No. 102223-9

SUPREME COURT OF THE STATE OF WASHINGTON

ANTIO, LLC, AZUREA, LLC, BACK BOWL I, LLC, CANDICA, LLC, CERASTES-WTB, LLC, GCG EXCALIBUR, LLC, LINDIA, LLC, OAK HARBOR CAPITAL, LLC, OAK HARBOR CAPITAL II, LLC, OAK HARBOR CAPITAL III, LLC, OAK HARBOR CAPITAL IV, LLC, OAK HARBOR CAPITAL VI, LLC, OAK HARBOR CAPITAL VII, LLC, OAK HARBOR CAPITAL X, LLC , OAK HARBOR CAPITAL XI, LLC, and VANDA, LLC,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Respondent.

BRIEF OF *AMICUS CURIAE* THE INVESTMENT COMPANY INSTITUTE IN SUPPORT OF PETITIONERS

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Investment Company Institute ("ICI") is the leading association representing regulated investment funds. ICI's mission is to strengthen the asset management industry for the ultimate benefit of the long-term individual investor. ICI members include mutual funds, exchange-traded funds ("ETFs"), collective investment trusts (held by pension funds), and investment advisers to regulated investment funds, managing total assets of $33.4 trillion in the United States and serving more than 120 million investors. ICI provides statistical data on the fund industry and conducts public policy research on fund trends, shareholder characteristics, the industry's role in the financial markets, and the retirement market. ICI's research gives it the perspective and data to advocate for a sound legal framework for the benefit of funds and their investors.

The Court of Appeals in this case held that Petitioners "are not entitled to [the] deduction under RCW

82.04.4281(1)(a)" because "investment is the only purpose of their businesses – 100 percent of the LLCs' income was investment income." *Antio, LLC v. Washington Dep't of Revenue*, 26 Wash. App. 2d 129, 138, 527 P.3d 164 (2023). Regulated investment companies are similarly defined under the federal Investment Company Act of 1940, Pub. L. 76-768, 54 Stat. 789, as issuers "engaged primarily . . . in the business of investing, reinvesting, or trading in securities." 15 U.S.C. § 80a-3(a). Given this similarity, ICI is concerned that affirming the decision below will result in detrimental taxation of regulated funds. This tax burden would rest entirely on fund shareholders.

The role of regulated funds in helping average Americans achieve their retirement savings goals is profound. In 2023, 54.4 percent of US households owned shares of mutual funds or other US-registered investment companies—including ETFs, closed-end funds, and unit investment trusts—representing an estimated 71.5 million US households and 120.8 million

investors. *See* Holden, Schrass & Bogdan, "Ownership of Mutual Funds and Shareholder Sentiment, 2023," *ICI Research Perspective* 29, no. 10, at 1 (Oct. 2023), https://www.ici.org/files/2023/per29-10.pdf ("ICI Research 29, no. 10").

In 2023, 73 percent of mutual fund–owning households held mutual funds inside employer-sponsored retirement plans (such as 401(k) and other defined contribution plans), individual retirement accounts (IRAs), or variable annuities. *See id.* at 2 (link to Table 7 in the supplemental tables). Applying the B&O tax to a regulated fund's gross investment income would diminish retirement savings dollar-for-dollar for these households' proportionate shares in that fund.

ICI as amicus curiae urges the Court to reverse the holding of the Court of Appeals.

II. ISSUES OF CONCERN TO AMICUS

ICI will first address the potential unintended consequences of this case for regulated investment funds and

individual investors. ICI will second seek to show that the legislative history and the specific terms of the 2002 amendment's definition of "security business" demonstrate that the decision below and the Department's current argument are wrong. Finally, ICI will seek to show that the Department and the court below overstate the scope of the decision in *O'Leary v. Dep't of Revenue*, 105 Wash.2d 679, 717 P.2d 273 (1986), and that their position is inconsistent with the Department's regulation on apportionment of interstate income, which expressly treats mutual funds as "not engaged in business."

