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.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Washington has enacted a major surtax—an increase of nearly 70%—on the gross receipts of certain financial institutions: namely, any such institution that is part of a consolidated group earning at least $1 billion in net income anywhere in the world. Before enacting the surtax, the legislature verified that no in-state bank would have to pay it, and the legislature chose a trigger for the surtax that captures only banks that do large volumes of business outside the state. The result leaves little to the imagination: 98% of financial institutions subject to the surtax have their principal places of business outside Washington State, and 99.74% of surtax revenue comes from entities based out of state. All entities paying the surtax are subject to it only because they are affiliated with extensive interstate banking networks. Nonetheless, the Washington Supreme Court upheld the surtax under the dormant Commerce Clause. In doing so, it deepened acknowledged division in the lower courts. Numerous courts have properly held that regulating on the basis of a feature that is a proxy for being based out of state, or for participating in interstate commerce, amounts to impermissible discrimination against interstate commerce. Other courts disagree.

The question presented is:

Does a law that is triggered by a proxy for participating in interstate commerce and that burdens out-of-state entities almost exclusively violate the dormant Commerce Clause?

CORPORATE DISCLOSURE STATEMENT

The Washington Bankers Association and American Bankers Association are non-profit corporations. They have no parent companies and have issued no stock.

RELATED PROCEEDINGS

Washington Bankers Association et al. v. State of Washington et al., No. 98760-2 (Wash. Judgment entered Sept. 30, 2021).

Washington Bankers Association et al. v. State of Washington et al., No. 19-2-29262-8 SEA (King Cty. Super. Ct. Judgment entered May 15, 2020).

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INTRODUCTION

This Court has long recognized three forms of discrimination against interstate commerce that violate the dormant Commerce Clause: *facial* discrimination, discriminatory *purpose*, and discriminatory *effects*. *E.g.*, *Amerada Hess Corp. v. N.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989). That last category is critical. After all, discrimination against interstate commerce isn't always "forthright." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). Instead, such discrimination often is "ingenious," *id.*, using terms that are drawn to disadvantage out-of-state businesses or interstate commercial activity. But discrimination by means of artful drafting is discrimination all the same. And, no less than facial discrimination and discriminatory purpose, it is anathema to the Constitution's command that in-state and interstate commerce be treated evenhandedly so that fair competition in a truly national economy can flourish.

Contrary to the decisions of multiple other courts—and to this Court's clear guidance—the Washington Supreme Court has upheld a law that is engineered to discriminate almost perfectly against interstate commerce. Specifically, Washington State imposed a substantial surtax on "specified financial institutions," defined as any "member of a consolidated financial institution group" reporting at least $1 billion in global annual net income. Revised Code of Washington (RCW) 82.04.29004. This means that the surtax is triggered by the aggregate earnings of all consolidated affiliates and parents anywhere in the world, regardless of how little revenue the taxpaying institution generates in Washington. So a bank

that earns $100 million in net income only in Washington will be taxed at 1.75%, whereas a competing bank that earns $100 million in Washington and also has out-of-state affiliates that earn $900 million will be taxed at 2.95%—solely because of its connection to a financial group that earns substantial sums in interstate commerce. Indeed, even if the first bank earned $900 million in Washington, it still would pay a substantially lower tax rate on those earnings than the second bank that earns only $100 million in state. Why? Solely because of the second bank's tie to interstate commerce. The surtax is triggered by the earnings of entities outside of Washington—including entities that do no business in the state and that the state could not directly tax.

Nothing about the surtax's discriminatory effects is hypothetical—or accidental. The Washington legislature passed the surtax only after being assured that only out-of-state "mega-banks" would pay it. And the undisputed evidence is that 99.74% of surtax revenue comes from institutions based out of state; 98% of financial institutions subject to the surtax have their principal places of business outside of Washington State; and 100% of the entities paying the surtax are subject to it only because they are affiliated with extensive interstate banking networks.

In nonetheless upholding the surtax, the Washington Supreme Court deepened divisions between the lower courts and departed from this Court's precedents. First and foremost, it failed to recognize that a law imposing disfavored treatment based on a proxy for extensive interstate commerce necessarily discriminates against interstate commerce. There is an

acknowledged division of authority on this question, notwithstanding clear authority from this Court that it is unconstitutional to single out businesses based on their connections to interstate commerce. Second, in holding that a tax on in-state revenue is immune from the dormant Commerce Clause—regardless of how the tax is triggered—the decision below departed from this Court's precedents in ways that are the source of still further confusion in the lower courts.

The Court should grant review to resolve these divisions and to reaffirm that state legislatures may not draft their way around the Commerce Clause.

OPINIONS AND ORDERS BELOW

The trial court's summary judgment decisions and order declaring the Washington surtax unconstitutional are unreported and reproduced at Pet. App. 48a-60a. The Washington Supreme Court's decision is reported at 495 P.3d 808 and reproduced at Pet. App. 1a-47a.

JURISDICTION

The Washington Supreme Court issued its opinion on September 30, 2021. Pet. App. 1a. On November 24, 2021, this Court extended the time to petition for a writ of certiorari to January 28, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the U.S. Constitution provides in relevant part that "Congress shall have

Power … [t]o regulate Commerce … among the several States." U.S. Const. art. I, § 8, cl. 3. The statute establishing the surtax, RCW 82.04.29004, is reproduced at Pet. App. 61a-65a.

