No. 21-1066

In The
Supreme Court of the United States

WASHINGTON BANKERS ASSOCIATION
and AMERICAN BANKERS ASSOCIATION,

Petitioners,

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE OF THE
STATE OF WASHINGTON, and VIKKI SMITH,

Respondents.

**On Petition For Writ Of Certiorari
To The Supreme Court Of Washington**

**MOTION FOR LEAVE TO FILE AND
AMICUS BRIEF OF WESTERN BANKERS
ASSOCIATION IN SUPPORT OF PETITIONERS**

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

Western Bankers Association (WBA) hereby moves this Court for leave to file the attached amicus curiae brief in support of petitioners Washington Bankers Association and American Bankers Association.

WBA's counsel contacted counsel for respondent State of Washington on February 18, 2022, and asked if the State would consent to the filing of WBA's amicus brief. The State did not respond to WBA's request.

Petitioners have consented to the filing of WBA's amicus brief.

WBA, a nonprofit association, is one of the largest banking trade associations and regional educational organizations in the United States, with more than 200 years of combined experience serving banks. The California Bankers Association, a division of WBA, has a full time advocacy team dedicated to protecting the interests of WBA members and working for needed legislative, regulatory and legal changes.

WBA is particularly concerned with the far reaching implications of the Washington Supreme Court's opinion in this case. As will be detailed below, that opinion's focus on the facial neutrality of the surtax at issue here ignores the clear discriminatory effect on out-of-state businesses. For similar reasons, the surtax discriminates against interstate commerce

because it is triggered solely by ties to out-of-state businesses.

Respectfully submitted,

BUCHALTER, A PROFESSIONAL CORPORATION

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INTEREST OF AMICUS CURIAE[1]

Western Bankers Association (WBA), a nonprofit association, is one of the largest banking trade associations and regional educational organizations in the United States, with more than 200 years of combined experience serving banks. The California Bankers Association, a division of WBA, has a full time advocacy team dedicated to protecting the interests of WBA members and working for needed legislative, regulatory and legal changes.

WBA is particularly concerned with the far reaching implications of the Washington Supreme Court's opinion in this case. As will be detailed below, that opinion's focus on the facial neutrality of the surtax at issue here ignores the clear discriminatory effect on out-of-state businesses. For similar reasons, the surtax discriminates against interstate commerce because it is triggered solely by ties to out-of-state businesses.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties' counsel of record received timely notice of the intent to file the brief.

WBA's counsel contacted counsel for respondent State of Washington on February 18, 2022, and asked if the State would consent to the filing of WBA's amicus brief. The State did not respond to WBA's request.

Petitioners have consented to the filing of WBA's amicus brief.

SUMMARY OF THE ARGUMENT

Prior to 2019, financial service businesses operating in the State of Washington were subject to a business and occupation ("B&O") tax of 1.5 percent of the in-state gross income they earned. Pet. App. 3a. That changed with the enactment of a surtax, codified at RCW 82.04.29004. The new statute, enacted to cover a budget shortfall, imposed a surtax of 1.2 percent on the gross in-state 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).

As explained in the petition for a writ of certiorari, the surtax is triggered by the global net income of the financial group; the amount of revenue generated in Washington is irrelevant. The State conceded below that comments of the bill's sponsor appear to show a legislative intent "to promote 'local banks' at the expense of banks operating in interstate commerce." Clerk's Papers ("CP") 254; Petn. at 5-6; *see also* CP 223, 225. Despite the request of a bipartisan group of legislators to veto the bill, the Governor signed it into law. Petn. at 6-7.

Petitioners brought a declaratory judgment action in state court, arguing that (1) the surtax discriminates against out-of-state banks, which bear the overwhelming brunt of the surtax, and (2) the surtax discriminates against interstate commerce. The trial

court held that although the surtax is facially neutral, it is unenforceable "because it discriminates in effect and in purpose against interstate commerce in violation of the dormant Commerce Clause." Pet. App. 55a.

In a direct appeal, the Washington Supreme Court reversed. The court held that the surtax 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 held it was "of no moment" that the tax "is borne primarily by out-of-state institutions." Pet. App. 14a; *see also* Pet. App. 11a. The court acknowledged that the surtax burdens interstate commerce by increasing the costs on out-of-state banks doing interstate business, but believed that a law must also "prohibit[ ] the flow of interstate goods and distinguish[ ] between in- and out-of-state companies in the retail market" in order to violate the Commerce Clause. Pet. App. 15a-16a.

The Washington Supreme Court's opinion is contrary to the Dormant Commerce Clause jurisprudence of this Court. The opinion below provides a blueprint for how other states can target out-of-state businesses to close budget shortfalls at the expense of interstate commerce. This is exactly the type of "economic protectionism" that the Commerce Clause is designed to prevent.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

Certiorari is Required to Determine Whether Washington's Surtax Violates the Dormant Commerce Clause.