III. STATEMENT OF THE CASE

ICI adopts Petitioners' Statement of the Case in the Petition for Review and the Amended Brief of Appellants below. *See* Pet. for Review at 6-7; Amd. Br. Appellants at 6-11.

ICI also notes that one of the Department's auditors very soundly favored granting Petitioners' refund requests because Petitioners were "issuers" of securities, as evidenced by their

filings with the Securities and Exchange Commission, and were therefore not disqualified from the deduction as "security businesses." *See* CP 364 (S. Barrett email referring to the definition of "security business" in RCW 82.04.4281(3)(d)). In this, Petitioners' position is aligned with ICI's members.

It appears that the Department has never disputed its auditor's analysis of the definition of "security business" in this litigation.

IV. ARGUMENT

A. Unintended Consequences: A Ruling for the Department Could Subject Regulated Investment Funds and Their Investors to Tax, Contrary to Legislative Intent

Regulated investment funds currently rely on the investment-income deduction from the Washington B&O tax. The Department's narrow interpretation of this deduction, if sustained, could improperly expose these funds to the Washington B&O tax. Any tax paid by a fund reduces the fund's net asset value ("NAV"), which reduces the value of all

fund shares held by investors, eroding their savings for retirement and other important financial goals.

The vast majority of regulated investment funds are subject to federal tax as separate legal entities, specifically as regulated investment companies ("RICs"). *See* 26 U.S.C. § 851 *et seq*. However, RICs pay no federal income tax if they distribute all net income to shareholders annually, which they almost always do. *See* 26 U.S.C. § 852; Investment Company Institute, 2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry, at 126 (May 2023) ("2023 ICI Fact Book"), 2023 Investment Company Fact Book (ici.org). The fund's investors pay any tax on these distributions. This RIC tax treatment is generally followed by states with corporate income taxes.[1] The

[1] Also, among other states with modified gross receipts taxes, Oregon for example achieves a similar exclusion of collective investment vehicles from the Corporate Activity Tax by excluding interest, dividends received, and proceeds from the sale of capital assets from taxable "commercial activity" receipts under Or. Rev. Stat. 317A.100(1)(b)(A), (B), and (BB).

Department's position would threaten widespread disruption of mutual fund taxation throughout the country.

Given that RICs typically distribute all income after fees and expenses, it is easy to make a rough estimate of the direct loss that would have been incurred by retirement savers and other investors in the past several years from the Washington B&O tax burden. ICI estimates that investors in mutual funds (not all RICs) would have incurred Washington B&O tax burdens in the hundreds of millions of dollars, as shown in the following table:

Year	Total mutual fund distributions (billions)	Percentage of US population in Washington	Estimated tax in Washington (millions)	Estimated taxes if tax occurs nationwide (millions)
2018	$865	2.30%	$348	$15,134
2019	$756	2.33%	$308	$13,229
2020	$672	2.33%	$274	$11,751
2021	$1,138	2.33%	$464	$19,912
2022	$774	2.33%	$316	$13,548

The estimates assume that mutual fund distributions (a proxy for the fund's gross income) would have been subject to tax at

1.75%, based on the percentage of the US population residing in Washington. The fourth column assumes that all other states had imposed similar taxes on fund investment income.[2]

Given the federal tax treatment of RICs, Washington's tax would be directly exported dollar-for-dollar to fund investors throughout the United States. Funds would likely need to disclose the Washington tax burden in prospectuses or other shareholder disclosures as a material tax risk to the fund. It would not be surprising if Washington's anomalous tax were to attract negative attention in other States, calls for retaliatory taxes or other public response, and/or claims that the tax violates the nexus principles of Due Process and the Commerce Clause under such cases as *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 177, 188, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) (taxpayer nexus created by "carrying on business" in a state) (citation omitted).

[2] The foregoing estimates are derived from 2023 ICI Fact Book, at xii (link to Tables 29, 30, and 39 (mutual funds' capital gains and dividend distributions)), and ICI tabulations of the March 2018–2023 Current Population Surveys, U.S. Census Bureau, Current Population Survey (CPS) (census.gov).

