of engaging in *transactions*," not on the privilege of state citizenship. Clayton Br. at 22 n.10. The State may legally assess a tax based on the transactional sale of real property or goods at a store. If the tax is on transactions, it is a valid excise tax. *See* State's Br. at 18-47; State's Reply Br. But the Quinn Plaintiffs argue the tax is on income. Quinn Br. at 21-25. In the event the Court so holds, it

should adopt the view, accepted by many courts, that such a tax is an excise for the privileges of living in the State. *See* Int. Br. at 43-50.[6]

Finally, Plaintiffs present no authority countering Intervenors' detailed history of Amendment 14's purpose: to tax intangible property in which wealth could be hidden and which had previously evaded taxation. Int. Br. at 18-24. Nor do Plaintiffs dispute that many of Amendment 14's supporters favored income taxes. *Id*. at 23. Instead, citing *Culliton*, Plaintiffs summarily assert income is "a form of intangible property" that was generally understood as encompassed within Amendment 14's definition of property. Plaintiffs thus imply that income tax supporters believed any such tax would be subject to article VII's uniformity requirement. Clayton Br. at 41-42.

---

[6] Alternatively, such a tax could be characterized as *sui generis*. *See* Int. Br. at 50-52. Either way, it is not a property tax.

Contrary to Plaintiffs' claim, *Culliton* sheds no light on the history of Amendment 14 or what the people believed in passing it. Amendment 14 had nothing to do with income and everything to do with expanding taxation to capture wealth that was increasingly being moved from real property (taxed) to intangible property (not taxed). That concern does not support characterizing income as property, as income is not an asset into which wealth can be transferred. And contrary to Plaintiffs' view that Amendment 14 was intended to require uniformity in income taxation, the Amendment immediately was followed by the passage of a graduated personal income tax. It is unlikely the Legislature and the people approved Amendment 14 in 1930 believing it to bar graduated income taxes (as Plaintiffs claim) when less than a year later the Legislature passed such a tax (which was vetoed), and a year after that the people directly enacted it.

b.) Treating an Income Tax as a Property Tax Results in Harm.

Plaintiffs mischaracterize both the standard for showing harm justifying departure from *stare decisis* and the nature of the harm here.

To start, Plaintiffs cite no authority requiring "admissible evidence"[7] of harm to overturn prior incorrect precedent. Clayton Br. at 5–6, 53–54. To the contrary, this Court often has found harm warranting departure from *stare decisis* based on broad public interest considerations without any discussion of whether "admissible evidence" supported that determination. *See, e.g., State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (prior lesser included offense rule was "inequitable in that it precludes a lesser included offense instruction whenever a crime may be statutorily committed by alternative means"); *State v. Siers*, 174

[7] Ironically, Plaintiffs challenge the "admissibility" of evidence of harm, but they counter Intervenors' harm arguments with documents not presented to the trial court below. *See* Clayton Br. at 54–58 (citing Tax Structure Work Group (TSWG) PowerPoint and Washington Policy Center publication).

Wn.2d 269, 281–83, 274 P.3d 358 (2012) (prior rule regarding aggravated sentencing factors was "harmful to the public interest because it wastes valuable judicial resources and imposes too heavy a burden on the criminal justice system").

Here, the detriment to the public interest is well-established and sufficient to depart from *stare decisis*. Plaintiffs do not dispute the public interest in equitable taxation. *See* Int. Br. at 41–42. As the Legislature found, Washington's tax system is "the most regressive in the nation" and disproportionately burdens low- and moderate-income residents. RCW 82.87.010. Plaintiffs do not meaningfully dispute these findings. The Legislature passed the capital gains tax to invest in the ongoing support of education and early learning and childcare without worsening these burdens. *Id*. Plaintiffs do not dispute the benefit from additional investment in these areas. To the extent this Court rules the capital gains tax an invalid tax on property, *Culliton*'s incorrect treatment of an income tax as a property tax stands in the way of the State's ability to make needed public

investments in a fair way. More broadly, the relationship between the current bar on the State's ability to adopt progressive taxation in the form of an income tax and Washington's continued reliance on regressive tax structures is apparent.

Plaintiffs acknowledge that this Court defers to legislative findings of fact. Clayton Br. at 56; *State v. McCuistion*, 174 Wn.2d 369, 391, 275 P.3d 1092 (2012); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 270–71, 534 P.2d 114 (1975). Nevertheless, they claim the Legislature's findings cannot support overturning *Culliton* here. Plaintiffs are wrong, for several reasons.

