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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR DOUGLAS COUNTY

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.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiffs, by and through their attorneys, allege the following Complaint for
Declaratory and Injunctive Relief against Defendants the State of Washington, Department
of Revenue of the State of Washington, and Vikki Smith, as Director of the Department of
Revenue of the State of Washington:

I. NATURE OF ACTION

1. There is “nothing new under the sun” when it comes to the ways Washington
lawmakers and state income tax proponents have repeatedly attempted to work around

1 Washington voters' rejection of a state income tax. All prior efforts have failed or been rejected
2 by voters, and the 2021 effort that gives rise to this action fails too.

3 2. Washington lawmakers enacted ESSB 5096 to impose a seven percent tax on
4 Washington residents' income from long-term capital gains exceeding \$250,000 annually.

5 3. Every taxing authority in the country, including the IRS and all other state revenue
6 departments, agrees that capital gains are income. Even the Senate Bill Report for ESSB 5096
7 admits that capital gains are taxed as income under the federal tax code, and most states do not
8 have separate capital gains tax rates. Instead, most states tax capital gains as ordinary income
9 subject to the state's income tax rates. Neither the federal government nor any other state levies
10 an excise tax on capital gains.

11 4. Masquerading under a variety of political labels to suit the times, there have long
12 been efforts by a minority in Washington to impose an income tax on a majority of voters that has
13 repeatedly, consistently and overwhelmingly voted to defeat and prohibit such income taxes in
14 Washington. There have been ten initiatives and referendums to allow an income tax, and each
15 and every one went down to substantial defeat. Most recently, in 2010, 64% of Washington
16 voters rejected the imposition of a "progressive" income tax, and recent polls reflect that an even
17 greater percentage would reject an income tax today. Knowing that voters are likely to reject
18 another effort to amend the Washington Constitution to impose an income tax, a closely divided
19 Legislature has been trying to achieve the same goal of enacting an income tax, but with a
20 different label. That is the genesis of the "excise tax on capital gains" that is the subject of this
21 action for declaratory judgment and injunctive relief.

22 5. Despite the unanimous national consensus that a tax on capital gains is a tax on
23 income, Washington lawmakers purport to label ESSB 5096 an "excise tax," and have codified it
24 as part of RCW Title 82, Excise Taxes. They have done so to sidestep 90 years of legal
25 precedent holding that a graduated tax on income, like this one, is unconstitutional. But the tax
26 fails the most fundamental test of an excise tax. Unlike the Washington Business & Occupation
27 tax, ESSB 5096 does not attach to any privilege to conduct business—to sell goods or services—
28 within Washington that is subject to state licensure and regulation. Nor does ESSB 5096 levy a

1 tax on a particular transaction, like excises on the sale within Washington of cigarettes, alcohol,
2 or gasoline.

3 6. Excises attach to transactions and events occurring within a jurisdiction, not
4 residency. In fact, the capital gains tax here does not attach to specific events or transactions at
5 all, and flaunts well-settled rules requiring that excises bear a substantial relationship to the
6 transaction or business activity that is the taxable event. On the contrary, ESSB 5096 imposes its
7 tax on an individual's or marital community's net gains on a range of potential transactions
8 occurring over the course of a calendar year anywhere in the world, regardless whether and what
9 connection to Washington each event or transaction may possess. Unlike real estate excise taxes,
10 for example, ESSB 5096 taxes aggregate gains to an individual over a year, not value generated
11 in specific transactions within its jurisdiction. Every other jurisdiction calls these gains
12 "income." In this way, Washington illegally and invalidly imposes an excise that may fall on
13 economic and financial value created entirely outside its borders, and over which it possesses no
14 conceivable jurisdiction. Taken at face value, the so-called excise tax levied by ESSB 5096 is an
15 invalid exercise of Washington's excise authority.