B. The Department's Argument is Belied by the Legislature's Careful Delineation of Entities Disqualified for the Deduction and the Related Legislative History.

The Department's argument that the 2002 Legislature silently enshrined this Court's decision in *O'Leary* as the core interpretation of the word "investments" is a false history, belied both by clear statements in testimony of the Department in 2001 and other legislative documentation and by the detailed terms with which the Legislature defined the types of businesses that are ineligible for the deduction. The legislative history and statutory language are a consistent through-line that shows that Petitioners' argument is correct and ICI's member funds remain entitled to the investment-income deduction.

The 2002 amendments to RCW 82.04.4281 were enacted against broad concern in both the legislative and executive branches about the uncertainty and potential threats to Washington's economy created by this Court's analysis of the "other financial businesses" exclusion of the pre-2002 statute. *See* Pet'rs' Supp. Br. at 12-21. A bill to amend the prior statute

was previously introduced in the 2001 session with the support of the business community. *See* H.B. 1853, 57th Leg., Reg. Sess. (2001) (reproduced in the Appendix). Structurally, H.B. 1853 exactly matched the bill enacted in 2002, with a new section 1 that established the scope of deductible income and a new section 2 that identified specified classes of ineligible businesses.

The Department did not like the bill. Then-Director Fred Kiga objected that the list of ineligible businesses would create unintended inconsistencies in the B&O code and have other uncertain or unintended consequences. H. Fin. Comm. Hr'g, 57th Leg. (Feb. 20, 2001, audio recording beginning at 2:58:56), House Finance - TVW (https://tvw.org/video/house-finance-38/). Director Kiga told the Legislature that the Department preferred to continue efforts it had already begun with stakeholders to develop "the necessary *right lines* for planning and compliance that we, again, plan on presenting to

you for your consideration in 2002." *Id.* (emphasis added).[3] He testified further that "collective investment vehicles, which by the way includes venture capital funds, . . . are *not subject to taxation* under the department's current reading of the exemption." *Id.* (emphasis added).

Given the Director's emphasis on developing the "right lines" around the deduction and eliminating uncertainty, it defies common sense to understand the recommendation of the taskforce convened by the Department in 2002 as anything other than a "clean-slate" revision of the deduction. In RCW 82.04.4281(2) and (3), the amended statute identified with plain language and bright-line precision, as Director Kiga wished, those businesses that would be ineligible to deduct their investment income. It left the remainder of the investing industry and public qualified to do so.

[3] Unofficial transcriptions by counsel.

The 2002 committee reports describe the amendment as having a *tax-imposition* function. The Senate and House committees both reported:

> The term "other financial business" is no longer used for B&O tax purposes. Instead, *tax is specifically applied to* banking businesses, lending businesses, security business, loans or the extension of credit, revolving credit arrangements, installment sales, and the acceptance of payment over time for goods or services.

S. Comm. Ways & Means Rep., H.B. 2641, 57th Leg., Reg. Sess. (Feb. 26, 2002) ("S. Rep. 2641"), at 2 (emphasis added); *see* H. Fin. Comm., H.B. 2641 Bill Analysis (Feb. 5, 2002) "(H. Anal. 2641"), at 2 (same); *see also* Pet'rs' Supp. Br. at 17-18. Conversely, the committees understood that businesses excluded from the class of "security business" were not subject to B&O tax:

> *Mutual funds*, family trusts, and other collective investment vehicles are not securities businesses, and *are not subject to the B&O tax*.

S. Rep. 2641 at 2 (emphasis added); *see* H. Anal. 2641 at 2 (same).

The plain technical statutory language defining "security business" gave direct effect to the express legislative goal of confirming that mutual funds and other collective investment vehicles are not subject to B&O tax. The language excludes "investment companies" under the federal Investment Company Act of 1940 from the meaning of "security business." The Department's argument would render that language absurd or nonfunctioning.

