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SUPERIOR COURT OF WASHINGTON
FOR DOUGLAS COUNTY

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

v.

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

Case No. 21-2-00075-09
Case No. 21-2-00087-09

AMICI CURIAE BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION, WASHINGTON POLICY CENTER, ADAM HOFFER, RANDALL G. HOLCOMBE, JEREMY HORPEDAHL, TODD NESBIT, JUSTIN M. ROSS, WILLIAM F. SHUGHART II, AND JARED WALCZAK (“TAX ECONOMISTS AND POLICY ANALYSTS”) IN SUPPORT OF PLAINTIFFS

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; WASHINGTON FARM BUREAU,
Plaintiffs,

v.

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

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5 *Black v. State,*

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15 *City of Alamogordo v. Walker Motor Co.,*

16 616 P.2d 403 (N.M. 1980) 9

17 *City of Glendale v. Trondsen,*

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19 *Cont. Motors Corp. v. Twshp. of Muskegon,*

20 135 N.W.2d 908 (Mich. 1965)..... 8

21 *Cosro, Inc. v. Liquor Control Bd.,*

22 733 P.2d 539 (Wash. 1987)..... 10

23 *Emerson Coll. v. City of Boston,*

24 462 N.E.2d 1098 (Mass. 1984) 9

25 *Fang Lin Ai v. United States,*

26 809 F.3d 503 (9th Cir. 2015)..... 4

27 *Flint v. Stone Tracy Co.,*

28 220 U.S. 107 (1911)..... 5, 7

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3	<i>Knowlton v. Moore</i> , 178 U.S. 41 (1900).....	11
4	<i>Larson v. Seattle Popular Monorail Auth.</i> , 131 P.3d 892 (Wash. 2006).....	8
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13	<i>United States v. King Mountain Tobacco Co., Inc.</i> , 899 F.3d 954 (9th Cir. 2018).....	10
14	<i>United States v. Reorganized CF & I Fabricators of Utah, Inc.</i> , 518 U.S. 213 (1996).....	3
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16	<i>Vill. of Lombard v. Ill. Bell Telephone Co.</i> , 90 N.E.2d 105 (Ill. 1950)	8
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23	“Excise Tax,” Webster’s Dictionary, https://www.merriam-	
24	webster.com/dictionary/excise%20tax	7
25	“Excise,” Samuel Johnson, A Dictionary of the English Language (1755).....	7
26	CONG. RESEARCH SERV., FEDERAL EXCISE TAXES: BACKGROUND AND GENERAL ANALYSIS https://sgp.fas.org/crs/misc/R46938.pdf	11
27		

1 George Haas, U.S. Treasury Dept. Div. of Research, “Tax Revision Studies:
Excise Taxes” (Sep. 1937)
2 <http://www.taxhistory.org/Civilization/Documents/Surveys/hst23734/23734-1.htm> 14
3
4 James Whitcomb Riley, POEMS & PROSE SKETCHES (2017) 2
5 Jared Walczak, “Washington Capital Gains Proposal Not Helped by Analogy to
Real Estate Excise Tax,” Washington Policy Center (Mar. 7, 2019)
6 <https://tinyurl.com/22pzyh23> 13
7 Jared Walczak, “Who Pays? Doesn’t Tell Us Much About Who Actually Pays
State Taxes,” Tax Foundation Tax Policy Blog, Oct. 2018,
8 <https://taxfoundation.org/itep-who-pays-analysis/> 14
9 Jared Walczak, “Why Washington State Can’t Claim Its Capital Gains Tax Is an
Excise Tax,” Tax Foundation Tax Policy Blog (Dec. 16, 2021)
10 <https://taxfoundation.org/washington-state-capital-gains-tax/> 9
11 JOHN F. DUE, INDIRECT TAXATION IN DEVELOPING ECONOMIES (1970) 7
12 JOSEPH HENCHMAN, HOW IS THE MONEY USED? FEDERAL AND STATE CASES
13 DISTINGUISHING TAXES AND FEES (2013) <https://tinyurl.com/taxesandfees> 3, 4
14 Marjorie E. Kornhauser, Corporate Regulation and the Origins of the Corporate
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15 Message of President Taft, 44 CONG. REG. 3344 (Jun. 16, 1909) 5
16 Norman B. Ture, “Chairman Packwood’s Excise Tax and Tariff Changes,” 31 TAX
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17 TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION (1997) 7, 10, 11
18 THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY (2005) 7, 9
19 William Shakespeare, “Romeo and Juliet,” act II, scene 2 2
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21 **Treatises**
22 1 T. COOLEY, THE LAW OF TAXATION § 42 (1924) 7
23 3A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 66.01 (C. Sands,
24 4th ed. 1986) 4
25 71 AM. JUR.2D, STATE AND LOCAL TAXATION § 28 8
26 85 CJS TAXATION § 1806 7
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1 **Identity and Interest of *Amici Curiae***

2 Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan
3 research and educational organization and NTUF's Taxpayer Defense Center advocates for
4 taxpayers in the courts. NTUF Vice President Joe Bishop-Henchman is the author of a 2013 book
5 on the definition of taxes, and NTUF staff have written extensively on the issues in this case.