16 7. Merely labeling the capital gains tax as an "excise tax" cannot avoid the
17 fundamental fact that ESSB 5096 levies a tax on personal income. Following voter approval of
18 an amendment to the state Constitution which expanded the definition of "property" to
19 encompass everything, tangible and intangible, that is subject to ownership, the Washington
20 Supreme Court ruled that income is property. The Washington Constitution prohibits taxes on
21 property that are non-uniform (graduated) and that have a levy rate greater than one percent. For
22 nearly a century, including most recently in 2019, Washington courts have followed and applied
23 these constitutional rules and declared invalid every state or local government bill that imposed a
24 nonuniform levy on income. There have been no exceptions, and ESSB 5096 does not create
25 one. ESSB 5096 imposes a non-uniform tax on personal income in excess of the maximum one
26 percent allowed under the Constitution, and so is illegal and invalid.

27 8. The bill-related communications among legislators for Senate proceedings belie
28 the true intention that ESSB 5096 tax personal income. In floor notes for the Senate Democratic

1 Caucus instructing its members to vote down an amendment to exempt livestock sales from the
2 excise tax, the Caucus offered this revealing “Talking Point”: “[i]f farmers and ranchers are able
3 to *make more than \$250,000 in profit each year* while working less than half time, they can
4 afford to pay 7% on *all profits* above \$250,000.” This is a classic description of a tax on annual
5 income, not an excise on voluntary transactions.

6 9. In consequence, another primary motivation behind the passage of ESSB 5096
7 was to set up a “test lawsuit” to urge the Washington Supreme Court to overrule this longstanding
8 precedent prohibiting a state income tax absent a constitutional amendment. The Legislature is
9 seeking to put the question to the Supreme Court because the voters have rejected ten initiatives
10 or referendums to impose an income tax on the people of Washington. And the Legislature seeks
11 to overcome that resistance by judicial fiat rather than risk yet another voter rejection of their
12 efforts to amend the Constitution. Indeed, the Legislature is so convinced that voters would
13 reject this tax if given the opportunity that they inserted an “emergency declaration” in ESSB
14 5096 in a transparent effort to prevent the people from having their say, effectively
15 disenfranchising the entire voting public.

16 10. Plaintiffs now seek a declaratory judgment and permanent injunction that ESSB
17 5096 is unlawful and invalid because (1) it is an illegal excise tax on income, (2) it was enacted in
18 violation of Article VII, Section 1 of the Constitution of the State of Washington, (3) it was
19 enacted in violation of Article VII, Section 2 of the Constitution of the State of Washington, and
20 (4) it was enacted in violation of the Commerce Clause of the United States Constitution.

21 11. Plaintiffs also seek to enjoin the Defendants from assessing and collecting the
22 capital gains tax from Washington residents and otherwise taking any action to enforce
23 ESSB 5096.

24 II. PARTIES

25 12. Plaintiff April Clayton is a resident of Douglas County, Washington. Ms. Clayton
26 and her husband run Red Apple Orchards in Orondo, Washington, which grows six varieties of
27 organic apples and five varieties of cherries. Ms. Clayton is the President of the Chelan/Douglas
28 County Farm Bureau and is also a member of the Northwest Farm Credit Local Advisory

1 Committee, the United States Farmers and Ranchers in Action, and the Wenatchee Valley
2 College Foundation Board. Ms. Clayton holds a degree in Biochemistry and received her Ph.D.
3 in Analytical Chemistry from the University of California, Davis. Ms. Clayton owns non-exempt
4 capital assets that if sold would produce long-term capital gains of more than \$250,000.

5 13. Kevin and Renee Bouchey, a married couple, are residents of Richland,
6 Washington. The Boucheys are the former co-owners of S.K.D. Farms, Inc., a mid-sized farming
7 operation which grew fresh market and processing potatoes. S.K.D. Farms was sold in December
8 2020. Mr. Bouchey is also a former Yakima County Commissioner. Ms. Bouchey served on the
9 Board of Trustees for Heritage University from 2013-2020 and has been involved in several
10 business and community organizations, including the Toppenish Mural Society and the
11 Toppenish Flag Committee. The Boucheys own non-exempt assets which if sold would produce
12 long-term capital gains of more than \$250,000.

