NO. 21-1066

In the
Supreme Court of the United States

WASHINGTON BANKERS ASSOCIATION, a Washington Public Benefit Corporation, and AMERICAN BANKERS ASSOCIATION, a District of Columbia Non-Profit Corporation,

Petitioners,

v.

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,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BANK POLICY INSTITUTE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a strong interest in preventing state and local discrimination against interstate commerce and has filed *amicus* briefs in other cases addressing such questions. *See, e.g.*, *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015). The Chamber's members include a significant number of banks and other businesses that engage in commerce in and among the 50 states. As a result, they are subject to a host of state and local taxes across virtually every jurisdiction. Discriminatory state taxes can significantly affect their business

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of the intent to file this brief and have consented to this filing.

objectives—particularly their interstate activities. Properly interpreted, the Commerce Clause protects the Chamber's members from discriminatory laws imposing taxes that, in effect, target out-of-state businesses and interstate commerce.

The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group. Members of the BPI include universal banks, regional banks, and major foreign banks doing business in the United States. BPI's members employ nearly two million Americans and make 68% of all loans and nearly half of the nation's small business loans. BPI has a strong interest in ensuring a fair and competitive interstate banking market that is not hindered by protectionist barriers to interstate trade.

Amici submit this brief to share their perspective on why it is critical that the courts continue to meaningfully enforce the long-settled rule that the Commerce Clause prohibits states from enacting laws that have the impermissible effect of discriminating against interstate commerce.

SUMMARY OF THE ARGUMENT

Washington's new business and occupation tax on financial institutions with a global net income of at least $1 billion is a study in discrimination against interstate commerce. The tax was designed for the acknowledged purpose of helping local banks at the expense of "the largest banks in the world," Pet.5, and it accomplishes exactly that. By applying only to financial institutions that do a volume of *global* business that exceedingly few local financial institutions have reached, the surtax is tailor-made to fall almost exclusively on financial institutions that are based and do most of their business outside the state, which it has in fact done a whopping 98% of the time. There is thus no denying that out-of-state banks pay a higher tax rate to do business in Washington than in-state banks pay—and do so because they engage in a higher volume of out-of-state commerce, no less. That is textbook discrimination against interstate commerce.

The Washington Supreme Court nonetheless held that the surtax does not violate the Commerce Clause, insisting that petitioners' discriminatory *effects* claim fails because the tax is not discriminatory *on its face*. That gets matters backward. As this Court's cases teach, it is the *effect* of a law on interstate commerce, not the particular means by which that effect is accomplished, that is the principal concern of the dormant Commerce Clause. After all, the point of the doctrine is to police for barriers to interstate trade, not to impose an equal-treatment rule for its own sake. And a state law that draws distinctions based on a near-perfect proxy for "out-of-state" imposes just as much of a barrier to interstate trade as one that draws distinctions between in-state and out-of-state goods, services, or suppliers explicitly. That is precisely why this Court has said time and again that laws that have the effect of discriminating against interstate commerce are subject to the same rule of virtually *per se* invalidity as laws that accomplish that end explicitly. By deeming facial neutrality sufficient to defeat a discriminatory effects claim, the decision below deprives that rule of all force.

Left standing, the decision below will enable Washington's discriminatory law to serve as a model for other states seeking to adopt equally protectionist tax regimes. Moreover, nothing about Washington's approach, or the Washington Supreme Court's decision sanctioning it, is confined to the financial services industry. States could just as easily use "global income" (or some other near-perfect proxy) to impose discriminatory barriers to interstate trade in other industries. Indeed, at least one other state has already done so, using global income to target digital advertising services that do most of their business out of state. *See infra* at 16. And the potential for abuse is as broad as commerce itself. The Court should grant certiorari and provide states and lower courts with a much-needed reminder that the discriminatory effects test remains alive and well.

ARGUMENT

Washington's bank surtax is an extreme outlier in the world of state taxes. Although it is not unusual to apportion a tax to income derived on in-state activity, it is highly unusual for the tax to be triggered in the first instance by how much business an entity does *out* of state. The Washington tax does just that, as it is triggered by how much net income a bank generates anywhere in the world. *See* Wash. Rev. Code §82.04.29004. That novel approach is woefully out of step with how states have traditionally taxed businesses. And that deliberate effort to shift a tax almost entirely to large banks with considerable business outside the state cannot pass muster under this Court's Commerce Clause jurisprudence.