STATEMENT OF THE CASE

The Surtax's Discriminatory Origins

In the waning days of the 2019 legislative session, the Washington State legislature found itself facing a budget shortfall with only two days to close the gap. So, in just 48 hours, the legislature proposed and passed an 80% increase in the business and occupation ("B&O") tax owed by certain "specified financial institutions." RCW 82.04.29004. Prior to enactment of this new surtax, financial service businesses operating in Washington were subject to a B&O tax of 1.5% of the gross income they earned on their business in the state.[1] Pet. App. 3a. The new bill, SHB 2167, imposed a surtax of 1.2% on the gross Washington income of financial institutions that are "member[s] of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year [global] annual net income of at least one billion dollars." Pet. App. 2a; RCW 82.04.29004(1), (2)(e)(i).

In other words, although the surtax is paid only on in-state earnings, it is triggered by the global net

[1] A B&O tax is an excise tax on gross income imposed for doing business in the state. Pet. App. 3a. The base rate for the B&O tax increased to 1.75% in 2020, so the surtax now amounts to an increase of 68% over the otherwise applicable tax. 2020 Wash. Sess. Laws, ch. 2, § 3 (codified at RCW 82.04.290(2)(a)).

income of the entire affiliated financial group, regardless of how little revenue the taxpaying institution generates in Washington. By selecting a one-billion-dollar trigger for the surtax, the legislature ensured that the tax would reach only financial institutions that engage in extensive interstate commerce.

The legislature was forthright about whom it was targeting and why. In statements concerning the bill and proposed amendments to it, the surtax's sponsor, Representative Tarleton, urged colleagues to "help the community banks and the small credit unions and … make sure that the largest banks in the world are going to pay the tax."[2] The surtax would apply to "mega-banks" that, in the sponsor's view, "have not chosen to participate in local economies and put money into local communities"; if they wanted the same "credit" and the same "benefits" the legislature was affording local banks, they'd have to "demonstrate that they want to be here in our own communities supporting us." House Floor Debate 8:28-50, 22:57-23:12; *see id.* at 23:30-40 ("I haven't seen the commitment to the local communities from these largest institutions that we need to see to support our state."). Even the State conceded below that the sponsor's comments "appear to show an intent to promote 'local banks' at the expense of banks operating in

[2] House Floor Debate on Substitute HB 2167, 66th Leg., Reg. Sess. (Wash. Apr. 27, 2019), at 6:24-34, https://www.tvw.org/watch/?eventID=2019041311 ("House Floor Debate").

interstate commerce." Clerk's Papers ("CP") 254 (Defs.' Opp. to Mot. for Summ. J.).[3]

Like the bill's sponsor, other supporters touted the surtax's targeted effect on institutions outside of their "community." They bragged that, because the surtax applies only to "institutions with $1 billion in global net profits," it "does not impact community banks or credit unions." CP 223. "Small community banks and credit unions will not pay this rate and in fact [it] will help increase their competitiveness with big banks." CP 225.

Other legislators, however, balked at the obvious discrimination. One warned that the surtax "clearly seems to violate the Commerce Clause" by targeting "out-of-state bank[s]" because, under "the definition of a billion dollars in net profits, not a single bank in Washington meets that definition. So in-state banks pay half the tax rate of what the out-of-state banks will pay."[4] Another explained, "[y]ou can't have a differential tax scheme, like we're proposing here, that so clearly, so obviously differentiates between in-state and interstate banks without failing the smell test." Senate Floor Debate 1:41:40-1:41:56.

Nonetheless, the bill was rushed through committee and both houses of the legislature. Following

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[3] The Clerk's Papers are the records transmitted by the trial court to the Washington Supreme Court as the record on appeal.

[4] Senate Floor Debate on Substitute HB 2167, 66th Leg., Reg. Sess. (Wash. Apr. 28, 2019), at 1:39:59-1:40:19, https://www.tvw.org/watch/?eventID=2019041266 ("Senate Floor Debate").

passage, a bipartisan group of legislators asked the governor to veto the bill—among other reasons because it "likely [would] be the subject of litigation on grounds that it violates the commerce clause of the United States Constitution by subjecting out-of-state banks to different tax laws than in-state banks." CP 233. The governor nonetheless signed the bill into law.

The Surtax's Discriminatory Effects

The surtax was stunningly successful in achieving the legislature's aim of targeting out-of-state "mega-banks." Before voting on the surtax, legislators asked the Washington Department of Revenue to project how many—if any—Washington-chartered banks would satisfy the threshold for the surtax. CP 297. The Department of Revenue confirmed that every single entity likely to owe the surtax in 2020 and 2021 "ha[s] their principal place of business outside Washington." CP 236. Undisputed data from the first quarter the surtax was in effect proved its discriminatory effect: Just three of the 153 surtax payers—fewer than 2%—are based in Washington, and only one is a business formed under Washington law. Pet. App. 4a; CP 375-80. Those three taxpayers paid just $88,428—a mere 0.26% of the total surtax paid by all 153 taxpayers in that first quarter. Pet. App. 4a; CP 375-80; CP 371-72. And all three of them are subject to the surtax only because they are affiliated with extensive interstate banking networks. CP 375-76, 393 n.5.