13 14. Plaintiff Joanna Cable is a resident of Spokane, Washington. Ms. Cable spends
14 her time working with non-profits and caring for her family. Ms. Cable previously graduated
15 from the University of Washington with a degree in Chemistry and worked in finance, investment
16 banking, and the venture capital industry for ten years. Ms. Cable owns non-exempt capital
17 assets that if sold would produce long-term capital gains of more than \$250,000.

18 15. Plaintiffs Rosella and Burr Mosby are residents of Auburn, Washington. The
19 Mosby's, a married couple, own and operate Mosby Brothers Farms, located in the Upper Green
20 River Valley, just outside of Auburn. Their mission is to grow fresh, locally grown, hand-
21 weeded, hand-harvested vegetables for the Puget Sound's grocers, restaurants, and food banks.
22 The farm's location enables delivery of healthy produce like cucumbers, leeks, beets, and
23 zucchini to consumers efficiently with a low carbon footprint. Mr. Mosby always wanted to be a
24 farmer. He was seventeen years old when he delivered his first load of acorn squash in a pick-up
25 truck to a local grocery store in 1977. The Mosby's have worked hard to grow their farm into
26 what it is today, an essential component in the community's local food supply. The Mosby's own
27 non-exempt capital assets that if sold would produce long-term capital gains of more than
28 \$250,000.

1 16. Plaintiffs Christopher Senske and Catherine Senske, a married couple, are
2 residents of Kennewick, Washington. Mr. Senske has been involved in the lawn care and pest
3 control business for 47 years. Mr. Senske graduated from the University of Washington in 1974
4 and has worked in his family’s business since then. The small five-person business was
5 transferred to him in the early 1980s as his father phased out of the business. Since then,
6 Mr. Senske’s business has grown to its current size of approximately 500 employees. Mr. Senske
7 has served on multiple state and national trade association and advocacy organization boards.
8 The Senskes own non-exempt assets which if sold would produce long-term capital gains of more
9 than \$250,000.

10 17. Plaintiff Matthew Sonderen is a resident of Spokane, Washington. Mr. Sonderen
11 is the Co-President and fifty percent owner of Sonderen Packaging, a third generation, family-
12 owned and operated custom folding carton manufacturing company of which he shares ownership
13 with his sister. Sonderen Packaging employs around 130 people in Spokane and generates
14 approximately \$29 million in annual gross revenue. Even a partial sale of Mr. Sonderen’s shares
15 of Sonderen Packaging would produce non-exempt long-term capital gains of more than
16 \$250,000.

17 18. Plaintiff Washington State Farm Bureau (“Farm Bureau”) is a non-profit
18 corporation and voluntary grass roots advocacy organization representing the social and
19 economic interests of farm and ranch families. It represents more than 46,000 members,
20 including members who would be exposed to the capital gains tax imposed by ESSB 5096 based
21 on their non-exempt capital assets. Its offices are in Lacey, Washington. Members of the Farm
22 Bureau farm and ranch in every county of the state, including Douglas County.

23 19. Defendant is the State of Washington.

24 20. Defendant Department of Revenue (“DOR”) is an agency of the State of
25 Washington. DOR exercises general supervision and control over the system of taxation
26 throughout the State of Washington.

1 upon the same class or property.” The Constitution goes on to define “property” in the broadest
2 possible terms to “mean and include everything, whether tangible or intangible, subject to
3 ownership.” Moreover, Article VII, Section 2 of the Washington Constitution establishes the
4 upper limit upon ad valorem property taxes. That constitutional restriction essentially limits any
5 property tax to no more than one percent of the value of the property.