6 Washington Policy Center (WPC) is an independent, non-profit think tank that promotes
7 sound public policy based on free-market solutions. Through its Center for Government Reform,
8 WPC has been actively researching the topic of capital gains income taxes.

9 Adam Hoffer is the Director of the Menard Family Initiative and an associate professor of
10 economics at the University of Wisconsin – La Crosse. He is the co-editor of *For Your Own Good:
11 Taxes, Paternalism, and Fiscal Discrimination in the Twenty-First Century*.

12 Randall G. Holcombe is DeVoe Moore Professor of Economics at Florida State University.
13 Dr. Holcombe is also Senior Fellow at the James Madison Institute and the Independent Institute,
14 and a Research Fellow at George Mason University's Law & Economics Center.

15 Dr. Jeremy Horpedahl is an assistant professor of economics at the University of Central
16 Arkansas. His research has been published in *Econ Journal Watch*, *Constitutional Political
17 Economy*, the *Atlantic Economic Journal*, *Public Choice*, and *Public Finance and Management*.

18 Todd Nesbit is an assistant professor of economics and interim director of the Institute for
19 the Study of Political Economy at Ball State University. Dr. Nesbit's primary academic research
20 includes excise taxes, secondary/unintended consequences of public policy, and governance.

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

24 William F. Shughart II is J. Fish Smith Professor in Public Choice at Utah State University's
25
26
27
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1 Jon M. Huntsman School of Business. He is editor-in-chief of *Public Choice*, current president of
2 the Public Choice Society, and research director of the Independent Institute.

3 Jared Walczak is Director of State Projects at the Tax Foundation in Washington, D.C. and
4 author of numerous studies on tax policy in general and excise taxes in particular.

5 **Issue Addressed by *Amici Curiae***

6 Is Washington’s capital gains tax an excise tax?
7

8 **Argument**

9 **I. Capital Gains Taxes Such as Washington’s Are Income Taxes, Not Excise Taxes.**

10 **A. Terms Such as “Excise Tax” Have Real-World Meaning Based on How the** 11 **Charge Operates, Which Should Not Change Because the Legislature Decided** 12 **to Call an Income Tax an Excise Tax.**

13 Defendant Washington and Department of Revenue state that whether a tax on capital gains
14 is an income tax or not “is a question of Washington law controlled by the Washington Supreme
15 Court decisions discussed above, not by the vagaries of tax laws imposed by other jurisdictions.”
16 Def. Motion for Summary Judgment at 16. While this concedes that the term used by the Legislature
17 is not by itself dispositive, it ignores the fact that public finance terms have defined meaning.

18 “What’s in a name? That which we call a rose by any other name would smell as sweet,”
19 Shakespeare famously wrote. William Shakespeare, “Romeo and Juliet,” act II, scene 2. Or as
20 James Whitcomb Riley put it, “When I see a bird that walks like a duck and swims like a duck and
21 quacks like a duck, I call that bird a duck.” James Whitcomb Riley, POEMS & PROSE SKETCHES
22 (2017). Roses and ducks have definite characteristics and functions inherent to what they are, and
23 retain those even if a Legislature or an attorney chooses to call them by a different name.

24 Taxes, by their nature, are often the subject of definitional disputes. Americans have a
25 historically-rooted antipathy to taxes, dating from the Boston Tea Party to the Whiskey Rebellion
26 to the tax revolt begun by California’s Proposition 13 to today. Federal and state constitutional
27

1 provisions and statutes impose additional substantive and procedural requirements on revenue-
2 raising measures as opposed to other types of laws, on taxes as opposed to fees, and on certain types
3 of taxes as opposed to other types. Elected and appointed officials consequently have an incentive
4 to relabel even obvious taxes as other things.

5 This is not just a matter of semantics. Taxes that are not called taxes violate a principle of
6 transparency and honesty, by depriving taxpayers of information needed to make meaningful
7 choices about public priorities. A good tax system is one where taxpayers easily understand what
8 a tax is and how it operates, and subterfuge about these matters prevents that.

