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 *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce.[1] Today COST has grown to an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST members are extensively engaged in interstate commerce and its membership shares a vital interest in ensuring states do not impede the rights of all businesses engaged in both interstate and international commerce. To that end, it is important to COST members that states fairly apply graduated business tax rates in a manner consistent with the protections afforded by the U.S. Constitution's Commerce Clause. The instant case involves the imposition of the State of Washington's (hereinafter "Washington") business and occupation (hereinafter "B&O") surtax on select financial institutions—thus, it provides this Court a timely opportunity to address this issue.

COST has a history of submitting *amicus* briefs to this Court when state and local tax issues are under consideration. COST has submitted *amicus* briefs in

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus*' intent to file this brief and written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

significant state tax cases considered by this Court: *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015); *Alabama Department of Revenue v. CSX Transportation, Inc.*, 575 U.S. 21 (2015); *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015); *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019); and *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (Utah 2019, *cert. denied*, 140 S. Ct. 1114 (2020)). Most recently, COST filed an *amicus* brief in *Ferrellgas Partners, L.P. v. Director, Division of Taxation*, 251 A.3d 760 (N.J. 2021, *petition for cert. pending*, No. 21-641 (filed Oct. 28, 2021)). As a long-standing representative of multijurisdictional tax-payers, COST is uniquely positioned to provide this Court with the analytical underpinnings for why Washington's financial institution surtax violates the Commerce Clause.

STATEMENT OF THE CASE

In 2019, Washington's legislature enacted a 1.2% B&O surtax (a graduated tax rate increase of nearly 70%) on large financial institutions operating within the State for a combined rate of 2.95%. Wash. Rev. Code § 82.04.29004 (2019). The surtax is imposed only on financial institutions with at least $1 billion in global annual income, irrespective of how much of their income is apportioned to Washington.

This Court is being asked to determine whether Washington's B&O surtax as applied to large financial institutions is discriminatory against interstate commerce and unfairly apportioned—either of which constitutes a violation of the Commerce Clause.

SUMMARY OF THE ARGUMENT

Washington's use of a worldwide income threshold, applied before the taxable income is apportioned to a particular state (known as pre-apportionment), to determine which financial institutions are subject to the surtax, instead of using the financial institutions' income after it is apportioned to the State (known as post-apportionment), violates the Commerce Clause.[2]

The Petitioner comprehensively lays out the *end result* of the surtax's discriminatory impact, with 98% of its tax burden borne by financial institutions with a principal place of business outside of the State. Pet'rs' Pet. for Writ of Cert. at i. A state can impose graduated tax rates that may incidentally place a greater burden on interstate businesses not having a principal place of business in the state. Such burdens, however, run afoul of constitutional protections when a state's graduated tax rate imposed on a multijurisdictional business has no direct relationship with the actual activity the business entity conducts in the state—resulting in an impermissible extraterritorial taxation by a state. The imposition of a tax rate on business activity not directly related to that business's intrastate activity, *de facto*, violates the Commerce Clause.

Unless this Court intervenes by granting this Petition for writ of certiorari, other states' legislatures will have an incentive to impose similar taxes that discriminate against interstate commerce and violate fair apportionment protections for multijurisdictional taxpayers. The tax rate imposed by a state should reflect a taxpayer's activity in that state, and it should

[2] The Commerce Clause "regulate[s] commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

not be based on its business activity in other states, or other countries.

ARGUMENT

I. WASHINGTON'S FINANCIAL INSTITUTION SURTAX NECESSITATES THIS COURT'S REVIEW UNDER *COMPLETE AUTO*'S JURISPRUDENCE.

This Court uses a four-prong test to evaluate whether a state or local tax regime creates an undue burden on interstate commerce in violation of the Commerce Clause. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). A levy "does not discriminate against interstate commerce, and is fairly related to the services provided by the State" if "[t]he tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279.

Two of the four prongs presently impose fewer restrictions on state taxation of interstate commerce— the "fairly related" prong and the "substantial nexus" prong.

For the "fairly related" prong, lower courts have followed this Court's lead and consistently decline to find that a tax violates the Commerce Clause based on a "fair relation" analysis alone. *See Commonwealth Edison, Co. v. Montana*, 453 U.S. 609, 645 (1981) (Blackmun, J., dissenting) (the fairly related prong was "emasculate[d]" by this Court). The substantial nexus prong was revised by this Court in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), with this Court removing the physical presence rule established in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and reaffirmed in *Quill*

Corp. v. North Dakota, 504 U.S. 298 (1992). While it is unlikely this prong will generate the amount of controversy it historically did, the substantial nexus prong impacts all businesses engaged in interstate commerce. In this case, Washington now has an enhanced ability (as do other states) to subject financial institutions not physically present in the State to its taxing jurisdiction. Accordingly, financial institutions deriving income from Washington sources, without having a physical presence in the State, could be subject to tax based on having "economic and virtual contacts" presence in the State. *Wayfair*, 138 S. Ct. at 2099.[3]

