

Ferguson Asks Court to Reject Brief Because of Reference to 'Tyrannical Legislature'

By Lawrence Wilson | The Center Square contributor (via Big Country News)

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Washington Attorney General Bob Ferguson has asked the Washington Supreme Court to disregard an amicus brief opposing the constitutionality of the state's capital gains tax because its authors allegedly insult the Legislature and the Court.

The [brief](#) in question, one of four friend-of-the-court briefs filed in opposition to the tax, was submitted by Building Industry Association of Washington and Washington Retail Association in an appeal of the case *Quinn v. Washington State Department of Revenue*, which challenged the constitutionality of the state's capital gains tax, enacted by the Legislature last year.

Opponents alleged that the law is unconstitutional because it is, in effect, a progressive income tax, which is prohibited by the state constitution. Douglas County Superior Court Judge Brian Huber agreed and ruled the tax unconstitutional in March.

The case made its way to the state Supreme Court, where it is scheduled for a hearing on Jan. 26. Several parties have filed amicus briefs [supporting](#) and [opposing](#) the constitutionality of the law.

Ferguson [objected](#) to the BIAW and WRA brief in a Dec. 15 motion to the Supreme Court because it argues that the Legislature knowingly passed a law that violates the state Constitution and that the Court would tarnish its reputation by condoning the action.

The BIAW and WRA brief states: "If Washington lawmakers are willing to trample on the rules of justice and ignore the constitution now in order to achieve their legislative agenda, what constitutional restraints will they flout next in the service of their political ends? Are our constitutional limits meaningless? Will this Court compromise its own standing in the eyes of citizens, and allow itself to be perceived as a hand maiden and facilitator of cynical legislative legerdemain to circumvent the voters repeated rejections of income taxes?"

The authors conclude, "No rational business owner wants to operate in an environment of legal uncertainty, under a tyrannical legislature that ignores constitutional limits on its power."

Ferguson argues that the Legislature was completely within its rights to enact the tax, and that the BIAW and WRA arguments amount to personal attacks that should not be allowed in a courtroom. He has asked the Court to disallow the brief or to ask the authors to rewrite and resubmit it without the offending language.

In response, BIAW [pointed out](#) that the same arguments had been used in this case in a lower court with no objection from the attorney general, and that there's nothing wrong with questioning the motives of lawmakers for enacting a piece of legislation. They conclude that Ferguson's "objection boils down to a difference of opinion in semantics. While reasonable minds can disagree on word choice in an argument in the heat of advocacy, this should not be the basis to deny the motion."

In support of the claim that lawmakers knowingly enacted a law that would not withstand the test of constitutionality, Jason Mercier of Washington Policy Center points to an email exchange among legislators proposing that by enacting a capital-gains tax they could circumvent the legal prohibition against a progressive income tax.

The Apr. 20, 2018, email from Sen. Jamie Pederson, D-43rd Dist., states, "But the more important benefit of passing a capital-gains tax is on the legal side, from my perspective. The other side will challenge it as an unconstitutional property tax. This will give the Supreme Court the opportunity to revisit its bad decisions from 1934 and 1951 that income is property and will make it possible, if we succeed, to enact a progressive income tax with a simple majority vote."

The email was [made public](#) by Washington Policy Center in March 2020.