

No. _____

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.

**APPLICATION TO THE HON. ELENA KAGAN
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF WASHINGTON**

Pursuant to Rule 13.5 of the Rules of this Court, Petitioners Washington Bankers Association and American Bankers Association (collectively, Petitioners) move for an extension of time of 30 days, up to and including January 28, 2022, within which to file a petition for a writ of certiorari.

1. The decision below is *Washington Bankers Ass'n v. State*, 495 P.3d 808 (Wash. 2021) (No. 98760-2) (attached as Exhibit 1). The Washington Supreme Court issued its judgment on September 30, 2021. Unless extended, Petitioners' time to seek certiorari in this Court expires December 29, 2021. Petitioners are filing this Application at least ten days before that date. *See* S. Ct. R. 13.5. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

2. This case concerns the constitutionality of Washington's surtax on financial institutions that do large volumes of interstate business. The statute imposes a substantial increase in the State's business and occupation tax on any financial institution that is a member of a consolidated financial institution group reporting global net income of at least \$1 billion. *See Rev. Code of Wash.*

82.04.29004. The tax is borne overwhelmingly by out-of-state financial institutions: 98 percent of taxpayers are based out of state, and 99.74 percent of revenue comes from out-of-state taxpayers. And the *only* financial institutions subject to the surtax are those affiliated with extensive interstate banking networks. That is no accident, as the surtax is triggered by the global profits of a consolidated group, regardless of how little revenue the affiliated institution generates within Washington itself. For example, the surtax applies to a bank with \$10 million of annual net income in Washington that is a member of a group with \$1 billion in global net income, but not to a bank with \$900 million of annual net income in Washington with no affiliation with a group that earns interstate or foreign income.

Given that the law imposes costs on businesses because of their connection to interstate commerce, it generates a discriminatory effect forbidden by the Commerce Clause. That discriminatory effect was by design. When the Washington legislature voted on the tax, it was assured that *only* out-of-state businesses would pay it. The bill's sponsor (among others) was explicit that the surtax would exempt local banks and credit unions, and that the full weight of the tax would fall on major out-of-state banks.

3. Petitioners—two associations whose members are subject to the surtax—filed a lawsuit challenging its constitutionality. They explained that the tax discriminates in both effect and purpose against interstate commerce, in violation of the dormant Commerce Clause. The Superior Court agreed, declaring the statute to be invalid and unenforceable.

The Washington Supreme Court reversed. It concluded that the tax was “facially neutral,” as the statute itself “does not distinguish between in-state and out-of-state taxpayers.” *Washington Bankers Ass’n*, 495 P.3d at 815. As to the “disproportionate economic effect” on taxpayers doing business in interstate commerce, the court held that it did “not render [the] tax discriminatory” under the Commerce Clause. *Id.* The court also concluded that the law was not motivated by a discriminatory purpose. *Id.* at 821-25.

4. A 30-day extension within which to file a certiorari petition is reasonable and necessary. As the trial court’s judgment reflects, the Washington Supreme Court’s decision upholding the State’s surtax on interstate financial activity implicates important questions under this Court’s dormant Commerce Clause jurisprudence. A statute like the surtax here that is keyed to interstate commercial activity operates no differently than an old-fashioned tariff, the “quintessential evil targeted by the dormant Commerce Clause.” *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542 (2015). An extension of time will help to ensure that the petition clearly and thoroughly presents the vitally important and complicated issues raised by the Washington Supreme Court’s decision.

An extension is also justified by the press of business on other matters. Undersigned counsel was responsible for filing a brief in opposition to a motion to dismiss the appeal in *Krakauer v. DISH*, No. 21-1616 (4th Cir.) on November 8, 2021. Counsel responsible for the petition are also responsible for numerous other engagements with imminent deadlines, including: a reply brief in support of certiorari in *Roberts v. Garland*, No. 21-161 (U.S.) due November 22, 2021; an answering brief in *Brock v. Zuckerberg*, No. 21-1796 (2d Cir.) due November 26, 2021; a reply brief in *Washington Food Industry Ass'n v. City of Seattle*, No. 99771-3 (Wash. S. Ct.) due December 17, 2021; and ongoing responsibilities in *Fresenius Medical Care of Orange County, LLC v. Bonta*, No. 8:19-cv-02130 (C.D. Cal.).

5. For the foregoing reasons, Petitioners request that an extension of time be granted, to and including January 28, 2022, within which Petitioners may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Eric A. Shumsky

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