10 This Court, the U.S. Supreme Court, and courts in all except two states have frequently
11 confronted the question of whether the *label* of a tax matters for the applicability of constitutionality
12 and statutory taxpayer protections, or whether *how the charge operates* is what matters, and the
13 answer has been consistent that function matters and label does not. *See, e.g., Hillis Homes, Inc. v.*
14 *Shohomish County*, 650 P.2d 193, 194-95 (Wash. 1982) (concluding that development charges were
15 taxes “although characterized by the Counties as fees”); *United States v. Reorganized CF & I*
16 *Fabricators of Utah, Inc.*, 518 U.S. 213, 220 (1996) (“On a number of occasions, this Court
17 considered whether a particular exaction, whether or not called a ‘tax’ in the statute creating it, was
18 [an excise tax], and in every one of those cases the Court looked behind the label placed on the
19 exaction and rested its answer directly on the operation of the provision using the term in
20 question.”); JOSEPH HENCHMAN, HOW IS THE MONEY USED? FEDERAL AND STATE CASES
21 DISTINGUISHING TAXES AND FEES (2013) <https://tinyurl.com/taxesandfees> (identifying cases and
22 listing all but two states as defining taxes based on how the charge operates rather than label used).

25 Washington’s Supreme Court has also joined most of its sister states in holding that any
26 ambiguity as to meaning in a tax statute should be construed in favor of the taxpayer. *See, e.g., Ski*
27 *Acres, Inc. v. Kittitas County*, 827 P.2d 1000, 1003 (Wash. 1992) (“If any doubt exists as to the
28

1 meaning of a taxation statute, the statute must be construed most strongly against the taxing power
2 and in favor of the taxpayer.”); HOW IS THE MONEY USED? at 10-11 (“All states except one
3 (Oregon) interpret ambiguity in tax statutes in favor of the taxpayer.”); 3A SUTHERLAND, STATUTES
4 AND STATUTORY CONSTRUCTION § 66.01 (1986) (“[T]ax laws are to be strictly construed against
5 the state and in favor of the taxpayer.”); *Fang Lin Ai v. United States*, 809 F.3d 503, 506 (9th Cir.
6 2015) (“We have held that taxing statutes must be construed most strongly in favor of the taxpayer
7 and against the government [although not every] doubtful question should be resolved in favor of
8 the taxpayer.”). This long-standing canon of interpretation prevents harm by a taxpayer caught
9 unaware by the state taking a position not discernible in advance.

11 The scope of Washington’s constitutional taxpayer protections is certainly a matter for
12 Washington’s courts and to decide the persuasive relevance of how other states interpret analogous
13 protections to ban income taxes or limit property taxes or allow excise taxes. But what an *income*
14 *tax is*, or *how all excise taxes operate*, are not mere differences of state rules. Words have meaning,
15 particularly in this field of tax where legislators have a political incentive to disguise things.
16 Washington’s Legislature may call this tax an excise tax, but if it operates like an income tax, it is
17 an income tax and any applicable taxpayer protections relevant to income taxes should apply.

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

22 Excise taxes and income taxes are different things. To be sure, like all taxes, all three collect
23 revenue for the government, and that revenue is ultimately and economically borne by individuals
24 in some fashion. Beyond that, they operate different ways, affect the economy differently, and
25 consequently have been subject to varying taxpayer protections. The meaning of each of these types
26 of tax have taken on clear definitions that have been consistently applied in the public finance and
27 economic literature, in court cases, and in common parlance.

1 An excise tax is an indirect tax on a specific good, service, or privilege, which is generally¹

2
3 ¹ Most excise taxes are levied per unit: gasoline (18.3¢ federal+30.5¢ median state rate) cigarettes
4 (\$1.0066/pack federal+\$1.70/pack median state rate), alcohol (\$13.50/gallon federal+\$5.98/gallon
5 median state rate), wine (\$1.09/gallon federal+87¢/gallon median state rate), beer (58¢/gallon
6 federal+26¢/gallon median state rate), international air travel (\$18.90 per person), etc.