Proceedings Below

Petitioners, two non-profit banking associations, brought a declaratory-judgment action challenging the surtax under the Commerce Clause of the U.S. Constitution. They explained that, in both purpose and effect, the surtax discriminates against out-of-state banks, which bear the overwhelming brunt of the surtax. CP 165. Moreover, the surtax discriminates against interstate commercial *activity*. That is because the threshold for the surtax—$1 billion in consolidated global net income—can be met only by entities substantially engaged in *interstate* commerce, and not entities like local credit unions and community banks that engage solely in intra-state commercial activity. CP 165-66. The state presented no evidence indicating that the surtax would be triggered in the absence of extensive interstate commerce.

On cross-motions for summary judgment, the trial court concluded that while the surtax is *facially* neutral, Pet. App. 59a, it is "illegal, invalid, and unenforceable because it discriminates in effect and in purpose against interstate commerce in violation of the dormant Commerce Clause," Pet. App. 55a.

The Washington Supreme Court granted the State's request for direct review, bypassing the intermediate appellate court, and reversed. Pet. App. 2a, 5a. The court did not deny that financial institutions that trigger the surtax are subject to a significantly higher tax rate. Nor did it deny that the higher rate falls exclusively on banks engaged in interstate commerce, which are overwhelmingly located out of state.

Nonetheless, the court concluded that the surtax, which it deemed facially neutral, does not discriminate against interstate commerce because it "applies to any financial institution meeting [the $1 billion] threshold regardless of whether it is physically located in Washington, and it is apportioned to income from Washington business activity." Pet. App. 2a.

The court reached that conclusion because it thought the surtax's undisputed effect on out-of-state banks to be irrelevant. Specifically, the court held that, under cases like *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), it was "of no moment" "[t]hat the tax is borne primarily by out-of-state institutions." Pet. App. 14a; *see also* Pet. App. 11a. According to the court, the surtax burdens interstate commerce only by increasing the costs on out-of-state banks doing interstate business, and it read *Exxon* to hold that "raising the cost of doing business alone does not show a discriminatory effect"; a law must *also* "prohibit[] the flow of interstate goods *and* distinguish[] between in- and out-of-state companies in the retail market." Pet. App. 15a-16a (emphasis added).

The court also rejected Petitioners' argument that the surtax discriminates against interstate commerce by "burden[ing] out-of-state institutions based on their interstate commercial activity." Pet. App. 19a. According to the court, the fact that the surtax is "apportioned[] to only the income associated with Washington business activity" distinguished this statute from cases like *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996), where the Court invalidated a tax on

stock ownership whose amount turned on the degree to which the issuing corporation participated in interstate commerce. Pet. App. 20a-21a. Because the surtax is fairly apportioned, the Washington Supreme Court opined, an affected taxpayer would not be subjected to multiple taxation even if every other state adopted the surtax, and therefore the tax is not discriminatory. Pet. App. 21a-22a.

The court also concluded that the surtax was not discriminatory in purpose, Pet. App. 26a-37a, and that the law survives the *Pike* balancing test applicable to nondiscriminatory laws that burden interstate commerce, Pet. App. 37a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Exacerbates An Acknowledged Circuit Split About The Constitutionality Of Classifications That Are Discriminatory Proxies For Interstate Commerce.

Washington State designed a trigger for its surtax that it expected would cause the tax to be borne solely by out-of-state entities participating extensively in interstate (and foreign) commerce. As intended, 98% of financial institutions subject to the surtax are based outside of Washington State, and all of them are subject to it only because they are affiliated with extensive interstate banking networks.

The lower courts are sharply divided over how to determine that a statute has an impermissibly discriminatory effect on interstate commerce. In at least

five circuits, a law (like Washington's) targeting a business feature that is a proxy for interstate commerce would be seen for what it is: discriminatory and thus per se invalid. Those courts recognize that states cannot evade the Commerce Clause simply by using statutory surrogates for location or extensive interstate commerce. On the other side of the ledger, at least three courts join the Washington Supreme Court in upholding laws that use proxies to target out-of-state entities or interstate activity. This conflict is square and acknowledged, and the Court's guidance is sorely needed; as the Ninth Circuit candidly admitted, it is struggling to evaluate measures like Washington's that "impose[] costs on a class of businesses said to be highly correlated with out-of-state firms or interstate commerce." *Int'l Fran. Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 403-04 (9th Cir. 2015).

A. Five courts of appeals correctly recognize that discrimination by proxy is discrimination nonetheless.

This Court repeatedly has held that statutes with discriminatory effects violate the dormant Commerce Clause. *Supra* 1; *e.g.*, *Maine v. Taylor*, 477 U.S. 131, 138 (1986) ("[A] state law [may] discriminate against interstate commerce 'either on its face or in practical effect'" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979))); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 350 (1977) (statute has the impermissible "practical effect of … discriminating against" interstate sales); *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 566-67 (2015) (citing additional cases). Consistent with those holdings, at least five courts of appeals—the First, Sixth, Seventh,

Eighth, and Eleventh Circuits—have seen the discrimination in statutes that use a proxy for interstate commerce as a basis for regulation. Such statutes by their nature have the practical effect—and often the goal—of discriminating against interstate commerce.