6 29. Applying the plain meaning of the Constitution’s definition of property, the
7 Washington Supreme Court repeatedly has held that income is property. In 1932, Washington’s
8 voters passed an initiative instituting the payment of a graduated income tax for the purpose of
9 funding public schools, and reducing or eliminating annual taxes on general property which were
10 believed to impose disproportionate tax burdens on farmers to the benefit of citizens whose
11 wealth was derived from non-agricultural sources like investments.

12 30. That initiative was ruled unconstitutional in 1933, *Culliton v. Chase*, 174 Wash.
13 363, 25 P.2d 81 (1933), and similar legislative efforts were ruled unconstitutional in 1935 and
14 1936. *See Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936).

15 31. Indeed, the Washington Supreme Court has on every subsequent occasion
16 declared both individual and corporate income to constitute a class of property subject to this
17 constitutional requirement of uniformity. *See, e.g., Power Inc. v. Huntley*, 39 Wn.2d 191, 235
18 P.2d 173 (1951). The Supreme Court has made clear that it is “unwilling ... to recede from the
19 position announced in its repeated decisions,” which is based on a plain reading of “property” as
20 defined by the Washington Constitution. *Apartment Operators Ass’n of Seattle, Inc. v.*
21 *Schumacher*, 56 Wash. 2d 46, 47-48, 351 P.2d 124, 125 (1960). The Court noted that in order to
22 change the rule, “the constitution may be amended by vote of the people.”

23 32. Washington voters have consistently recognized the substantial economic benefits
24 of living in a state that does not tax individual income and have voted time and again against
25 attempts to change this fundamental feature of Washington’s tax structure. Since 1932, voters
26 have been asked on at least 10 separate occasions to adopt a state personal income tax or
27 corporate income tax, including as recently as 2010. Washington voters have rejected all such
28 attempts, including six proposed constitutional amendments to allow a graduated income tax.

1 33. Washington voter opposition to a state income tax remains strong. In a recent poll
2 of Washington voters, 72% of respondents answered “no” when asked whether local
3 governments should be allowed to impose an income tax.

4 34. For years, Washington’s Department of Commerce has also touted the state’s lack
5 of an income tax as a competitive advantage for prospective employers whom the Department
6 wished to entice to come to Washington.

7 ***Key Provisions of ESSB 5096***

8 35. ESSB 5096 imposes an annual state net capital gains tax on the sale or other
9 voluntary exchange of long-term capital assets by individuals.

10 36. Individuals subject to the capital gains tax must pay a seven percent (7%) tax on
11 the amount of adjusted capital gains less \$250,000 and other possible deductions. Generally, the
12 tax rate is applied to the capital gains amount reported on the individual’s federal income tax
13 return, subject to exclusions.

14 37. All taxpayers must file with the Washington DOR a capital gains return for each
15 taxable year, due on the same date as the federal income tax return. In addition to the
16 Washington tax return form, taxpayers must also file a copy of their entire federal income tax
17 return along with all schedules and supporting documentation.

18 38. ESSB 5096 allocates all capital gains from the sale or exchange of intangible
19 personal property, such as stock and other ownership interests in businesses, to Washington,
20 regardless of the geographic circumstances of the transaction that creates the gain. In contrast,
21 capital gains from real estate transactions are allocated to Washington only if the real property
22 that gives rise to the gain is located in Washington. Generally, capital gains from the sale or
23 exchange of tangible personal property are allocated to Washington if the property was located in
24 Washington at the time of the transaction that creates the gain.

25 39. In lieu of an allocation among states based on accepted rules applicable to state
26 excise taxes, ESSB 5096 purports to grant tax credits equal to the amount of any legally imposed
27 tax paid by the individual to another taxing jurisdiction on capital gains that are included in the
28

1 taxpayer's Washington capital gains. ESSB 5096 defines no rules governing the application of
2 such credits.

3 40. Failure to pay the capital gains tax or otherwise comply with ESSB 5096 may
4 result in penalties for the taxpayer and possible criminal punishment as either a felony or gross
5 misdemeanor.