7 A minority of excise taxes are levied *ad valorem*, while still being considered excise taxes as they
8 satisfy all the other four features described herein. Examples include excise taxes on banks,
9 insurance companies, or transfers of real estate or inherited property, generally imposed as a
10 percentage of gross receipts, as well as the federal corporate income tax, originally justified as an
11 indirect excise tax on entities doing business in a special form that was accompanied by special
12 privileges such as perpetual life and free transferability of ownership shares. *See, e.g., Flint v. Stone*
13 *Tracy Co.*, 220 U.S. 107, 151-62 (1911) (“The tax under consideration, as we have construed the
14 statute, may be described as an excise upon the particular privilege of doing business in a corporate
15 capacity, i.e., with the advantages which arise from corporate or quasi corporate organization; or,
16 when applied to insurance companies, for doing the business of such companies.”); Message of
17 President Taft, 44 CONG. REG. 3344 (Jun. 16, 1909) (“This is an excise tax upon the privilege of
18 doing business as an artificial entity and of freedom from a general partnership liability enjoyed by
19 those who own stock.”); Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the*
20 *Corporate Income Tax*, 66 IND. L.J. 53, 122 (1990). Notably, although being levied *ad valorem*,
21 these taxes still retain all the other features of excise taxes, namely, that they are levied indirectly
22 and passed forward to an ultimate end consumer, rather than being imposed directly on the end
23 consumer or income-earner alone, are levied on specific goods or activities rather than generally
24 on individual income, and are justified as a “user tax” on business forms perceived to be enjoying
25 special privileges. Note also that these taxes are imposed on the entirety of gross receipts or the
26 sales price of each asset, not the net of gains and losses across all aggregated investments, as here.

27 Defendants claim that “the overwhelming consensus is that income taxes are excise taxes.” Def.
28 Motion for Summary Judgment at 16. This is an incorrect description of the scholarly consensus
and a misleading summary of *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1 (1916). That case upheld
the federal individual income tax following the passage of the Sixteenth Amendment, which
removed the requirement that direct taxes on income be apportioned. If the Supreme Court really
considered income taxes to be excise taxes, as Defendant claims, the Sixteenth Amendment would
have been unnecessary since the U.S. Constitution authorized excises since the beginning. *See* U.S.
Const., art. I, sec. 8 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts
and Excises”) (emphasis added). Indeed, in *Pollock v. Farmers’ Loan & Trust Company*, 158
U.S. 601 (1895), the Court held the opposite of what Defendants’ claim: that income taxes were
not authorized by the Constitution, because such taxes are direct and must be apportioned. The
quotation Defendants use in *Brushaber* is a truncated quotation from *Pollock*, the full context of
which is that the Court should presume a claimed excise tax to be within Congress’s power unless
how it operates demonstrates that it is not a true excise tax. See Brushaber, 240 U.S. at 17, *citing*
Pollock, 158 U.S. at 637 (“[T]axation on income was in its nature an excise entitled to be enforced
as such unless and until it was concluded that to enforce it would amount to accomplishing the
result which the requirement as to apportionment of direct taxation was adopted to prevent, in which
case the duty would arise to disregard form and consider substance alone, and hence subject the
tax to the regulation as to apportionment which otherwise as an excise would not apply to it.”)

1 levied per unit, capable of being passed forward to an ultimate consumer, and justified as
2 internalizing a negative externality (*e.g.*, excise taxes on tobacco) or as a proxy for a user payment
3 system (*e.g.*, excise taxes on gasoline as a “user tax” to pay for road maintenance and construction).
4 Income taxes are levied directly on individuals, always levied *ad valorem* (as a percentage), and
5 justified as increasing tax code progressivity or raising revenue, usually for general purposes.

6
7 Thus the distinctions between excise taxes and income taxes are (1) excise taxes are levied
8 indirectly, capable of being passed forward to an ultimate consumer, while income taxes are levied
9 directly on people; (2) excise taxes are levied narrowly on a specific good, service, or privilege
10 while income taxes are levied on income earned in a certain way, often with deductions and credits
11 subtracting a *de minimis* level of income and legislatively favored sources of income; (3) excise
12 taxes are generally levied per unit and income taxes are generally levied *ad valorem* (as a
13 percentage of income); (4) excise taxes are generally justified as internalizing a negative externality
14 or as a proxy for user payment system, while income taxes are justified as a way of increasing
15 progressivity in the tax system or raising revenue, usually for general purposes.

16
17 These defining features of an excise tax—that it is indirect on producers and not direct on
18 people, is narrowly on particular things or activities, is generally imposed per unit, and is generally
19 justified as addressing an externality or as a proxy for a user fee—appear over and over in the
20 various official definitions of the term. Black’s Law Dictionary defines excise tax as “[a] tax
21 imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or
22 activity (such as a license tax or an attorney occupation fee).” “Excise Tax,” Black’s Law
23 Dictionary (11th ed. 2019).² “It is typically levied against the manufacturer or producer for sale of

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(emphasis added).