In two cases, the Eleventh Circuit upheld challenges to local ordinances effectively prohibiting "formula" businesses—i.e., large chain stores and restaurants. *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008); *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008). Those ordinances did not "facially discriminate against interstate commerce." *Cachia*, 542 F.3d at 842; *Island Silver & Spice*, 542 F.3d at 846. Even so, the Eleventh Circuit held them unconstitutional. Following this Court's precedents on discriminatory effects, *see Cachia*, 542 F.3d at 842; *Island Silver & Spice*, 542 F.3d at 847 (citing *Hunt*, 432 U.S. 333), the Eleventh Circuit recognized that, because these ordinances "disproportionately target[] [businesses] operating in interstate commerce," they are not "evenhanded in effect." *Cachia*, 542 F.3d at 843; *Island Silver & Spice*, 542 F.3d at 848; *see also 8 Erie St. JC LLC v. City of Jersey City*, No. 19-CV-9351, 2021 WL 689147, at *5 (D.N.J. Feb. 19, 2021) (permitting Commerce Clause claim to proceed against prohibition on formula businesses because its "effect … appears to limit businesses that already have out-of-state locations from opening another location in Jersey City").

The Seventh Circuit has likewise recognized that discrimination by proxy is still discrimination. In *Wiesmuller v. Kosobucki*, it considered a Wisconsin law granting a special privilege to graduates of

Wisconsin law schools—admission to the Wisconsin state bar without taking the bar exam. 571 F.3d 699, 701 (7th Cir. 2009). That privilege did not on its face discriminate against interstate commerce; it did not, for instance, distinguish between residents of different states. *Id.* at 703-04. But plainly the statute's basis for regulation was highly correlated with out-of-state status, and so the Seventh Circuit held the diploma privilege to be "discriminatory" and remanded for the district court to assess whether it was justified. *Id.* at 704-05 (relying on the Eleventh Circuit's decision in *Island Silver & Spice*, 542 F.3d at 847-48).

The Sixth Circuit, too, has recognized that statutory schemes are unconstitutional when they are tailored to burden interstate commerce and to spare in-state entities. In *Cherry Hill Vineyards, LLC v. Lilly*, the Sixth Circuit struck down Kentucky's in-person purchase requirement for shipments of wine. Although facially neutral, the statute had a clear discriminatory effect: It made most sales by out-of-state wineries infeasible. 553 F.3d 423, 432-33 (6th Cir. 2008). The Sixth Circuit likewise has recognized the clear discriminatory effect of an Ohio licensing requirement for truck remanufacturers that "[o]n its face" was "neutral in application." *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000). Out-of-state truck remanufacturers typically buy a vehicle chassis out of state. *Id.* But the licensing requirement forced them to obtain a service agreement with an Ohio chassis dealer. *Id.* at 436, 442. Those service agreements, however, were "much harder for an out-of-state remanufacturer to obtain" because the local dealers preferred to work with local manufacturers, who typically bought their

chassis from the in-state dealers. *Id.* at 442. Notwithstanding the law's facial neutrality, the Sixth Circuit held that Ohio's licensing requirement had an unconstitutional discriminatory effect. *Id.* at 442-43.

The Eighth Circuit has also struck down state laws that turned on features inextricably intertwined with out-of-state status. In *Jones v. Gale*, the Eighth Circuit held unconstitutional a ballot initiative that prohibited farming by corporations and syndicates except for family-farm corporations and limited partnerships in which at least one family member resided on or ran the farm on a daily basis—a feature that was heavily correlated with in-state residence. 470 F.3d 1261 (8th Cir. 2006). It made no difference that the law did "not expressly prohibit the owning of agricultural land by out-of-state citizens and d[id] not exclude solely out-of-state corporations"; the initiative nonetheless "afford[ed] differential treatment of in-state and out-of-state economic interests." *Id.* at 1267, 1269 (quotation marks and citation omitted).

Finally, the First Circuit has repeatedly struck down enactments that use proxy features to discriminate against interstate commerce. In *Family Winemakers of California v. Jenkins*, the First Circuit invalidated a Massachusetts law that gave preferential treatment to "small" wineries over "large" wineries. 592 F.3d 1, 4-5 (1st Cir. 2010). Although the size criterion was "neutral on its face," the law violated the Commerce Clause because it conferred "a clear competitive advantage to 'small' wineries, which include[s] all Massachusetts's wineries, and create[d] a comparative disadvantage for 'large' wineries, none of which are in Massachusetts." *Id.* at 5, 11.

Similarly, in *Walgreen Co. v. Rullan*, the First Circuit struck down a Puerto Rico statute that used a different proxy that also had a discriminatory effect. 405 F.3d 50 (1st Cir. 2005). Specifically, the statute contained a facially neutral requirement that new pharmacies obtain a "certificate of need" in order to operate in Puerto Rico but exempted from that requirement existing pharmacies—92-94% of which were locally owned. *Id.* at 55-56. It also permitted those existing pharmacies to trigger a more burdensome process for new pharmacies to obtain the certificate. *Id.* at 56. The First Circuit held that "[t]his protectionist regime has had discriminatory effects," even though it treated "all newcomers equally," because it gave "an on-going competitive advantage to the predominantly local group of existing pharmacies." *Id.* at 56, 58.

Reflecting the same confusion in the lower courts that we discuss next, the First Circuit has at other times upheld laws that were plainly engineered to discriminate against interstate commerce. In *Wine & Spirits Retailers, Inc. v. Rhode Island*, the First Circuit rejected a Commerce Clause challenge to Rhode Island's prohibition against chains and franchises owning and operating liquor stores. 481 F.3d 1, 14 (1st Cir. 2007). As the Ninth Circuit explained, that ruling was "at odds with" the Eleventh Circuit cases striking down similar prohibitions. *Int'l Franchise*, 803 F.3d at 404 n.7.