I. A Robust Discriminatory Effects Doctrine Is Essential To Guard Against Protectionist State Laws.

The Commerce Clause grants Congress the power to "regulate Commerce … among the several States." Art. I, §8, cl. 3. Although the clause is a positive grant of power to Congress, "the proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in [this Court's] case law." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2460 (2019). Indeed, just a few Terms ago, the Court reiterated that the Commerce Clause is "the primary safeguard against state protectionism." *Id.* at 2461.

As the Court explained, "removing state trade barriers was a principal reason for the adoption of the Constitution," for states had "notoriously obstructed the interstate shipment of goods" in the years leading up to the Constitutional Convention of 1787. *Id.* at 2460; *see also, e.g.*, The Federalist No. 7, at 62-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("regulations of trade, by which particular States might endeavor to secure exclusive benefits to their own citizens … naturally lead to outrages, and these to reprisals and wars"); Gordon S. Wood*, The Creation of the American Republic, 1776-1787*, 463-67 (1998). Thus, "[i]t would be strange if the Constitution contained no provision curbing state protectionism, and at this point in the Court's history, no provision other than the Commerce Clause could easily do the job." *Tenn. Wine*, 139 S.Ct. at 2460; *see generally* Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the*

Dormant Commerce Clause, 97 Va. L. Rev. 1877 (2011) (defending the textual and historical basis for the dormant Commerce Clause).

As the primary constitutional safeguard against state protectionism, the Commerce Clause is naturally concerned not just with *overt* discrimination against interstate commerce, but also with state laws that have *the effect* of discriminating against interstate commerce. It could hardly be otherwise given the real-world concerns underlying it. After all, the framers were not worried about eradicating some dignitary or other abstract form of harm that might flow from the bare act of drawing distinctions between in-state and out-of-state goods, services, or suppliers. They were worried about eradicating barriers to interstate trade.

To be sure, laws that on their face treat in-state and out-of-state interests differently are prime candidates for the imposition of such impermissible barriers, which is why they are subject to a "virtually *per se* rule of invalidity." *Granholm v. Heald*, 544 U.S. 460, 476 (2005). But the ultimate concern of the Commerce Clause is whether a state has imposed a barrier to interstate trade, and history has proven that states are no less capable of accomplishing that forbidden end through stratagems more subtle than facial discrimination. A Commerce Clause that captured only "the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods," *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951), thus would do vanishingly little to constrain the states' protectionist instincts.

In keeping with those commonsense principles, this Court has long held that a state law triggers the virtually *per se* rule of invalidity if it discriminates against interstate commerce "*either* on its face *or* in practical effect." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (emphasis added). And the Court has not hesitated to invalidate "facial[ly] neutral[]" state laws that had real-world "discriminatory impact[s] on interstate commerce." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 352-53 (1977). That has been no less true in the context of tariffs, duties, and taxes—the "paradigmatic example" of laws that discriminate against interstate commerce. *West Lynn Creamery, Inv. v. Healy*, 512 U.S. 186, 193 (1994); *see, e.g.*, *Best & Co. v. Maxwell*, 311 U.S. 454 (1940) (striking down facially neutral North Carolina tax law that distinguished between "regular retail merchants" and those that sold their wares out of rented hotel rooms because it primarily affected out-of-state retailers); *Wynne*, 575 U.S. 542 (striking down facially neutral income tax scheme). In short, whether tariff or tax, "forthright or ingenious," *Healy*, 512 U.S. at 201, the Commerce Clause "prohibits discrimination against interstate commerce," "whatever its form or method" may be, *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185-86 (1938).

II. Washington's Surtax On Out-Of-State Banks Violates The Commerce Clause.

That long-settled rule should have made this an easy case. If Washington merely wanted to generate more revenue from the operation of banks within its borders, it had the means at its disposal. It could have imposed a tax triggered by how much revenue a bank earns in the state of Washington, thus directly linking its revenue collection efforts to activities taking place within its borders. If it wanted to provide some measure of protection to smaller banks, it could have set that in-state threshold relatively high. To be sure, that may have left some larger banks that do most of their business *outside* the state off the hook. But that is just a necessary byproduct of a tax scheme that respects both the prohibition on protectionism and the territorial limits of a state's regulatory reach.

Instead, Washington chose a different path. First, it made the trigger for its new surtax a bank's *global* income, thereby ensuring that any bank that does a dollar of business in Washington would be exposed to the tax, even if it does the vast majority of its business outside the state. Second, it set the triggering threshold at $1 billion, an amount carefully calibrated to capture "the largest banks in the world," Pet.5, while excluding virtually all of the banks based in Washington. That strategy worked to a tee: Large national or multinational financial institutions with principal places of business out of state account for a whopping 98% of the institutions subject to the new surtax, while a miniscule 0.26% of the revenue generated by the surtax has come from in-state banks. Pet.2. That unabashed effort to impose special taxes on banks that heavily "participate[] in interstate commerce," *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 578 (1997), is textbook discrimination against interstate commerce.