27 ² “The Dictionary juxtaposes ‘excise tax’ with ‘income tax’ and ‘property tax.’” *Hughes*
28 *Communications India Private Ltd. V. The DirecTV Group, Inc.*, No. 20 CIV. 2604 (AKH), 2021

1 the select product or good; because it is narrowly based, it is often described as a ‘selective sales
2 tax.’” J. Fred Giertz, “Excise Taxes” in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY at 125
3 (2005). Webster’s Dictionary defines excise tax as “a tax on certain things that are made, sold, or
4 used within a country.” “Excise Tax,” Webster’s Dictionary, [https://www.merriam-
5 webster.com/dictionary/excise%20tax](https://www.merriam-webster.com/dictionary/excise%20tax). Samuel Johnston, author of the first comprehensive English
6 dictionary, defined “excise” as “a hateful tax levied upon commodities, and adjudged not by the
7 common judges of property, but wretches hired by those to whom excise is paid” and more recently
8 Professors Gant and Ecklund defined excise tax as “simply a per unit tax on the consumption of a
9 selected good or service.” See “Excise,” Samuel Johnson, A Dictionary of the English Language
10 (1755); Paula A. Gant & Robert B. Ekelund, Jr., “Excise Taxes, Social Costs, and the Consumption
11 of Wine,” TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 251 (1997). The
12 late Professor John F. Due, a respected scholar in public finance, defined excise tax as “domestic
13 levies on particular commodities” that “almost without exception, other than in a few countries in
14 which inflation has been severe, excises are imposed with specific rates and thus upon physical
15 units.” JOHN F. DUE, INDIRECT TAXATION IN DEVELOPING ECONOMIES 59 (1970).

18 Many courts, including the U.S. Supreme Court, cite the influential treatise by Professor
19 Thomas M. Cooley, the Dean of the University of Michigan Law School and later a justice of the
20 Michigan Supreme Court and chairman of the Interstate Commerce Commission. Referencing
21 Blackstone’s commentaries, Cooley wrote that excise taxes are “taxes laid upon the manufacture,
22 sale or consumption of commodities within the country, upon licenses to pursue, certain
23 occupations and upon corporate privileges.” 1 T. COOLEY, THE LAW OF TAXATION § 42 (1924); see,
24 e.g., *Flint*, 220 U.S. at 151 (citing Cooley definition with favor); 85 CJS TAXATION § 1806 (same);
25

26
27 _____
28 WL 5359662 at *4 (S.D.N.Y. Nov. 16, 2021).

1 *Black v. State*, 406 P.2d 761, 762 (Wash. 1965) (same); *Morrow v. Henneford*, 47 P.2d 1016, 1017
2 (Wash. 1935), citing *Pacific Ins. Co. v. Soule*, 74 U.S. 433 (1868) (“[An excise tax] is defined by
3 the Supreme Court of the United States to be an inland imposition, sometimes upon the
4 consumption of the commodity and sometimes upon the retail sale; sometimes upon the
5 manufacturer and sometimes upon the vendor.”); *Larson v. Seattle Popular Monorail Auth.*, 131
6 P.3d 892, 903 (Wash. 2006) citing *Arborwood Idaho, LLC v. City of Kennewick*, 89 P.3d 217, 222
7 (Wash. 2004) (“A tax is an excise where “(1) the obligation to pay ... is based upon the voluntary
8 action of the person taxed in performing the act, enjoying the privilege, or engaging in the
9 occupation ... and (2) the element of absolute and unavoidable demand is lacking.”).³

11 Maryland’s highest court has observed that excise taxes are imposed without regard to the
12 assets of the taxpayer, which distinguishes them from income and property taxation, and identified
13 rulings by other state supreme courts that concluded likewise:
14

15 In *Continental Motors Corp. v. Township of Muskegon*, 376 Mich. 170, 135 N.W.2d
16 908, 911 (1965), an excise was defined as “a tax imposed upon the performance of
17 an act, the engaging in an occupation, or the enjoyment of a privilege.” (emphasis
18 added). *Accord, Village of Lombard v. Illinois Bell Telephone Co.*, 405 Ill. 209, 90
19 N.E.2d 105, 108 (1950); *Callaway v. City of Overland Park*, 211 Kan. 646, 508 P.2d
20 902, 907 (1973). Indeed, an excise is said to embrace every form of taxation that is
21 not a burden directly imposed on persons or property. *Gila Meat Co. v. State*, 35
22 Ariz. 194, 276 P. 1, 2 (1929); *City of Glendale v. Trondsen*, 48 Cal.2d 93, 308 P.2d
23 1, 7 (1957).