The first sentence of RCW 82.04.4281(3)(d) defines a "security business" and incorporates one exclusion:

> (d) "Security business" means a person, *other than an issuer*, who is engaged in the business of effecting transactions in securities as a broker, dealer, or broker-dealer, as those terms are defined in the securities act of Washington, chapter 21.20 RCW, or the federal securities act of 1933.

Id. (emphasis added). The state and federal definitions of this excluded class, "issuer," are virtually identical. Under RCW 21.20.005(10),

> (10) "Issuer" means [1] *any person who issues or proposes to issue any security . . . .*

(Emphasis added). The concept of "issuer" is broad, because every security has an issuer.

The second sentence of RCW 82.04.4281(3)(d) provides additional exclusions from the imposition of tax on "security businesses."

> "Security business" does not include [1] any company *excluded from the definition of broker or dealer under the federal investment company act of 1940* or [2] any entity that is not an investment company by reason of sections 3(c)(1) and 3(c)(3) through 3(c)(14) thereof.

(Emphasis added.) The pertinent definition of "dealer" under the Investment Company Act of 1940 expressly excludes "investment companies":

> **(11)** The term "dealer" has the same meaning as given in the Securities Exchange Act of 1934, but *does not include* an insurance company or *investment company*.

15 U.S.C. § 80a-2(a)(11) (emphasis added). "Investment company," in turn, is defined as follows:

> **(a) Definitions**

> **(1)** When used in this subchapter, "investment company" means *any issuer*[4] which--
> **(A)** is or holds itself out as being *engaged primarily, or proposes to engage primarily, in the business of investing*, reinvesting, or trading in securities; . . . .

15 U.S.C. § 80a-3(a) (emphasis added). By adopting the Investment Company Act's exclusion from "dealer" for "investment companies," the Legislature determined not only to permit "issuers" of securities generally to deduct investment income from B&O tax, but specifically "issuers" that "engag[e] primarily in the business of investing . . . in securities." *Id.*

The Legislature, "by adopting [the] recommended revision of the statute" that resulted from the Department's collaboration with affected stakeholders, 2002 Laws ch. 150, § 1, thus made clear, through specific statutory provisions, that B&O tax does not apply to securities issuers like mutual funds that, per federal law, are "engaging primarily in the business of investing . . . in securities."

---

[4] In this case "'Issuer' means every person who issues or proposes to issue any security, or has outstanding any security which it has issued." 15 U.S.C. § 80a-2(a)(22).

Washington securities law also recognizes (as it must) that investment companies, including mutual funds, are securities issuers. Pursuant to the National Securities Markets Improvements Act of 1996, Pub. L. 104-290, 110 Stat. 3419, Congress preempted the States' authority to regulate investment companies substantively but allowed States to continue requiring sales reports and collecting fees based on investment company sales. *See* 15 U.S.C. § 77r(a), (c)(2). Washington exerts this preserved authority, referring to investment companies expressly as "issuers," in RCW 21.20.340(2).

The Department rejected its own auditor's analysis of the plain meaning of these provisions and argues essentially that the definition of "security business" is beside the point, because the Legislature's failure expressly to repudiate *O'Leary's* terse analysis in 2002 preserved its gloss on the meaning of "investment" as overriding law. The argument does not withstand scrutiny. It defies a common-sense understanding of the effort of the Department in 2002 and the private sector,

working collaboratively at the direction of both the Governor and the Legislature, to avoid "a restrictive, narrow interpretation of the deductibility of investment income for business and occupation tax purposes" and provide "a positive environment for capital investment in this state." 2002 Laws ch. 150, § 1.

C. Applying B&O Tax to Mutual Funds' Income Is Neither Compelled by *O'Leary* Nor Consistent with Existing Department Regulations

Although the Department's argument would appear to impose tax on regulated funds' gross income, *O'Leary* does not compel that result, and it would be inconsistent with the Department's current regulation on the apportionment of multistate income, WAC 458-20-19402(304)(d). The regulation expressly describes mutual funds as "not engaged in business."