The Washington Supreme Court nonetheless upheld the surtax, insisting that the fact that it was carefully constructed to apply almost exclusively to out-of-state banks "is of no moment." Pet.App.14a. Indeed, in its view, "even if *no* Washington-based institutions qualified" for the surtax, that still would make no constitutional difference. Pet.App.14a (emphasis added). All that matters, in its view, is that the tax is not *explicitly* triggered by "a distinction between in-state and out of state" banks. Pet.App.13a-14a. But if that were all that mattered, then the effects test would be a dead letter, for the universe of facially neutral laws that have the effect of discriminating against interstate commerce would be a null set. That would turn the Commerce Clause on its head, policing only the easiest kind of discrimination for states to avoid, while doing nothing to preclude states from using more subtle means to accomplish the actual *ends* with which the Commerce Clause is concerned.

Remarkably, the court seemed to think that *this* Court's cases somehow compel that topsy-turvy result. Pet.App.14a. In fact, this Court's cases teach exactly the opposite lesson: "The Commerce Clause regulates effects," *Wynne*, 575 U.S. at 561 n.4, so it is the "practical effect," "not the formal language of the tax statute," that matters, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Were the analysis to hinge on the "formal language" of the law or the face of the statute, then states would be rewarded for the very artful drafting and "ingenious" devices, *Healy*, 512 U.S. at 201, that the Commerce Clause is supposed to guard against.

Contrary to the Washington Supreme Court's contentions, neither *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), nor *Commonwealth*

Edison Co. v. Montana, 453 U.S. 609 (1981), supports—let alone compels—a different conclusion. To be sure, those cases demonstrate that a facially neutral law that disproportionately impacts interstate commerce does not *necessarily* violate the Commerce Clause. But they do not begin to support the illogical proposition that facially neutral laws that disproportionately impact interstate commerce necessarily *do not* violate the Commerce Clause.

Exxon concerned a Maryland law that prohibited "a producer or refiner of petroleum products" from operating a "retail service station" in the state. 437 U.S. at 119-20. The challengers "argu[ed] that the effect of the statute [was] to protect in-state independent dealers"—gas distributors that did not produce or refine their own petroleum—"from out-of-state competition" from vertically integrated dealers. *Id.* at 125. This Court disagreed. In doing so, the Court did not reason that the facial neutrality of the law rendered its real-world effects irrelevant. It simply concluded that the challengers failed to prove as a matter of fact that the law actually had a discriminatory effect. As the Court explained, the law did not prevent "interstate dealers" who did *not* produce or refine petroleum from "compet[ing] directly with the Maryland independent dealers"—a considerable exclusion since there were "several major interstate marketers of petroleum that own[ed] and operate[d] their own retail gasoline stations." *Id.* at 125-27. And the law did not "place added costs upon" petroleum sold by independent interstate marketers, but rather left them free to compete with in-state independent dealers on equal terms. *Id.* at 126. The only entities for whom the law added costs were the vertically integrated, and those same costs would apply regardless of where they were based.

Here, by contrast, the discriminatory effect on out-of-state banks vis-à-vis in-state banks is palpable: Many out-of-state banks must now pay a tax that the vast majority of in-state banks must not. That is not because they are structured differently, or because they do more business in Washington. It is because they do more business *outside* Washington. Whatever may be said of making it more costly to be vertically integrated, making it more costly for out-of-state companies than it is for their in-state competitors to do business in state is a classic form of protectionism.

Commonwealth Edison is, if possible, even more off-point. That case involved a severance tax levied by Montana on the mining of coal in Montana. 453 U.S. at 612-13. While the tax applied in the same manner to anyone who mined coal in Montana, the challengers argued that it nonetheless discriminated against out-of-state commerce "because 90% of Montana coal is shipped to other States under contracts that shift the tax burden primarily to non-Montana utility companies and thus to citizens of other States." *Id.* at 617-18. The Court rejected that argument, reasoning that those who choose to mine coal in Montana should not be relieved of an ordinary "cost of doing business" in Montana just because Montana attracts a lot of out-of-state miners. *Id.* at 623-34.