24 Finally, the property tax and the excise tax may be differentiated by the methods
25 used to impose them and to fix their amount. Thus, it has been held that where a tax
26 is levied directly by the Legislature without assessment and is measured by the
27 extent to which a privilege is exercised by a taxpayer without regard to the nature
28 or value of his assets, it is an excise. Where, however, the tax is computed upon a

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

1 valuation of the property and is assessed by assessors, and where the failure to pay
2 the tax results in a lien against the property, it is a property tax, even though a
privilege might be included in the valuation.

3 *Weaver v. Prince George's County*, 379 A.2d 399, 404 (Md. 1977); *see also City of Alamogordo*
4 *v. Walker Motor Co.*, 616 P.2d 403, 405 (N.M. 1980) (“An excise tax is defined as: A tax imposed
5 directly by (the) Legislature without assessment and measured by amount of business done, income
6 previously received, or by extent to which (the) privilege may have been enjoyed or exercised by
7 the taxpayer, irrespective of (the) nature or value of his assets or his investments in business.”);
8 *Bloom v. City of Fort Collins*, 784 P.2d 304, 307 (Colo. 1989) (“The term ‘excise tax’ has come to
9 mean and include practically any tax which is not an *ad valorem* tax.”); *Emerson Coll. v. City of*
10 *Boston*, 462 N.E.2d 1098, 1107 (Mass. 1984) (“The mere right to hold and own...property cannot
11 be made the subject of an excise.”).

12
13 The *direct* nature of income and property taxes and *indirect* nature of excise taxes is a key
14 contrast between the two types of taxes. As Jared Walczak of the Tax Foundation has observed:
15

16 The income tax is a direct tax because it falls directly on people. The legal incidence
17 is on particular people, and tax liability is assessed per person, not per sale or
activity. . . .

18 Consider the gas tax, for instance. There is no question that you ‘pay’ the gas tax
19 when you fuel up, even though the service station remits the tax on your behalf. But
20 the government is not imposing a tax on you specifically, and the tax is owed based
21 on where the fuel is purchased or used, not based on the fuel’s ultimate ‘owner.’
22 You don’t file a tax return at the end of the year detailing how much fuel you
purchased and paying accordingly—and even if you did (a vehicle miles traveled
tax, VMT, would be somewhat more aggregated, because it’s on an activity rather
than a transaction), the taxable event would be the activity, not the person.

23 Jared Walczak, “Why Washington State Can’t Claim Its Capital Gains Tax Is an Excise Tax,” Tax
24 Foundation Tax Policy Blog (Dec. 16, 2021) [https://taxfoundation.org/washington-state-capital-](https://taxfoundation.org/washington-state-capital-gains-tax/)
25 [gains-tax/](https://taxfoundation.org/washington-state-capital-gains-tax/). *See also* ENCYCLOPEDIA OF TAXATION AND TAX POLICY at 125 (noting that excise taxes
26 are ultimately imposed on a transaction rather than on a person or corporation); *Cosro, Inc. v.*
27

1 *Liquor Control Bd.*, 733 P.2d 539, 544 (Wash. 1987) (“An excise tax is a tax on the right to use or
2 transfer items, while a property tax is a tax on the items themselves.”); *United States v. King*
3 *Mountain Tobacco Co., Inc.*, 899 F.3d 954, 962-63 (9th Cir. 2018) (“[Q]uite unlike a property or
4 income tax, the cost of an excise tax is easily—and in the case of tobacco products, virtually
5 always—passed along to consumers.”).

6
7 The *narrow* base of excise taxes is a factor of their history, as applying not directly to
8 aggregated income but indirectly to the production or sale of certain selected items. The first federal
9 excise tax was on whiskey in 1794, later expanded to include other “luxury” items, repealed in
10 peacetime and re-imposed in wartime, and those not repealed after the Korean War have been
11 retained. By the mid-1990s, there remained seven federal excise tax categories: (1) sales of
12 automobiles; (2) production or wholesaling of gasoline, sporting goods, firearms and ammunition,
13 alcohol, and tobacco; (3) facilities “user” payment proxy taxes on telephone service and air
14 transportation; (4) documentary stamp taxes on insurance; (5) annual license taxes on bookmakers
15 and lottery operators; (6) a highway vehicle use tax on truckers; and (7) environmental taxes on
16 chemicals and related products. *See* Brenda Yelvington, “Excise Taxes in Historical Perspective,”
17 in TAXING CHOICE. Long-time congressional tax staffer Norman Ture explained that excise taxes
18 are “imposed at differing rates on selected products and services rather than being levied at the
19 same rate on all. . . .” Norman B. Ture, “Chairman Packwood’s Excise Tax and Tariff Changes,”
20 31 TAX NOTES 65 (Apr. 7, 1986). A tax on *aggregated* annual capital gains income from a *person*
21 does not resemble traditional excise taxes in the slightest.
22
23