O'Leary itself recognized that the Legislature did not need to treat the taxpayers in that case the same as other businesses that generate investment income. The *O'Leary*

taxpayers were property managers that also generated interest income on deferred payments from sales of real estate. 105 Wash.2d at 680. This Court in *O'Leary* contrasted the taxpayers from investors in debt securities:

> We previously have determined the vendor of a real estate contract may be treated differently than other holders of debt investments. We directly addressed this contention in *Clifford v. State*, 78 Wn.2d 4, 8, 469 P.2d 549 (1970) stating:
>
> > Making a loan and taking a land contract as security is not the same activity as selling a piece of land and accepting the payment in installments. In one activity, money is advanced. In the other, no money is advanced by the seller; rather he relinquishes the right to immediate payment.

Id. at 682. In the years following *O'Leary*, it was reasonable for the Department to continue not imposing tax on mutual funds and other collective investment vehicles, since this Court in *Clifford* expressly distinguished among businesses depending on regulatory status. *See Clifford*, 78 Wash.2d at 8.

Consistent with this history and the legislative history of the 2002 amendment of RCW 82.04.4281 discussed above, the

Department formally promulgated a regulation more than 10 years ago recognizing that mutual funds are "not engaged in business." WAC 458-20-19402 was adopted in 2012 to provide methods for apportioning income from interstate activities for B&O tax purposes. The statute requires attributing receipts based on where the taxpayer's customers receive the benefit of the taxpayer's services. RCW 82.04.462(3)(b)(i). The Department identified several categories of service activities for purposes of implementing this standard, including services provided to a customer "not engaged in business" or unrelated to the customer's business. WAC 458-20-19402(303)(d).

The Department's examples of customers "not engaged in business" include both an "Arizona resident" who receives stockbroker services and a "***mutual fund***" managed by an "Investment Manager." WAC 458-20-19402(304)(d)(Examples 31, 32) (emphasis added).

Although RCW 82.04.140 defines "business" broadly as including "all activities engaged in with the object of gain,

benefit, or advantage to the taxpayer or to another person or class, directly or indirectly," the Department formally adopted a regulation saying both individual investors and mutual funds are *not* "engaged in business." Why? They are both investors entitled to the investment income deduction pursuant to the plain language of amended RCW 82.04.4281.

Although the legislative history of the 2002 amendment provides more than sufficient evidence that the Legislature intended not to incorporate *O'Leary's* gloss on the meaning of "investment," the consistency of WAC 458-20-19402 with that legislative history supplies more such evidence under the legislative-acquiescence doctrine. Consideration of legislative acquiescence in an agency interpretation comes into play when statutory language is ambiguous and the agency has a longstanding regulation in place. *See, e.g.*, *First Student, Inc. v. Dep't of Revenue*, 194 Wash.2d 707, 717, 451 P.3d 1094 (2019) (quoting *Pringle v. State*, 77 Wash.2d 569, 573, 464 P.2d 425 (1970)). If amended RCW 82.04.4281 is considered

ambiguous, the Department's regulation impeaches its new argument that the Legislature enshrined *O'Leary's* supposed definition of "investment" for periods after 2002.

V. CONCLUSION

For these reasons, ICI respectfully requests that the Court reverse the decision of the Court of Appeals.

I certify that this document, excluding the parts exempted from the word count by RAP 18.17, contains 3,170 words.

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Respectfully submitted April 5, 2024,

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APPENDIX

H.B. 1853, 57TH LEGISLATURE, REGULAR SESSION (2001)

H-1158.1

HOUSE BILL 1853

State of Washington 57th Legislature 2001 Regular Session

By Representatives Morris, Cairnes, Pennington, Miloscia, Roach, Benson, Van Luven, Veloria, Carrell, Kessler and Linville

Read first time 02/06/2001. Referred to Committee on Finance.

AN ACT Relating to clarifying the decision of the Washington state supreme court in *Simpson Investment Co. v. Dept. of Revenue*; amending RCW 82.04.4281; and creating a new section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** The legislature finds that the recent state supreme court decision in *Simpson Investment Co. v. Dept. of Revenue* could lead to an unusually restrictive, narrow interpretation of the deductibility of investment income

for business and occupation tax purposes. If allowed to stand, this interpretation could be extremely detrimental.