B. Other courts permit discrimination by proxy against interstate commerce.

In stark contrast to the decisions described above, other circuit courts and state courts of last resort are in alignment with the Washington Supreme Court: They allow state and local authorities to use proxies for interstate commerce to disadvantage out-of-state interests.

One prominent decision is *International Franchise Ass'n, Inc. v. City of Seattle*, in which the Ninth Circuit considered a Seattle ordinance that treated any small business associated with a franchise network of a certain size as a "large employer"—and therefore subject to an accelerated schedule for phasing in a $15 minimum wage. 803 F.3d at 397-98. The undisputed evidence showed that "96.3 percent of Seattle franchisees are affiliated with out-of-state franchisors." *Id.* at 406. The court nevertheless concluded that the ordinance would not have "discriminatory effects on out-of-state firms or interstate commerce" because it burdened only "in-state franchisees," "not the wheels of interstate commerce." *Id.* at 405-06.

Important here, the Ninth Circuit recognized that it is "somewhat difficult to reconcile" the various decisions addressing measures that "impose[] costs on a class of businesses said to be highly correlated with out-of-state firms or interstate commerce." *Id.* at 403-04 (quotation marks and citation omitted); *see also id.* at 404 n.7 (such decisions are "not clearly reconcilable"). For instance, it recognized that the Eleventh Circuit's decisions in *Cachia* and *Island Silver & Spice* are "at odds with" the First Circuit's decision in

Wine & Spirits Retailers. *Id.*; *see also Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010) (upholding an in-person purchase requirement similar to the one the Sixth Circuit struck down in *Cherry Hill* and a "small" winery exception akin to that invalidated by the First Circuit in *Family Winemakers*); *see also id.* at 1235 (treating *Cherry Hill* as a "*but see*").

Like the decision below, the Arizona Supreme Court in *Saban Rent-a-Car LLC v. Arizona Department of Revenue* rejected a dormant Commerce Clause challenge to a surcharge—there, on rental car agencies. 434 P.3d 1168, 1171-74 (Ariz. 2019). Although facially neutral, *id.* at 1172, the law was tailored to impose nearly all of the burden on nonresidents. For instance, it gave preferential treatment to the types of rentals residents typically use, like temporary replacement vehicles and off-road vehicles. *Id.* at 1170; Ariz. Rev. Stat. § 5-839(C), (D). Nonetheless, the Arizona Supreme Court found the statute to be evenhanded because "the car rental surcharge is imposed uniformly on all car rental agencies, and ultimately on their customers, regardless of the agencies' or customers' residency status." *Id.* at 1173; *see also Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019) (upholding a ban on vacation rentals that disadvantaged that interstate commercial practice and the overwhelmingly out-of-state visitors who avail themselves of it).

To similar effect is the Fifth Circuit's decision in *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission*, 945 F.3d 206 (5th Cir. 2019). *Wal-Mart Stores* involved a challenge to a law that prohibited

public corporations—which inevitably have out-of-state shareholders—from obtaining permits for liquor stores but exempted existing permit holders. *Id.* at 210-11, 217 n.10. That careful tailoring barred nearly all out-of-state entrants to the market, and locked in the status quo, in which 98% of the liquor stores in the state were owned by in-state residents. *Id.* at 222. Notwithstanding that this law regulated on the basis of a near-perfect proxy for out-of-state status, the Fifth Circuit held that it had no discriminatory effect under the dormant Commerce Clause because "Texas-based public corporations are prohibited," too, and not all out-of-state corporations were excluded. *Id.* at 220.

* * *

Although discriminatory effects are the "most common form of discrimination against interstate commerce," *Rosenblatt*, 940 F.3d at 448, courts and commentators alike are unsure how to evaluate them—finding decisions in this area to be "difficult to reconcile," *Int'l Franchise*, 803 F.3d at 403, and lacking in "clear criteria," Erwin Chemerinsky, *Constitutional Law*, at 476 (6th ed. 2019).[5] This confusion both

[5] *See* Valerie Walker, Notes and Comments, *The Dormant Commerce Clause "Effect": How the Difficulty in Reconciling* Exxon *and* Hunt *Has Led to a Circuit Split for Challenges to Laws Affecting National Chains*, 91 Wash. L. Rev. 1895 (2016) (examining "why the circuits have split over the purported discriminatory effect of laws regulating national chains"); *see also Wal-Mart Stores*, 945 F.3d at 220 n.21 ("[J]urisprudence in the area of the dormant Commerce Clause is, quite simply, a mess." (citation omitted)); Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 Temple L. Rev. 331, 332 (2020) ("The U.S.

hampers judicial review and makes it difficult for state officials to determine the constitutionality of the legislation before them. The Court's intervention is sorely needed to resolve this confusion.

II. The Decision Below Is Irreconcilable With This Court's Precedents.

The Washington Supreme Court's decision also cannot be reconciled with this Court's precedents. And its attempts to do so only deepened the division in the lower courts.

A. This Court has made clear that laws that disproportionately burden out-of-state interests based on their participation in interstate commerce are discriminatory.