24 The *justification* for excise taxes as taxing away harms or collecting revenue from “users”
25 who benefit from a service or privilege also distinguishes excise taxes from income taxes, which
26 are generally justified as advancing progressivity or raising revenue for general programs. Professor
27 Shughart, editor of a definitive collection of academic articles on excise taxes, observes that excise
28

1 taxes have three justifications: (1) raising revenue from product taxation where consumers are not
2 price-sensitive, the so-called Ramsey rationale; (2) serving as a proxy for user fees where proceeds
3 are dedicated to providing public services uniquely to the payor, the so-called user tax rationale;
4 (3) corrective taxes to curtail production of a negative externality by forcing individuals to take
5 account of the costs their consumption choices impose on others, the so-called Pigouvian rationale.
6
7 See William F. Shughart II, TAXING CHOICE 13-14 (1997); see also CONG. RESEARCH SERV.,
8 FEDERAL EXCISE TAXES: BACKGROUND AND GENERAL ANALYSIS 2,
9 <https://sgp.fas.org/crs/misc/R46938.pdf> (defining the purpose of an excise tax as to discourage
10 negative externalities, to offset costs, as a proxy for user fees, or luxury taxes on certain products).

11 An excise tax may be justified under all three rationales; the excise tax on gasoline, for
12 instance, can be justified simultaneously as not likely to deter behavior (driving) for the most part,
13 as a proxy for a “user fee” to generate funds for road maintenance and construction, and as reducing
14 societal harm from traffic and air pollution. Or it can be justified under only one, such as the excise
15 tax payer having to pay the tax but receiving additional privileges provided by the taxing entity.
16
17 See, e.g., *Home Builders Ass’n of Greater Des Moines v. City of West Des Moines*, 644 N.W.2d
18 339, 346 (Iowa 2002) (describing an excise tax as “a tax imposed on a transaction or as a condition
19 to the exercise of a privilege”); *Knowlton v. Moore*, 178 U.S. 41 (1900) (upholding the federal
20 estate tax as an indirect tax on the action of distributing property after the death from the person
21 who earned it) (“The right to take property by devise or descent is the creature of the law, and not
22 a natural right—a privilege, and therefore the authority which confers it may impose conditions
23 upon it.”); *Cincinnati, Milford & Loveland Traction Co. v. State*, 113 N.E. 654, 655 (Ohio 1916)
24 (“An excise tax is a tax assessed for some special privilege or immunity granted to some artificial
25 or natural person, based upon the grant of such privilege or immunity.”).

26
27 Each of these definitions, while differing slightly, describe excise taxes as indirectly on a
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1 producer or licensee enjoying special privileges who will then pass the tax onward to end users, as
2 imposed on a narrow tax base and often on a particular product or activity, and in contrast to income
3 taxes and property taxes imposed directly on the taxpayer, on an *ad valorem* basis, and with a broad
4 tax base subject to legislatively-enacted credits and de minimis exemptions such as income
5 exclusions, standard deductions, and homestead exemptions. Excise taxes are regularly contrasted
6 as distinct from taxes on income or property.
7

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

9 Roses are roses, ducks are ducks, and taxes on capital gains are taxes on income. Excise
10 taxes or transaction taxes do not have exemption levels, nor are they imposed on annual totals, nor
11 do they track the filing deadlines and requirements of the federal income tax. State income taxes
12 do all those things. Washington taxpayers will fill out a return due the same day as the federal
13 income tax, and the base of the tax will be derived from capital gains taxed under the federal income
14 tax and state income taxes. The IRS, every other state, and every tax expert agree that capital gains
15 are income. *See, e.g.*, Declaration of Jason Mercier in Support of Plaintiffs’ Motion for Summary
16 Judgment (listing responses from each state government to the effect that “[w]hile some
17 jurisdictions responded that they did not tax capital gains at all, no state that was surveyed taxed
18 capital gains through an excise tax or in any way other than through a tax on income” and including
19 a response from the Internal Revenue Service denying that a tax on capital gains is an excise tax
20 and stating that “capital gains are treated as income under the tax code and taxed as such”).
21
22