6 41. The first five hundred million (\$500 million) in revenue derived from ESSB 5096
7 is required to be deposited into the state Education Legacy Trust Account, and the remainder is to
8 be deposited into the Common School Construction Account.

9 ***In a transparent effort to usurp the will of the voters, Washington lawmakers attempt to impose***
10 ***an excise tax on income***

11 42. Voters in Washington have overwhelmingly voted down ten attempts to pass a
12 statewide income tax, including six initiatives to amend the Constitution to allow graduated
13 income taxes. In passing ESSB 5096, the Legislature ignored the expressed will of the people.
14 Having failed in various prior attempts at the polls, most recently in 2010 in a voters' initiative
15 opposed by 64% of Washington voters, proponents of taxing income seek to circumvent
16 Washington voters' consistent opposition to an income tax. The 2021 Legislature resorted to a
17 tactic that previous legislatures have also tried, only to see their enactments struck down by
18 Washington's courts: instead of an income tax, they purport to have levied an excise tax on
19 income; in the present case, on income from long-term capital gains.

20 43. The fact that Washington lawmakers have labeled the new tax on capital gains
21 income an "excise tax" does not make it so. In rejecting a similar tactic in 1936, the Washington
22 Supreme Court made clear that "the legislative body cannot change the real nature and purpose of
23 an act by giving it a different title." *Jensen v. Henneford*, 185 Wash. 209, 216, 53 P.2d 607, 610
24 (1936) (holding that a purported excise was in fact and effect an unconstitutional tax on income).
25 Similarly here, the State may not avoid the fact that ESSB 5096 levies a tax on income.

26 44. An excise is an exercise of the State's sovereign power to license and regulate
27 business activity and transactions occurring within its borders. Excise taxes are imposed by
28 governments on the exercise of substantive privileges that are granted by the government, such as

1 a business and occupations tax on gross business revenue. More generally, the obligation to pay
2 an excise tax stems from the voluntary action of a person to perform an act or enjoy a privilege
3 made available and permitted by the state, such as the right to conduct business activity for profit
4 within the state.

5 45. In Washington, excise taxes are commonly levied on sales of goods such as
6 cigarettes, alcoholic beverages, and gasoline, based on retail price. Washington also imposes an
7 excise tax known as the business and occupation tax on the gross revenues generated by persons
8 or entities that conduct business by selling goods and services within the state, pursuant to the
9 State's sovereign power to license, permit and regulate such activity.

10 46. Washington courts have distinguished between excise taxes and property taxes in
11 two ways:

12 First, excises are imposed on the voluntary act of the taxpayer, which affords the taxpayer
13 benefits from conducting the occupation, business, or other activity that triggers the
14 taxable event. By contrast, property taxes are imposed on the mere ownership or
15 possession of property, creating an 'element of absolute and unavoidable demand.'

16 Second, excises are directly imposed based upon the extent to which the taxpayer enjoys
17 the taxed privilege, i.e., the volume of business done. By contrast, property taxes are
18 imposed based upon the value of the taxpayer's assets or property.

19 *Harbour Vill. Apartments*, 139 Wn.2d at 611 (Talmadge, J., dissenting) (internal citation
20 omitted); *Sheehan v. Cent. Puget Sound Reg'l. Transit Auth.*, 155 Wn.2d 790, 800, 123 P.3d 88
21 (2005) (same).

22 47. Every tax authority in the country, including the IRS, agrees that taxes on capital
23 gains are income taxes, not excise taxes.

24 48. In 2018, Representative Dan Newhouse (R-WA, 4th District) asked the IRS
25 whether a tax on capital gains is considered an excise tax or an income tax. The IRS answered in
26 no uncertain terms:

1 It is an income tax. More specifically, capital gains are treated as income under the tax
2 code and taxed as such. The Internal Revenue Code, Subtitle A—Income Taxes, covers
3 capital gains. At § 61, Gross Income Defined, the code says gross income means all
4 income from whatever source derived, including (but not limited to) gains derived from
5 dealings in property (capital gains).
6

7 49. The Congressional Budget Office (“CBO”) also recognizes that a capital gains tax
8 is an income tax. In a March 22, 2021 report, the CBO acknowledged that: “[t]he individual
9 income tax combines a tax on labor income and a tax on capital income, such as interest,
10 dividends, *capital gains*, and certain business profits.”