The decision below and those like it flout this Court's clear command that a law impermissibly discriminates against interstate commerce when it "fall[s] by design in a predictably disproportionate way" on out-of-state entities or interstate activity. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 579 (1997) (invalidating law that did not exempt from tax charitable organizations that principally served out-of-state clientele). That is true regardless of whether the law turns on explicit geographic distinctions. *Supra* 11. After all, this Court's dormant "Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce." *W. Lynn Creamery, Inc.*

Supreme Court's dormant Commerce Clause doctrine has long been a disjointed mess.").

v. Healy, 512 U.S. 186, 201 (1994). So a state law may "discriminate against interstate commerce 'either on its face or in practical effect.'" *Maine*, 477 U.S. at 138 (quoting *Hughes*, 441 U.S. at 336); *see also S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 185-86 (1938) (the dormant Commerce Clause prohibits legislation that "*by its necessary operation* is a means of gaining a local benefit by throwing the attendant burdens on those without the state" (emphasis added)).

Consistent with these principles, this Court has repeatedly invalidated laws that do not discriminate on their face but that do have a discriminatory effect on interstate commerce. For instance, in *Hunt v. Washington State Apple Advertising Commission*, the Court invalidated a North Carolina statute that prohibited using certain apple-grading systems because it burdened Washington apple producers, who used their own system of apple grading to signal their superior quality. 432 U.S. 333, 348-54 (1977). North Carolina's apple law "sought to accomplish [its goal] in an evenhanded manner," *id.* at 349—the law did not expressly or even solely burden out-of-state businesses. Yet this Court nevertheless invalidated the law because it disproportionately targeted out-of-state competitors, *id.* at 350-51—and interstate activity itself by "singl[ing] out … the very means by which apples are transported in [interstate] commerce," *id.* at 352. Similarly, in *Best & Co. v. Maxwell*, the Court invalidated a privilege tax on retailers who sold goods from rented rooms and weren't "regular retail merchants"—a status highly correlated with being an out-of-state resident—even though "[n]ominally the statute taxes all" the same, "regardless of whether they

are residents or nonresidents." 311 U.S. 454, 456 (1940).

Washington's surtax is at least as egregious as the laws struck down in *Hunt* and *Best & Co.*: Not only does Washington's surtax target out-of-state businesses, it also takes aim at interstate commercial activity itself. There is no business in Washington that, but for its affiliation with out-of-state affiliates earning money in interstate commerce, is subject to the surtax. This form of regulation is flatly impermissible. Imposing a tax because an entity "participates in interstate commerce" constitutes discrimination against interstate commerce, plain and simple. *Camps Newfound/Owatonna*, 520 U.S. at 578 (quoting *Fulton*, 516 U.S. at 333); *see also Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) (Commerce Clause precludes "discriminat[ing] between transactions on the basis of some interstate element").[6]

Accordingly, this Court has repeatedly invalidated taxes, like Washington's, that hinge on the amount of business transacted outside the state. In *Fulton*, the Court struck down a North Carolina law that taxed the value of stock owned by its residents based on the degree to which the corporation did

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[6] The Washington Supreme Court sought to distinguish *Camps Newfound/Owatonna* on the theory that the statute there was facially discriminatory while the surtax here is not. Pet. App. 24a-25a. But the statute in *Camps Newfound/Owatonna* also had discriminatory effects, which was critical to its invalidity. *See* 520 U.S. at 578 (referring to the impermissible "effect" of discouraging businesses from engaging in interstate commerce).

business in the state. The Court explained that a tax that increases to the extent that a company "participates in interstate commerce" necessarily "favors domestic corporations over their foreign competitors" and "discourage[s] … interstate commerce." 516 U.S. at 333. And in *Westinghouse Electric Corp. v. Tully*, the Court struck down a New York tax scheme that tied the amount of a credit available to businesses to the relationship between their in-state and out-of-state revenues. 466 U.S. 388, 392-95 (1984). Just like the Washington surtax, that New York tax meant that two companies that "maintain the same amount of business in [the state]" would incur different tax burdens depending on "the amount of [economic] activity each conducts outside [the state]." *Id.* at 400 n.9.

B. The Washington Supreme Court's attempt to reconcile its decision with this Court's precedents misconstrues those cases and reflects additional divisions in the lower courts.

Notwithstanding the clear conflict between the decision below and the precedents discussed immediately above, the Washington Supreme Court claimed to draw support from other of this Court's decisions. In doing so, it misread them in ways that emphasize the need for this Court's intervention.

1. The Washington Supreme Court relied heavily on *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26 (1978), citing it as an example of a decision that rejected a discriminatory-effects claim where the challenged law "*solely* appl[ies] to out-of-

state interests." Pet. App. 11a. *Exxon* involved a Maryland law that prohibited oil producers and refiners from operating retail gas stations within the state. 437 U.S. at 120-21. By happenstance, there were no in-state producers or refiners, which is why the law applied "solely" to out-of-state interests. *Id.* at 125-26. But, this Court explained, the law did not unconstitutionally discriminate against interstate commerce because it left unaffected numerous interstate *retailers*—i.e., retailers that were neither producers nor refiners. *Id.*

In finding no discrimination, the Court identified at least three ways in which the law might have discriminated but did not. The Maryland law, the Court explained, "create[d] no barriers whatsoever against interstate independent dealers; it d[id] not [1] prohibit the flow of interstate goods, [2] place added costs upon them, [3] or distinguish between in-state and out-of-state companies in the retail market." *Id.* at 126. "The absence of *any* of these factors" distinguished the Maryland law from the apple regulation in *Hunt* (among other cases). *Id.* (emphasis added).