First, Plaintiffs misread *City of Tacoma* in arguing the consideration of legislative findings of fact in making a legal determination of harm is prohibited. Clayton Br. at 56. Not so. In *City of Tacoma*, this Court considered legislation that found a substantial increase in the cost of petroleum products had rendered many public works contracts "economically impossible." 85 Wn.2d at 269–70. The Court explained that

while a court will not controvert legislative findings of fact, under separation of powers principles "the legislature is precluded . . . from making judicial determinations," i.e., "legal conclusions." *Id*. at 271–72. The Court held the Legislature's attempt to adjudicate economic impossibility of existing contracts violated separation of powers. *Id*.

Under *City of Tacoma*, while the **Legislature** can find facts such as "a worldwide shortage of petroleum exists," or "certain public conditions exist," it cannot determine legal liability or make judicial determinations. *Id*. at 270–72 (collecting cases). But *City of Tacoma* in no way bars **courts** from making judicial determinations based on proper legislative findings of fact. This Court routinely does so. *See, e.g., Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 236–37, 290 P.3d 954 (2012) (Owens, J., lead opinion) ("This case certainly involves interpreting what constitutes a refund under article II, section 40. But the legislative finding that the appropriation will benefit affected taxpayers is not a legislative finding that the

appropriation is a refund. Instead, the finding is simply a statement about how the appropriation will impact certain groups, not a constitutional interpretation. We therefore defer to the legislature on this finding."); *Wash. Bankers Ass'n v. State*, 198 Wn.2d 418, 443-44, 495 P.3d 808 (2021) (relying in part on findings similar to those in the capital gains tax in determining graduated B&O tax was nondiscriminatory).

The Legislature did not make prohibited "adjudicative findings" in passing the capital gains tax. The Legislature's findings regarding the nature of Washington's regressive tax system, the inequitable tax burden low- and middle-income residents bear, and the intent of the capital gains tax are factual statements about how Washington's tax system impacts certain groups and how the capital gains tax will impact that system. These findings fall squarely within the types of findings deemed "factual" by this Court. *See City of Tacoma*, 85 Wn.2d at 270–71 (listing examples); *Wash. Off Highway Vehicle All.*, 176 Wn.2d at 236 (noting legislative finding of fact that an

appropriation would "benefit boaters and off-road vehicle users and others who use nonhighway and nonmotorized recreational facilities"). The Legislature did not make any determination of harm resulting from continued application of *Culliton*, nor did it determine that *stare decisis* should not bar overturning *Culliton.* Any such determination must be made by this Court.

Further, to the extent Plaintiffs suggest the Legislature's findings are not supported by independent "evidence," Clayton Br. at 56–57, such evidence is unnecessary. "Legislatures must necessarily make inquiries and factual determinations as an incident to the process of making law, and courts ordinarily will not controvert or even question legislative findings of facts." *City of Tacoma*, 85 Wn.2d at 270. This Court has rejected similar requests that it delve into the basis for legislative findings, and should do the same here. *See McCuistion*, 174 Wn.2d at 391 (declining to inquire into the "degree of scientific rigor underlying" the legislative findings at issue).

Plaintiffs' remaining arguments similarly miss the mark. Public opinion on income taxes is irrelevant to whether *Culliton* causes harm in limiting the State's options for equitable taxation.[8] And Plaintiffs' claims regarding the health of the State budget and availability of other revenue sources for education likewise miss the point. The constitutionality of an income tax does not depend on whether the State is experiencing an economic boom or whether other sources of tax revenue are available. The bar on progressive taxes, such as income taxes, harms the State's ability to raise revenue **equitably**.

---

[8] Plaintiffs repeat their erroneous voter acquiescence claim and also cite a March 2022 TSWG PowerPoint as evidence of public opinion, but overstate the document as "recommend[ing] that the state not include a statewide income tax," when the document itself makes clear that policy recommendations will occur later in 2022. Clayton Br. at 55; TSWG, Mar. 30, 2022 Meeting at 8–10, https://www.washingtonpolicy.org/library/docLib/FINAL-Mar-30-TSWG-Meeting-Slides-v2.pdf. And it is apparent that the TSWG's hesitancy on income taxes is due in substantial part to this Court's decisions holding such taxes unconstitutional, which supports Intervenors. *See id*. at 54, 77–78.

Finally, Plaintiffs view the harm too narrowly in claiming that neither the capital gains tax nor "any other legislation" will reduce existing tax burdens on low- or moderate-income residents. Clayton Br. at 53–54. The capital gains tax is intended to help rebalance the State's tax code such that wealthier individuals pay more of their fair share of the cost of state government. In raising revenues for education via the capital gains tax, rather than a tax applicable to low- and moderate-income residents, the State avoids placing additional burdens on those least able to pay. To the extent *Culliton*'s erroneous ruling precludes such a tax (or any progressive tax on income), the public interest in equitable taxation is thwarted—a harm sufficient to depart from *stare decisis*.

c.) Plaintiffs' Reliance Arguments Provide No Basis to Continue an Error in Constitutional Interpretation.