11 50. One hundred percent of the 49 state revenue departments that have addressed the
12 issue also describe capital gains as income. No other state imposes an excise on an individual’s
13 net capital gains. Instead, in every state that taxes capital gains, they are taxed through the states’
14 income tax codes.

15 51. The ESSB 5096 final bill report acknowledges this to be the case:

16 Under the federal tax code, individuals and corporations pay income tax on the net total of
17 all their capital gains just as they do on other sorts of income In addition to the federal
18 tax, capital gains are often subject to state income taxes. Most states do not have separate
19 capital gains tax rates. Instead, most states tax capital gains as ordinary income subject to
20 the state's income tax rates.

21 52. Even the Washington DOR has previously warned that the IRS considers taxes on
22 investment income to be an “income tax” and that a capital gains tax is “susceptible to
23 constitutional challenge as an income tax prohibited by the Washington state constitution.”

24 53. Joe Bishop-Henchman, Vice President of the National Taxpayers Union
25 Foundation,” was quoted during the floor debates for ESSB 5096:

26 [T]his is an income tax, not a transaction tax. Transaction taxes don’t have exemption
27 levels nor are they imposed on annual totals nor do they track the filing deadlines and
28

1 requirements of the federal income tax. State income taxes do all those things. Taxpayers
2 will fill out a return due the same day as the federal income tax, and the base of the tax
3 will be derived from capital gains taxed under the federal income tax and state income
4 taxes. The IRS, every other state, and every tax expert agree that capital gains are
5 income.

6 54. The unanimous national consensus that a capital gains tax is a tax on income was
7 not lost on Washington lawmakers when enacting ESSB 5096. In a recent email exchange
8 between Jason Mercier (Washington Policy Center) and Senator Joe Nguyen (D-WA, 34th Dist.),
9 Senator Nguyen wrote: “I agree with you that cap gains is income.”

10 55. Public records also show that Senator David Frock (D-WA, 46th Dist.), when
11 discussing the enactment of a capital gains tax, wrote:

12 I want to be clear, I am willing to consider the capital gains tax proposal—but I think we
13 need to be absolutely clear that there is no guarantee this thing will be upheld as valid
14 under our constitution for two reasons. One—I have yet to quite understand how a tax
15 calculated on income reported on a schedule to your federal 1040 form is going to pass
16 the smell test of being [an excise] tax on the transaction underlying the sale of the asset.

17 ***Washington Lawmakers Want it Both Ways. In ESSB 5096 They Have Imposed an Excise on***
18 ***Capital Gains, but at the Same Time, They Are Seeking a “Test Case” to Overrule 90 years of***
19 ***Stare Decisis and the Will of the People, to Enact a Broad-based Income Tax***

20 56. On the first day of the 2020 legislative session, several Washington lawmakers
21 filed an amicus brief with the Washington Supreme Court urging the Court to reverse nearly a
22 century of caselaw and allow a graduated income tax to be imposed. According to the amicus
23 brief, “This Court should accept review to determine the constitutionality of the graduated
24 income tax passed by the City of Seattle and to find that the legal underpinnings that supported
25 the Supreme Court precedent in the 1930’s no longer exist.”

26 57. Given the ten statewide votes that have been taken on the issue, the Washington
27 Supreme Court appropriately exercised its discretion and declined to review the issue, but
28

1 Washington lawmakers have not given up their ongoing assaults on the well-established
2 constitutional prohibition on a state income tax.

3 58. Public records show that a primary motivation behind the capital gains income tax
4 imposed by ESSB 5096 was to set up a “test lawsuit” to urge Washington courts to overrule
5 longstanding precedent prohibiting a state income tax.