Here, by contrast, the surtax is not a cost of doing business *in Washington*. Quite the contrary: It is a cost triggered by doing a high volume of business *outside of Washington*. That is no accident; the whole point of measuring net income on a global, rather than in-state, basis is to ensure that the tax falls primarily on "the largest banks in the world," not "the community banks and the small credit unions" who do most or all of their business in Washington. Pet.5. That makes this a particularly easy case, as singling entities out for special taxes *precisely because* of the degree to which they "participate[] in interstate commerce" is discrimination against interstate commerce, plain and simple. *Camps Newfound*, 520 U.S. at 579; *see also, e.g.*, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 n.9 (1980) ("discrimination based on the extent of local operations is itself enough to establish the kind of local protectionism" that is virtually *per se* invalid). That is true regardless of whether the singling out is explicit or is accomplished through the marginally more subtle means of finding a proxy that is a near-perfect fit for doing a lot of business outside the state. Either way, imposing special taxes on those who engage in more out-of-state business, in an avowed effort to aid their smaller, local competitors, is the "quintessential evil" of the kind of protectionist tax scheme that the Commerce Clause guards against. *Wynne*, 575 U.S. at 545. That lower courts cannot seem to recognize as much is a powerful illustration of the need for this Court to step in and ensure that the effects test does not wither on the vine.

III. The Decision Below Frustrates Competition And Provides A Roadmap For States To Evade The Constraints Of The Commerce Clause.

Left standing, the decision below will allow Washington's law to serve as a roadmap for states looking to skirt the Commerce Clause's strictures. If ready-made proxies for discrimination like "global income" truly suffice to render a law's actual effects on interstate commerce irrelevant, then national financial institutions will become easy targets for protectionist measures designed to advantage favored, local banks at their expense. Indeed, one of the principles animating the dormant Commerce Clause is the concern that when "the burden of state regulation falls on interests outside the state," the pressure to impose that burden "is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *S. Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 767 n.2 (1945); *see also, e.g.*, *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007). If anything, the dynamic is reversed, as state legislators feel even *more* pressure from their in-state constituents to enact laws that have the effect of shifting local costs to out-of-state interests.

The obvious impact of a surtax like the one Washington has imposed is to discourage large national banks from doing business in Washington. Because the surtax forces large financial institutions (which unsurprisingly have proven most likely to be national institutions) to pay a higher tax rate than smaller financial institutions, it puts them at a competitive disadvantage, curbing their ability to maintain the range and amount of banking products and services currently offered without an offsetting increase in prices. The result is exactly what the Commerce Clause is supposed to guard against: limited consumer choice and declining competition, owing to discrimination against interstate commerce.

A tax scheme that discourages large national banks from doing business in a state also frustrates critical federal objectives. Congress has made clear its interest in a national financial services market. Starting with the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Congress began undoing many of the restrictions from the McFadden Act of 1927 that restrained banking across state lines by authorizing national banks to operate interstate branches. 12 U.S.C. §36; *see also Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 548 n.2 (2009) (Thomas, J. concurring in part and dissenting in part). In Section 613 of the Dodd-Frank Act, Congress opened interstate banking further by eliminating the "opt-in" election from the Riegle-Neal Act that permitted states to choose whether to permit interstate bank branching within its borders through de novo branches. 12 U.S.C. §321. Since the enactment of Section 613, states can no longer enact statutes prohibiting interstate banking or branching within their state. *See id.*; Federal Reserve System Board of Governors, De Novo Interstate Branching by State Member Banks, (Feb. 14, 2011) https://bit.ly/35La3Ez. All of these moves reflect Congress's strong desire to eliminate barriers to an open, national interstate banking market and foster efficiency, competition, and consumer access to banking services.

That desire makes eminent sense, as the financial and economic well-being of individual consumers and communities is best served by a diverse banking sector that includes large banks. For instance, larger banks are better positioned to meet high demand for credit from small-business borrowers, both because of their economies of scale and because their greater resources reduce concerns about risk. *FDIC Small Business Lending Survey* 13, 47 (2018), https://bit.ly/3sBg7bI. Large banks help preserve stability in the nation's financial system. *See, e.g.*, Mario Draghi, President, Eur. Univ. Inst.: Risk-reducing and risk-sharing in our Monetary Union (May 11, 2018) https://bit.ly/3CbfFUL. Economies of scale make it easier for large banks to afford the information technology investment necessary to provide top quality applications, digital payment services, and cyber security. Moreover, the "inverse relationship" between bank size and operating costs is dramatic, yielding reduced expenses of $1-2 million per year for each $1 billion in assets. Anna Kovner, James I. Vickery, & Lily Zhou, *Do big banks have lower operating costs?*, 20 Econ. Pol'y Rev. 2 (Dec. 31, 2014). And large international financial institutions can provide banking services that large international corporations need, such as trade finance and correspondent offices.