Plaintiffs attempt to turn the harm analysis on its head by claiming they have "relied" on not having to pay an income tax. This argument is contrary to law and common sense.[9]

First, there is no right to "rely" on living free of any specific taxes in perpetuity. The Legislature has "broad plenary powers in its capacity to levy taxes." *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 96, 558 P.2d 211 (1977). The Legislature can and does frequently impose and repeal taxes of varying nature, and there is no "vested right" in a prior tax scheme. *In re Estate of Hambleton*, 181 Wn.2d 802, 829, 335 P.3d 398 (2014); *see also Everett v. Adamson*, 106 Wash. 355, 358, 180 P. 144 (1919) (there is "'no vested right in the continuance of any particular tax or method of taxation, or any

---

[9] It bears mentioning that Plaintiffs' allegation of harm is made on behalf of approximately 7,000 individuals, or less than one in every thousand Washingtonians, who will owe the capital gains tax in the first year. *See* Int. Br. at 9–10 & nn.3–4.

vested right securing one against the imposition of new taxes or the levy on a new basis'" (quoting 12 Corpus Juris, p. 967)); *United States v. Carlton*, 512 U.S. 26, 33, 114 S. Ct. 2018, 129 L. Ed. 2d 22 (1994) ("Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code."). Thus, no taxpayer can reasonably rely on being forever free from certain types of taxation. *See City of Tacoma v. Tax Comm'n*, 177 Wash. 604, 615, 33 P.2d 899 (1934) (contracts must always be entered into with knowledge that the government may at any time exercise its power of taxation).

The capital gains tax does not tax any prior gains, only those starting in 2022. RCW 82.87.040(1). Even if the tax was not contemplated by taxpayers before its enactment, this does not amount to harm in the constitutional sense. *See Carlton*, 512 U.S. at 33–34 ("An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.").

The cases Plaintiffs cite regarding "personal reliance interests" are inapposite. *See* Clayton Br. at 49–50. Those cases primarily involved contract or property rights or accrued claims, not taxation.[10] The only taxation-related case, *State ex rel. Egbert v. Gifford*, 151 Wash. 43, 275 P. 74 (1929), was decided pre-Amendment 14 and applied a narrow view of the Legislature's taxation power that this Court later rejected. *See State v. Wooster*, 163 Wash. 659, 661–64, 2 P.2d 653 (1931). These cases do not establish any right to rely on an existing taxation system.

Second, Plaintiffs' suggestion that those subject to the capital gains tax are harmed because they expected to fund

[10] *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 457, 135 S. Ct. 2401, 192 L. Ed. 2d 463 (2015) (decision involved "property (patents) and contracts (licensing agreements)"); *State Oil Co. v. Khan*, 522 U.S. 3, 20–22, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (decision implicated property and contract rights but Court nevertheless overruled it); *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 727–33 & n.9, 381 P.3d 32 (2016) (decision governed accrual of wrongful death cause of action), *Key Design Inc. v. Moser*, 138 Wn.2d 875, 881–82, 983 P.2d 653 (1999) (decision required correct legal description of property to satisfy statute of frauds).

retirements from selling family businesses tax-free does not hold water. Clayton Br. at 51. This argument is a variation of Plaintiffs' reliance claim, which is wrong as discussed above. Moreover, the capital gains tax includes a family-owned small business deduction applicable to the capital gains derived from sale or transfer of the taxpayer's interest in such a business. RCW 82.87.070. This deduction, as well as exemptions applicable to real estate and retirement accounts (among others), protect the very interests Plaintiffs allege here are harmed.

Finally, to the extent Plaintiffs assume overruling *Culliton* will result in statewide taxation of income more broadly, they put the cart before the horse. Intervenors seek only to validate adoption of an income tax as a constitutional option for the State. Any such tax must be enacted through the normal legislative process. If Plaintiffs oppose such a tax, they may voice their disapproval through that process—including at the ballot box.

d.) The Lochner Era Principles On Which Culliton Was Based Have Been Rejected.

Culliton and *Jensen* were decided during what is referred to in the history of American jurisprudence as the Lochner era, named for the pivotal case of judicial activism, *Lochner v. New York,* 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). Cases of that era frequently invalidated on substantive due process grounds statutes that limited economic autonomy in a manner thought by the Court to be unnecessary or unwise. *Ferguson v. Skrupa*, 372 U.S. 726, 729–30, 83 S. Ct. 1028, 10 L. Ed. 2d 93 (1963). But more recently, the Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Id*. at 730.