The Washington Supreme Court read this to mean that *all* these factors must be present for there to be discrimination. *See, e.g.*, Pet. App. 16a ("raising the cost of doing business *alone*" is not a cognizable discriminatory effect (emphasis added)).[7] But that is

[7] The Washington Supreme Court then relied on that reasoning to distinguish *Hunt* (discussed *supra* 20), the Eleventh Circuit's decision in *Cachia* (discussed *supra* 12), and the First Circuit's decision in *Family Winemakers* (discussed *supra* 14). *See* Pet. App. 16a, 17a-19a.

wrong several times over, as this Court's precedents make clear. *Exxon* itself emphasized the "absence of *any* of these factors." 437 U.S. at 126; *see also id.* at 126 n.16 (explaining that affecting the relative proportions of in-state and out-of-state goods flowing into the state alone suffices to establish a discriminatory effect). *Exxon* could not have meant that all three factors are necessary; after all, tariffs—which are the "quintessential evil targeted by the dormant Commerce Clause," *Wynne*, 575 U.S. at 545—do not satisfy the first factor; they do not prohibit the flow of interstate goods. Accordingly, this Court repeatedly has found unconstitutional discrimination where a tax's only effect was taxing some more heavily than others based on an interstate element. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 286-87 (1987) ("[i]n practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory"; rejecting the idea that "a mere disparity in per-mile costs between interstate and intrastate truckers provides no basis upon which to strike down a tax"); *Boston Stock Exchange*, 429 U.S. at 332 (invalidating tax that "imposes a greater tax liability on out-of-state sales than on in-state sales").

Not only is the decision below unfaithful to this Court's precedents, there also is conflict in the lower courts on this point—i.e., about whether the *Exxon* factors are necessary or sufficient to find discrimination. At least two circuits have correctly adopted the latter view. *See Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 751 n.12 (5th Cir. 2006) ("an absolute barrier to commerce is not required for discrimination

to exist"; cases have found "discrimination where the statute … simply applied a differential charge to out-of-state entities"); *Barringer v. Griffes*, 1 F.3d 1331, 1337-39 (2d Cir. 1993) (striking down a discriminatory use tax that imposed additional costs on vehicles purchased out of state). But the Ninth Circuit, like the Washington Supreme Court, Pet. App. 19a, took the former view when it tried to reconcile its decision upholding a regulation that targeted members of national networks with the Eleventh Circuit's *Islamorada* decisions striking down such measures—reasoning that the latter involved not just increased costs, but also a prohibition on the flow of interstate commerce in the form of barring those businesses from operating at all. *Int'l Franchise*, 803 F.3d at 404 n.7.

Even apart from the "costs alone" question, the Washington Supreme Court's reliance on *Exxon* was misplaced for the additional reason that when, as here, a law "discriminates among affected business entities according to the *extent of their contacts*" with the interstate economy, *Exxon* is not "controlling precedent." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980) (emphasis altered). In other words, when the feature that results in the law's disparate impact against out-of-state firms is itself the degree of participation in interstate commerce, *Exxon* does not excuse the discrimination.[8]

[8] The Washington Supreme Court's reliance on *Commonwealth Edison*, 453 U.S. 609, *see* Pet. App. 13a-15a, was similarly misplaced. Unlike that case, where Montana taxed coal mined

2. The Washington Supreme Court also sought to distinguish *Fulton*, 516 U.S. 325 (discussed *supra* 21-22), on the theory that (unlike the tax in *Fulton*) the Washington surtax cannot be discriminatory because it is apportioned to income earned in the state. Pet. App. 21a n.4; *see* Pet. App. 20a-24a. That is mistaken. The fact that the surtax is "apportioned" means simply that, although *global* profits trigger the surtax's higher rate, that higher rate applies only to the income earned by the bank in Washington. This higher rate—nearly double what other banks pay on the same income—is the discriminatory effect.

The Washington Supreme Court's position that apportionment is a panacea is squarely contrary to this Court's precedents. "Even if a tax is fairly apportioned, it may discriminate against interstate commerce." *Amerada Hess Corp. v. N.J. Dep't of Treasury*, 490 U.S. 66, 75 (1989); *accord Westinghouse*, 466 U.S. at 399 ("'Fairly apportioned' and 'nondiscriminatory' are not synonymous terms."). Thus, this Court repeatedly has invalidated laws that tax only in-state value, or regulate only in-state conduct, when (like here) the trigger for the law discriminates against interstate

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within the state, the surtax here is triggered by a financial network's global business activities that have no connection to Washington State at all. What's more, the tax in *Commonwealth Edison* did not apply directly to out-of-state entities. *See Commonwealth Edison Co. v. State*, 615 P.2d 847, 850 (Mont. 1980) ("The true taxpayers before us in this case are the producers of the coal."). Regardless of whether an indirect, downstream disparate impact on out-of-state entities constitutes discrimination against interstate commerce, *Commonwealth Edison v. Montana*, 453 U.S. at 619 n.8, the surtax here is different: "The tax here is levied directly on out-of-state institutions." Pet. App. 15a.

commerce. *E.g.*, *Fulton*, 516 U.S. 325; *Camps Newfound/Owatonna*, 520 U.S. 564. That plainly is the correct result. Imagine a law that taxes only income earned in state but imposes double the tax rate for out-of-state taxpayers or those whose businesses cross state lines. That tax would be fairly apportioned, and it therefore would pass the "internal consistency" test, as no money would be taxed more than once if other states adopted the same rule. *See generally Wynne*, 575 U.S. at 547-48. But such a tax obviously would be discriminatory. The only difference between that hypothetical and the Washington surtax is that Washington achieved the same result covertly rather than overtly.