Left standing, Washington's tax will have the unfortunate effect of disincentivizing large banks to provide all these benefits to businesses and consumers in Washington. That is particularly true since the effective tax rate of the surtax, as a percentage of net income, is out of proportion to corporate taxes imposed on financial institutions in other states. That discrepancy will only grow as interest rates rise. Indeed, it will be uniquely exacerbated: Rising interest rates lead to an increase in taxable gross revenue through a higher return on loans made by the financial institution, and gross revenue, unlike net income, is not offset by rising costs on interest paid out to the institution's depositors. And if discrimination-by-proxy taxes like Washington's proliferate, they will effectively produce tax penalties specifically targeted to large financial institutions throughout the country, ultimately leaving the entire nation with fewer large institutions.

All of that is bad enough for the financial services industry. But nothing about the discrimination-by-proxy strategy of circumventing the Commerce Clause is confined to financial institutions. It could spread dangerously easily to other industries. After all, businesses are subject to taxes pretty much anywhere they operate, and most tax schemes employ thresholds, both to determine who must pay which taxes and to determine at what rate. A "global income" scheme thus could just as easily be used to impose special tax burdens—or many other types of fees or costs—on large national companies in any other industry that a state legislature thinks is not doing enough to "put money into local communities." Pet.5 (quoting House Floor Debates).

That is no mere hypothetical. While Washington may be focused on banks, Maryland has already employed a similar scheme to institute a surcharge on digital advertising services based on global annual gross revenue. *See Chamber of Com. of the U.S. v. Franchot*, No. 1:21-cv-410 (D. Md., filed Feb. 18, 2021). Much like the Washington surtax, while the charge is "assessed against 'annual gross revenues derived from digital advertising services in the State,'" the *rate* at which the assessment is imposed depends "on a payer's 'global annual gross revenues.'" Pl's Opp., *Franchot*, Dkt. 31-1 at 5 (July 29, 2021) (quoting Md.

Code Ann. Tax-Gen. §7.5-102(b)(1)). Whether deemed a surtax, surcharge, or anything else, that is, at its core, an increased cost for businesses engaged in a higher volume of interstate commerce. *See* Jerry Ellig & Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, 10 J. of Empirical and L. Studies 196, 197 (June 2013).

And, of course, global income is hardly the only proxy out there for "out-of-state." States have proven quite adept at identifying facially neutral means of imposing special burdens on out-of-state companies, whether they be higher taxes, increased costs, or outright exclusion from the market. *See, e.g.*, *Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 403-04 (9th Cir. 2015) (upholding accelerated minimum-wage schedule that defined "large employer" in a way that made 96.3% of "large employers" franchisees affiliated with an out-of-state franchisor); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008) (striking down zoning ordinance imposing size requirement on chain stores as a proxy for discrimination): *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008) (similar); *Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n*, 945 F.3d 206, 220 n.21 (5th Cir. 2019) (upholding licensing regime that excluded publicly owned companies, thereby ensuring that 98% of liquor stores in Texas were wholly owned by Texans). Just as surely as facially discriminatory laws, these types of discrimination-by-proxy measures "renew the barriers to interstate trade which it was the object of the commerce clause to remove." *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938).

While the direct target of such schemes may be (typically "large") out-of-state companies, the real victims are consumers. When states make it more costly for out-of-state entities to do business within their borders, that exerts an obvious "pressure on an interstate business to conduct more of its activities" in its home state, thereby depriving residents of other states of the benefit both of the goods and services it provides and of robust competition for their business. *Amerada Hess Corp. v. Dir., Div. of Tax*, 490 U.S. 66, 77-78 (1989). It is thus consumers who bear the ultimate cost when states enact protectionist laws, and those costs are borne regardless of whether the pressure the law exerts manifests itself in facial discrimination. To be sure, people are free to choose to patronize local businesses, whether it be banks, restaurants, shops, or any others, even if doing so means paying more or forgoing some benefits. But the Commerce Clause demands that consumers be given a genuine *choice* in the matter, not deprived of the benefits of interstate commerce owing to barely disguised protectionism.

* * *

As this Court recently reminded, the Commerce Clause "reflect[s] a 'central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Tenn. Wine*, 139 S.Ct. at 2461 (quoting *Granholm*, 544 U.S. at 472). Those same "tendencies" of "economic Balkanization" are just as potent today, and they will only increase if the Commerce Clause does not serve as a force to rein them in. Washington's bank surtax is just the latest iteration of that trend, but if left standing, it will not be the last.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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