6 59. On April 30, 2018, Senator Jamie Pederson (D-WA, 43rd District) discussed the
7 potential passage of a capital gains tax:

8 *But the more important benefit of passing a capital gains tax* is on the legal side, from
9 my perspective. The other side will challenge it as an unconstitutional property tax. This
10 will give the Supreme Court the opportunity to revisit its bad decisions from 1934 and
11 1951 that income is property and *will make it possible, if we succeed, to enact a*
12 *progressive income tax with a simple majority vote.*”

13 60. Senator Pederson reiterated the motivations behind the passage of ESSB 5096 in a
14 recent interview with *The Seattle Times*, stating that “the most important thing about the capital
15 gains tax is the ability to use the inevitable challenge to it as a vehicle for the state Supreme Court
16 to reconsider what I think are bad outdated rulings.”

17 61. Recently, Senator June Robinson (D-WA, 38th Dist.) publicly acknowledged, “I
18 do expect that it will likely be challenged in the Supreme Court and they will make the final
19 decision on that ... we are all very aware that the voters of Washington state have said many
20 times that they do not want, do not support an income tax.”

21 62. So, if an end-run around the Constitution using an excise tax is not successful,
22 members of the Legislature hope to use ESSB 5096 as a vehicle to convince at least five
23 members of the Supreme Court to do exactly that which the People have rejected many times—
24 amend the constitution by *fiat* to permit state and local governments to tax income.

25 ***ESSB 5096 Violates the Dormant Commerce Clause of the United States Constitution***

26 63. Even taking ESSB 5096 at face value as an excise tax, its application to
27 Washington taxpayers’ capital gains is unconstitutional as a violation of the Dormant Commerce
28

1 Clause of the United State Constitution. Residing in Washington is not, in and of itself, a proper
2 incident of excise taxation.

3 64. As an excise tax, ESSB 5096 taxes activities that are not fairly or substantially
4 related to the jurisdiction or authority of the state of Washington. Instead, like an income tax,
5 ESSB 5096 subjects individuals to the tax based on the simple fact that they reside in the state of
6 Washington, regardless of where the events or transactions that give rise to capital gains
7 occurred, and notwithstanding that the State had no role in permitting or regulating the
8 transaction, or creating or facilitating the gain in value subject to excise tax. Nor does ESSB
9 5096 apply rules of apportionment generally applicable to excise taxes where multiple
10 jurisdictions may claim a right to tax the same gains.

11 **VI. CAUSES OF ACTION**

12 **FIRST CAUSE OF ACTION**

13 **DECLARATORY JUDGMENT THAT ESSB 5096 VIOLATES ARTICLE VII, SECTION**
14 **1 OF THE WASHINGTON STATE CONSTITUTION**

15 65. Plaintiffs rely on the allegations of Paragraphs 1 through 64.

16 66. There is an actual, present and justiciable controversy as to whether ESSB 5096
17 violates Article VII, Section 1 of the Washington State Constitution because it imposes a non-
18 uniform tax on property of certain Washington residents.

19 67. A judicial determination on the illegality, invalidity, and unenforceability of ESSB
20 5096 will conclusively resolve these issues of substantial public concern and the parties' dispute.

21 68. Plaintiffs are entitled under RCW 7.24.020 to a declaration that ESSB 5096 is
22 invalid because it violates Article VII, Section 1 of the Washington State Constitution.

23 69. Plaintiffs reserve the right to raise any and all legal bases under Washington law to
24 challenge the constitutionality, legality, validity or enforceability of ESSB 5096.

25 **SECOND CAUSE OF ACTION**

26 **DECLARATORY JUDGMENT THAT ESSB 5096 VIOLATES ARTICLE VII, SECTION**
27 **2 OF THE WASHINGTON STATE CONSTITUTION**

28 70. Plaintiffs repeat and reallege Paragraphs 1 through 69 as if fully set forth here.