On this issue, too, there is conflict in the lower courts. Some courts properly recognize that a state statute is not immunized under the dormant Commerce Clause merely because the statute regulates only in-state activity. *E.g.*, *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825 (Minn. 2002) (precluding deductions for contributing to non-Minnesota charities when computing the alternative minimum tax violates the dormant Commerce Clause, even though "the deduction directly implicates only the personal tax liability of individuals residing in Minnesota or otherwise subject to the Minnesota tax and does not have a direct impact on any interstate business or market"); *Walgreen*, 405 F.3d at 57 n.5 (statute violated the Constitution even though it only "regulate[d] the ownership of local business rather than the flow of goods into the Commonwealth").

However, other courts have made Washington's mistake: turning a blind eye to a dormant Commerce

Clause violation because a law regulates only in-state activity. *See, e.g.*, *Int'l Franchise*, 803 F.3d at 406 (upholding increased minimum wage in part because "in-state franchisees are burdened, not the wheels of interstate commerce").

Review is warranted to resolve these multiple conflicts.

III. This Case Is An Ideal Vehicle To Address This Important Question.

Certiorari is also warranted because the question presented is of critical national importance. Allowing states to discriminate against interstate commerce—so long as they disguise that discrimination in seemingly neutral statutory language—would create a gaping loophole in this Court's Commerce Clause jurisprudence. This would allow precisely what the dormant Commerce Clause long has forbidden: putting the burdens of in-state programs on out-of-state companies and commerce.

As the Court recently reaffirmed, "a principal reason for the adoption of the Constitution" was to "remov[e] state trade barriers," which were "cutting off the very life-blood of the nation." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019) (quotation marks omitted). Accordingly, this Court has long held that the Commerce Clause, "by its own force, prohibits discrimination against interstate commerce, whatever its form or method." *S.C. State Highway*, 303 U.S. at 185.

That crucial constitutional protection will be drained of vitality if states are permitted to do indirectly what they cannot do openly. This Court recognized as much in *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, where it struck down a previous Washington business and occupation tax because it was the "practical equivalent" of an overtly discriminatory tax, despite having "the advantage of appearing nondiscriminatory." 483 U.S. 232, 241, 248 (1987) (quotation marks omitted). After all, "any protectionist law can be couched in non-protectionist terms." *Cloverland-Green Spring Dairies, Inc. v. Penn. Milk Mktg. Bd.*, 298 F.3d 201, 211 (3d Cir. 2002). A law targeting out-of-state wineries can be recast as regulating "large" wineries. *Family Winemakers*, 592 F.3d at 4. Discrimination against "restaurants operating in interstate commerce" can be disguised as a ban on "formula" eateries. *Cachia*, 542 F.3d at 842-43. Special privileges for in-state residents can be doled out through favored treatment of in-state graduates. *Wiesmueller*, 571 F.3d at 704-05. And a massive tax increase on financial institutions that are engaged in interstate commerce (as opposed to local "community banks") can be engineered through a revenue threshold that only interstate businesses satisfy. *Supra* 5-6.

As these examples illustrate, there is no limit to the variety of seemingly neutral laws that are designed to target unpopular out-of-state entities. Allowing the decision below to stand will embolden state and local governments to extract revenues from out-of-state interests at the expense of a unified national market. Moreover, the Washington Supreme Court's logic is not limited to taxation—it applies equally to

any form of unequal regulatory treatment. Future legislatures will follow this roadmap to impose onerous regulations on businesses based on their connections to national networks. Some legislatures have already taken that tack. *See, e.g.*, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-410 (D. Md. filed Feb. 18, 2021) (concerning Maryland surcharge on digital advertising services whose rate depends on the payer's global annual gross revenues). Before long, the Constitution's protections against economic balkanization will risk being "render[ed] … a nullity." *Cloverland-Green*, 298 F.3d at 211-12.

Laws like Washington's are particularly pernicious because their effects reach far beyond state borders. By targeting out-of-state financial institutions engaged in interstate commerce, Washington has imposed a financial burden on banks throughout the entire country. The costs of this discriminatory tax, and others similar to or modeled on it, will be passed on to out-of-state consumers, whether through increased prices or otherwise. By penalizing expansion, the surtax injures the business itself. And it also harms out-of-state consumers and small businesses by reducing their access to loans and other financial products and to the benefits of lower costs that come from consolidation and economies of scale.

Finally, because this case cleanly presents the important issue at hand and is outcome determinative, it serves as an ideal vehicle to resolve the conflict that exists in the courts below. The issue "was fully litigated below." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). And the surtax's discriminatory effect is apparent from the stark, uncontested facts—

including the tax's near-perfect targeting of out-of-state institutions engaged in extensive interstate business activities. The evidence of the Washington legislature's protectionist intent, *supra* 5-6, spotlights the constitutional violation. And the issue was analyzed in detail by the Washington Supreme Court in an opinion that fully resolved the litigation.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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