This Court was not immune from Lochner era judicial activism. Professor Spitzer notes "it is reasonable to suggest that" the core of the *Culliton-Jensen* majority "fell into a conservative school of economic and legal thought that for decades had viewed income taxes and other attempts to separate people from

their wealth with extreme distrust" and that the 1930s Washington Supreme Court "tilted strongly toward the 'substantive due process' doctrines developed by the United States Supreme Court during the previous decades." Spitzer, 16 U. Puget Sound L. Rev. at 544 (citing Charles Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court, 1889–1991*, at 17 (1992)). To the extent *Culliton* was grounded in these now-discarded principles, overturning this line of authority would bring the Court in line with the modern (and correct) approach to judicial review of legislative action. *See Moran v. State*, 88 Wn.2d 867, 875, 568 P.2d 758 (1977) ("It is not within our power to invalidate legislation because we think it might be unwise.").

III. CONCLUSION

The capital gains tax is a valid excise tax and should be upheld as such. But if this Court holds the tax is a property tax, the Court's cases holding income is property rest on faulty

premises and should be overruled. Either way, this Court should reverse the trial court and uphold the tax.

This document contains 5,994 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 7th day of October, 2022.

PACIFICA LAW GROUP LLP

By *s/ Paul J. Lawrence*
Paul J. Lawrence, WSBA #13557
Sarah S. Washburn, WSBA #44418

Attorneys for Intervenors

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this date I caused a true copy of the foregoing document to be served via the Washington State Appellate Portal's e-filing service and electronic mail to the following parties by agreement:

Scott Edwards
Callie Castillo
Lane Powell PC
1420 Fifth Avenue, Suite 4200
Seattle, WA 98101-2375
EdwardsS@lanepowell.com
CastilloC@lanepowell.com
CraigA@lanepowell.com
Docketing@lanepowell.com

Robert McKenna
Amanda McDowell
Daniel Dunne
Orrick Herrington & Sutcliffe
701 Fifth Avenue, Suite 5600
Seattle, WA 98104
rmckenna@orrick.com
Amcdowell@orrick.com
ddunne@orrick.com
abrecher@orrick.com
lpeterson@orrick.com
CaseStream@orrick.com

Daniel A. Rubens
Orrick, Herrington & Sutcliffe, LLP
51 West 52nd Street
New York, NY 10019-6142
drubens@orrick.com

Eric Stahlfeld
c/o The Freedom Foundation
P.O. Box 552
Olympia, WA 98507
EStahlfeld@freedomfoundation.com
KElder@freedomfoundation.com

ROBERT W. FERGUSON
Attorney General
Cameron G. Comfort, Sr. Assistant Attorney General
Noah G. Purcell, Solicitor General
Jeffrey T. Even, Deputy Solicitor General
Peter B. Gonick, Deputy Solicitor General
Charles Zalesky, Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Revenue and Finance Division
7141 Cleanwater Dr. SW
P.O. Box 40123
Olympia, WA 98504-0123
noah.purcell@atg.wa.gov
cam.comfort@atg.wa.gov
jeffrey.even@atg.wa.gov
peter.gonick@atg.wa.gov
chuck.zalesky@atg.wa.gov
carrie.parker@atg.wa.gov
carly.summers@atg.wa.gov

Dated this 7th day of October, 2022, at Seattle, Washington.

Cathy Hendrickson, Legal Assistant

PACIFICA LAW GROUP

October 07, 2022 - 4:28 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,769-8
Appellate Court Case Title:	Chris Quinn et al. v. State of Washington et al.
Superior Court Case Number:	21-2-00075-8

The following documents have been uploaded:

- 1007698_Other_20221007161033SC047676_6267.pdf
  This File Contains:
  Other - Intervenor's Reply Brief
  The Original File Name was Reply Brief of Intervenors.pdf

A copy of the uploaded files will be sent to:

- Chuck.Zalesky@atg.wa.gov
- EStahlfeld@freedomfoundation.com
- SGOOlyEF@atg.wa.gov
- TammyMiller@dwt.com
- allison@fhbzlaw.com
- amcdowell@orrick.com
- cam.comfort@atg.wa.gov
- castilloc@lanepowell.com
- cindy.bourne@pacificalawgroup.com
- craiga@lanepowell.com
- ddunne@orrick.com
- drubens@orrick.com
- edwardss@lanepowell.com
- jeffrey.even@atg.wa.gov
- lawyer@stahlfeld.us
- noah.purcell@atg.wa.gov
- peter.gonick@atg.wa.gov
- revolyef@atg.wa.gov
- rmckenna@orrick.com
- sarah.washburn@pacificalawgroup.com
- sea_wa_appellatefilings@orrick.com

Comments:

Sender Name: Cathy Hendrickson - Email: cathy.hendrickson@pacificalawgroup.com
Filing on Behalf of: Paul J. Lawrence - Email: paul.lawrence@pacificalawgroup.com (Alternate Email: dawn.taylor@pacificalawgroup.com)

Address:
1191 Second Avenue, Suite 2000
Seattle, WA, 98101
Phone: (206) 245-1700

Note: The Filing Id is 20221007161033SC047676