23 The Washington capital gains tax is imposed *directly* on people who bear the economic
24 incidence of the tax, as is the case with income taxes and not the case with excise taxes. The vast
25 majority of excise taxes are imposed on producers or businesses that sell selected taxed products
26 or services and collect the tax and pass it forward to their customers who bear the ultimate economic
27 burden. Insurance premium taxes are remitted by the insurance company but borne by those who
28

1 pay the premiums. Gasoline taxes are collected from the wholesaler and the retailer but borne by
2 those who fill up their cars and trucks. Even estate taxes are collected from the estate after death
3 and before distribution from the heirs who bear the economic burden in the form of a smaller
4 amount received. Business taxes are paid by the corporate treasury but ultimately paid by lower
5 wages to employees, higher prices to consumers, and smaller profits to shareholders. Here, the
6 economic burden of the capital gains tax is borne by the taxpayer owning and selling the asset,
7 making it a direct tax on them and unlike any excise tax.

9 The Washington capital gains tax is not a per unit consumption tax on individual
10 transactions by those buying or selling a particular good but on the *aggregate total income* itself,
11 measured *ad valorem tax as a percentage of income* and imposed broadly on all economic gains by
12 anyone in the state. The tax is accompanied with exemptions and deductions to limit the scope of
13 the tax to certain individuals, with the goal of it applying not universally to an activity but to those
14 individuals with relatively high levels of income. The tax is not on transactions or activity, much
15 less on the entirety of the sale price of an asset or all gross receipts of a business, but on the net
16 aggregate capital gains earned by *a person* in a year. These are all features of income taxes, not
17 excise taxes. *See, e.g.,* Jared Walczak, “Washington Capital Gains Proposal Not Helped by Analogy
18 to Real Estate Excise Tax,” Washington Policy Center (Mar. 7, 2019) <https://tinyurl.com/22pzyh23>
19 (“A real estate transfer tax is levied on the entire sale price of the property. Capital gains taxes are
20 on the net of gains and losses, across many transactions. As we’ve observed in the past, if there
21 were an excise tax on the privilege of buying or selling stocks or other investment assets, it would
22 fall on the entirety of the sale price of each asset, not on the net of gains and losses across all
23 investments.”).

26 The primary *justification* for the capital gains tax offered by the legislators and by
27 defendants here is to increase progressivity, which is a strong indication that this tax is not an excise
28

1 tax.⁴ Excise taxes are generally regressive and income taxes are generally progressive, a fact that
2 has been understood as early as 1937 when the Roosevelt Administration was seeking to reduce
3 excise taxes on consumption and expand the income tax on high-earners. *See, e.g.*, George Haas,
4 U.S. Treasury Dept. Div. of Research, “Tax Revision Studies: Excise Taxes” (Sep. 1937)
5 <http://www.taxhistory.org/Civilization/Documents/Surveys/hst23734/23734-1.htm> (characterizing
6 excise taxation as “less desirable than progressive direct taxes and, so far as possible, should be
7 replaced by a system of direct taxes,” noting that excise taxes are regressive and increase the cost
8 of taxed products). Whatever the merits and demerits of various views of progressive taxation, even
9 proponents clearly understand that excise taxes and income taxes are *opposites* in this regard.
10

11 The Washington capital gains tax is an income tax, not an excise tax. To the extent
12 Washington’s Constitution or precedents preclude an income tax, this tax should be precluded.
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22 ⁴ The main source for the claim that Washington’s existing tax system is unduly regressive is a
23 study by the Institute on Taxation and Economic Policy (ITEP), that reaches its conclusion by
24 excluding highly progressive elements of the existing tax code, exclude significant portions of
25 corporate income taxes on shareholders from the total, disregard preferential treatment of retiree
26 income, does not adjust lifetime earnings of high-income people who may be low-income for the
27 year of the analysis, and does not recenter scores based on the results leading to the conclusion that
28 no state performs well. Even though the data shows that the total tax system is progressive, by these
omissions ITEP is able to conclude that all but five states are regressive. *See, e.g.*, Jared Walczak,
“Who Pays? Doesn’t Tell Us Much About Who Actually Pays State Taxes,” Tax Foundation Tax
Policy Blog, Oct. 2018, <https://taxfoundation.org/itep-who-pays-analysis/>.

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Conclusion

For the foregoing reasons, the motion of the Plaintiff should be granted.

Respectfully submitted,

s/ Joseph Henchman
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