The Commerce Clause (Art. I, § 8, cl. 3 of the U.S. Const.) gives Congress the power "to regulate commerce with foreign nations, and among the several states, . . . " The "Dormant Commerce Clause" (or negative Commerce Clause) refers to the implicit prohibition against states passing legislation that discriminates against or excessively burdens interstate commerce. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). For example, in *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994), this Court invalidated a Massachusetts tax on milk products because the tax discriminated against non-Massachusetts dairy companies. " 'The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.' " *Id.* at 201 (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940)).

This Court should determine whether "the practical application" of Washington's surtax discriminates against interstate commerce. Amicus curiae contends it clearly does so. Although the surtax is assessed only

on in-state earnings, it is triggered solely on an entity's earnings and those of all related affiliates located anywhere in the world. Not surprisingly, a whopping 98 percent of the surtax payers are based out of state, and all must pay the surtax because they are affiliated with interstate banking networks. The end result: the surtax nearly doubles the state tax burden on affected out-of-state financial institutions when compared to in-state competitors.

While the Washington Supreme Court's decision works a grave injustice to out-of-state financial institutions, the implications of the opinion resonate far beyond the confines of this case. The rationale of the decision is not limited to taxation. The opinion offers a blueprint for other states to enact laws targeting interstate commerce. It would apply equally to any law or regulation that imposes higher fees on certain businesses merely because they are connected to national business networks. Given that state legislatures often seek ways to shift their tax burdens to out-of-state interests, this Court's intervention is vital.

The effect such laws or regulations would have on the national economy is staggering. This Court has long decried the use of provincial economic barriers. *See*, *e.g.*, *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935) (states cannot establish "economic barrier[s] against competition with the products of another state [because they] are an unreasonable clog upon the mobility of commerce"). More recently, this Court phrased the concern in terms of "economic

protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *McBurney v. Young*, 569 U.S. 221, 235 (2013) (cleaned up). This is precisely the effect of Washington's surtax here.

II.

This Court's Guidance is Further Needed in Light of Other Opinions That Have Misinterpreted Dormant Commerce Clause Jurisprudence.

As mentioned in the Petition, the Washington Supreme Court is hardly alone in its questionable interpretation of this Court's Dormant Commerce Clause jurisprudence. *See* Petn. at 16-18, 27-28.

For example, in *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015), *cert. denied*, 578 U.S. 959 (2016), a Seattle ordinance imposed a two-tier system to gradually raise the minimum hourly wage to $15. "Schedule One" was comprised of employers who had 500 or more employees, and the schedule of incremental raises was steep. "Schedule Two" was comprised of employers who had less than 500 employees, and the incremental increases were gradual. For purposes of determining the total number of employees, the ordinance classified franchisees associated with a franchisor or network of franchisees employing more than 500 employees *nationwide* as Schedule One employers, regardless of the number of persons

employed by the franchisee or the number of persons employed in Seattle. 803 F.3d at 397.

Plaintiff IFA brought suit, alleging that the franchisee classification violated the Commerce Clause. IFA argued that the ordinance was not "facially neutral" because it discriminated against franchises, which the evidence showed was a characteristic highly correlated with interstate commerce. The Ninth Circuit rejected this argument, holding that a "distinction drawn based on a firm's business model . . . does not constitute facial discrimination against out-of-state entities or interstate commerce." *Id.* at 400. In so holding, the Ninth Circuit attempted to rely on two Eleventh Circuit decisions, *Cachia v. Islamorada*, 542 F.3d 839, 843 (11th Cir. 2008) and *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 846 (11th Cir. 2008). The holdings of *Cachia* and *Island Silver*, however, conflict with *Int'l Franchise* as well as *West Lynn*. *See* Petn. at 12. Contrary to *Int'l Franchise*, courts should assess the "practical operation" of the statute to determine discrimination against interstate commerce. *See West Lynn*, 512 U.S. at 201.

The Ninth Circuit further held that "the ordinance does not have the effect of discriminating against interstate commerce." 803 F.3d at 406. According to the *Int'l Franchise* court, "IFA does not demonstrate how a wage requirement imposed on in-state franchisees affects interstate commerce. . . . [I]n-state franchisees are burdened, not the wheels of interstate commerce." *Id.* This myopic focus on in-state activity turns a blind eye to the practical effect a local provision can have on

out-of-state businesses. This Court can provide much needed guidance—as well as breathing some life back into the Dormant Commerce Clause – by granting certiorari.

CONCLUSION

The Washington Supreme Court's opinion flies in the face of this Court's Dormant Commerce Clause jurisprudence. Other courts have made the same mistake. For these reasons as well as those expressed in the Petition, this Court should grant certiorari in this case.

Respectfully submitted,

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