Through its ruling, the court called into question the application of the state's business and occupation tax to investment income derived by nonfinancial businesses such as family investment vehicles, estate planning entities, personal holding companies, mutual funds, venture capital companies, and other similar entities that have traditionally deducted their investment income pursuant to RCW 82.04.4281. The court's decision could also be read to expand the business and occupation tax to individual citizens' investment earnings even though they have never been considered to be engaging in business.

The court's decision has the potential of discouraging capital investment in this state's businesses and inhibiting individual citizens, their families, and noncommercial investors from preserving or increasing their financial security. The legislature recognizes that capital and investment income is

easily moved out of state. Interpretations that would apply the business and occupation tax to certain investment income will definitely cause a reduction of overall capital available to businesses and could cause some to take their operations and family-wage jobs out of this state.

The legislature finds that a narrow interpretation of RCW 82.04.4281 is clearly not in the best interest of this state or its citizens. Therefore, it is the intent of this act to clarify the deductibility of investment income and to specifically identify persons who may not take the deduction provided in RCW 82.04.4281.

Sec. 2. RCW 82.04.4281 and 1980 c 37 s 2 are each amended to read as follows:

(1) In computing tax there may be deducted from the measure of tax:

(a) Amounts derived ((~~by persons, other than those engaging in banking, loan, security, or other financial~~

~~businesses,~~)) from investments or the use of money ((~~as such, and also~~)) from investments;

(b) Amounts derived as dividends by a parent from its subsidiary corporations.

(2) The following persons are not entitled to the deduction provided in subsection (1) (a) of this section:

(a) Persons holding themselves out to the public and engaging in business as a banking, loan, or other financial institution chartered under:

(i) Title 30, 31, 32, or 33 RCW;

(ii) The national bank act, as amended;

(iii) The homeowners loan act, as amended; or

(iv) The federal credit union act, as amended;

(b) A holding company of any person described in (a) of this subsection that is subject to:

(i) The bank holding company act, as amended; or

(ii) The homeowners loan act, as amended;

(c) Persons holding themselves out to the public and engaging in business as a subsidiary or affiliate owned or controlled by one or more persons described in (a) of this subsection;

(d) Persons holding themselves out to the public and engaging in business as a lender approved by the United States secretary of housing and urban development for participation in any mortgage insurance program under the national housing act, as amended;

(e) Persons holding themselves out to the public and engaging in business as an underwriter and distributor of securities issued by other persons, a seller of securities to the public, a broker of securities, or any combination of these activities, whose gross income is normally derived principally from these activities. However, this subsection shall not be construed to include the entity which issues any of the securities that are underwritten, distributed, sold, or brokered by any of the persons identified in this subsection. In addition, this

subsection shall not be construed to include any collective investment entity such as a mutual fund, venture capital fund, hedge fund, or deferred compensation trust or account;

(f) Persons engaging in business as a provider of revolving credit accounts, but only to the extent of the interest income derived from the provision of the revolving credit accounts;

(g) Persons engaging in business as a provider of installment sales contracts, but only to the extent of the interest income derived from the provision of the installment sales contracts. However, a person providing installment sales contracts shall not be deemed to be engaging in business for the purposes of this subsection unless they hold three or more installment sales contracts;

(h) Persons whose primary business is holding themselves out to the public and engaging in business in substantially identical activities as any person listed in (a) through (g) of this subsection. However, this subsection shall

not be construed to include any person who qualifies as a personal holding company as defined in section 542 of the internal revenue code, or any person who would meet the definition of a personal holding company if that person was a corporation.

--- END ---

CERTIFICATE OF SERVICE

On April 5, 2024, I caused to be served upon the below named counsel of record, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

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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.

EXECUTED at Seattle, Washington, on April 5, 2024.

R. Samuel Hulick
Legal Assistant

DAVIS WRIGHT TREMAINE LLP

April 05, 2024 - 11:59 AM

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