FILED
SUPREME COURT
STATE OF WASHINGTON
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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, 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

STATE APPELLANTS' OBJECTION TO MOTION FOR LEAVE TO FILE BRIEF OF AMICI THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON AND THE WASHINGTON RETAIL ASSOCIATION

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.

I. STATEMENT OF RELIEF SOUGHT

State appellants respectfully request that this Court deny the motion filed by the Building Industry Association of Washington (BIAW) and the Washington Retail Association (WRA) seeking leave to participate in this appeal as amicus curiae. In the alternative, if the BIAW and WRA are permitted to participate as amicus curiae, they should be ordered to re-file their amicus brief without their unfounded ad hominem attack against the Legislature and this Court.

II. FACTS RELEVANT TO MOTION

In April 2021, the Legislature enacted a narrowly tailored seven percent capital gains excise tax to help fund education, early learning, and child care programs and to make "material progress toward rebalancing the state's tax code," which

disproportionately burdens low- and middle-income Washingtonians. RCW 82.87.010; *see generally* RCW 82.87.040(1) (imposing the tax); RCW 82.87.030 (distribution of tax revenue). Various opponents to the tax (the Quinn and Clayton plaintiffs) have brought a facial constitutional challenge, seeking to have this Court invalidate the tax in its entirety on state and federal constitutional grounds. Argument is set for January 26, 2023.

On December 12, 2022, this Court received motions to file amicus curiae briefs from seven would-be amici, including the motion filed by the BIAW and WRA. The proposed brief submitted by the BIAW and WRA provides policy and legal arguments supporting the Quinn and Clayton plaintiffs. The brief also includes an unsupported attack on the motives of our Legislature in enacting the tax, and an objectionable insinuation that this Court would be disrespecting the rule of law if it were to uphold the tax. *See* BIAW Am. Br. at 17-20.

III. GROUNDS FOR RELIEF

The BIAW and WRA oppose the capital gains tax primarily on policy grounds, also offering a confused legal argument centered on what they perceive as "illegal extraterritorial taxation." BIAW Am. Br. at 10-17. The BIAW and WRA, however, do not confine their brief to arguments over policy and law. They go on at pages 17 through 20 of their brief to attack the motives of the Legislature and the integrity of this Court. For example, the BIAW and WRA decry what they call the "obvious illegality of our state lawmakers' actions in enacting the tax," *id*. at 17, and declare that this Court will "compromise its own standing in the eyes of citizens" if it were to uphold the tax. *Id*. at 19; *see also id.* at 19-20 ("The legislature's imposition of an illegal income tax through ESSB 5096 signals … that Washington is a place where lawmakers bend (or break) the law when it suits their politics"). The BIAW and WRA end by invoking harmful rhetoric of a "tyrannical

legislature that ignores constitutional limits on its power." *Id*. at 20.

The BIAW and WRA's ad hominem attack on the Legislature and this Court has no place in this case, or any case. The Legislature had entirely proper motives in enacting the capital gains tax, as explained in prior briefing from the State and Intervenors, and the proposed amicus brief filed by the Equity in Education Coalition (EEC). The BIAW and WRA may disagree with that policy, but their claim that a "tyrannical legislature" is purposefully evading decisional law from this Court is both wrong (*see* State's Br. at 21-32, discussing this Court's established precedent distinguishing excise from property taxes) and offensive.

The BIAW and WRA are "free to criticize the state of the law." *In re Sawyer*, 360 U.S. 622, 631, 79 S. Ct. 1376, 3 L. Ed. 2d 1473 (1959). And if the BIAW and WRA were parties in this appeal, their over-the-top rhetorical attack on the integrity of the legislative and judicial branches of government might be

tolerated. But here, the BIAW and WRA seek to participate as "friends" of the court. Appearing as amicus curiae is a privilege requiring this Court's express permission. RAP 10.1(e), 10.6(a). The BIAW and WRA abuse that privilege when they attack and denigrate the motives of the Legislature without evidence, completely ignoring the Legislature's stated purpose and the legitimate legislative goals it seeks to achieve. *See* RCW 82.87.010 (legislative findings and intent); EEC Am. Br. at 20-28 (detailing recent efforts to address Washington's regressive tax system through the legislative process).

Moreover, the BIAW and WRA improperly suggest that this Court would necessarily disrespect the rule of law if it were to uphold the tax. BIAW Am. Br. at 19. This Court should take a clear stand against unnecessary and offensive attacks against the legislature and judiciary by those seeking to participate as amicus curiae by denying BIAW and WRA's motion for leave to file its amicus brief.

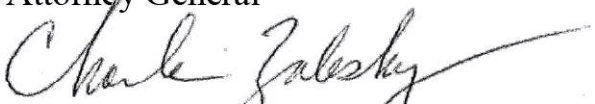
IV. CONCLUSION

The Court should deny BIAW and WRA's motion. Alternatively, the Court should order the BIAW and WRA to refile a proposed amicus brief without the inappropriate ad hominem attack set out in pages 17 through 20 of their brief.

This document contains 810 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 15th day of December, 2022.

ROBERT W. FERGUSON
Attorney General



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

DATED this 15th day of December, 2022, at Tumwater, WA.

s/Charles Zalesky
Charles Zalesky
Assistant Attorney General

ATTORNEY GENERAL'S OFFICE - REVENUE & FINANCE DIVISION

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