What is left of the four-prong test to protect multistate taxpayers against undue burdens on interstate commerce are the discrimination and the fair apportionment prongs of *Complete Auto*'s Commerce Clause jurisprudence. These two prongs are critical for reviewing modern-day Commerce Clause challenges of state or local taxes, including this case. *Id.* (noting that the discrimination and fair apportionment prongs were key remaining "aspects of the Court's Commerce Clause doctrine [that] can protect against any undue burden on interstate commerce").

A state's tax rate scheme that is not based on a business's actual economic activity in that state is unconstitutional. Washington's surtax on financial institutions suffers the infirmities of both

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[3] *E.g.*, *Citibank S.D. v. State Revenue*, Docket No. 21-2-02141-34 (Wash. Super. Ct., *pet. for rev. filed*, Dec. 27, 2021) (the Washington Department of Revenue asserted over $9.7 million in tax against Citibank based on acceptance of its credit cards at Washington stores).

discrimination and fair apportionment, addressed below.

A. Washington's Financial Institution Surtax Discriminates Against Interstate Commerce.

The Supreme Court of the State of Washington (hereinafter "Washington Supreme Court") cites *Commonwealth Edison* and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), for the premise "[t]hat the tax is borne primarily by out-of-state institutions is of no moment under *Commonwealth Edison* and *Exxon*." *Wash. Bankers Ass'n v. Dep't of Revenue*, 495 P.3d 808, 816 (Wash. 2021). Both of these cases, however, fail to support upholding Washington's discriminatory surtax on select financial institutions using pre-apportionment global net income. As discussed above, this Court primarily reviewed *Commonwealth Edison* in context of the fourth prong of *Complete Auto*—the fairly related prong. *Exxon* addressed a Maryland law that prevented petroleum producers and refiners of petroleum products from operating gas stations within the State. The Court noted "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations." *Exxon*, 437 U.S. at 127-28 (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806 (1976)). Importantly, *Exxon* dealt with a state regulating its intrastate retail gas station market; it did not address an imposition of a surtax using global income (international commerce) for determining when a surtax applies to a business.

The calculation of the surtax, using the consolidated financial institution group's global annual net income, is discriminatory in its chilling effect of protecting smaller Washington intrastate financial institutions

to the detriment of international financial institutions, which are subject to the surtax if they have at least $1 billion in global annual net income. "Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the [Commerce] Clause protects." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977) (internal quotations omitted, citing *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951)). Similar to the findings noted by the Petitioner relating to the Washington legislature's attempts to shift the tax burden to out-of-state financial institutions,[4] the Court in *Boston Stock Exchange* stated ". . . the fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Id.* at 334.

Indeed, over eighty years ago this Court struck down Washington's B&O tax as discriminatory in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939). "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state." *Id.* at 438. "The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce . . ." *Id.* at 439. Similarly, Washington's surtax that is based on a financial institution's global activity should be struck down as discriminatory.

Washington has reasonable, nondiscriminatory alternative means to impose the surtax. This case is

[4] Pet'rs' Pet. for Writ of Cert., App. A at 12a.

similar to other cases decided by this Court: "[w]hen discrimination against commerce of the type we have found is demonstrated [such that] the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977) (striking down a North Carolina regulation on apple shipments, North Carolina's Agriculture Commissioner noting North Carolina's apple producers were mainly responsible for the legislation being passed). Washington clearly had nondiscriminatory alternatives available to it. For example, the legislature could have applied the surtax based on in-state income apportioned to the State—there was no need for the legislature to use a financial institution's pre-apportionment global net income. Washington's legislature, however, chose not to use this methodology.[5]

This case is vastly different from this Court's decisions addressing a competing local interest to sustain a tax or fee. *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008) (sustaining Kentucky's preferential treatment of its municipal bonds); *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007) (sustaining law requiring waste

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[5] Not inclusive, some other cases decided by this Court are also instructive. *E.g.*, *New Energy Co. v. Limbach*, 486 U.S. 269 (1988) (Ohio ethanol tax credit held to be discriminatory); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Massachusetts tax on out-of-state milk producers distributed to in-state dairy farmers burdened out-of-state competitors); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (West Virginia wholesale gross receipts tax unconstitutionally discriminated against interstate commerce); and *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Oklahoma prohibition on exporting minnows deemed discriminatory).

haulers to deliver waste to a public authority located in New York). As noted by the Supreme Court of Mississippi, "[i]n *Davis*, the tax scheme at issue was facially discriminatory, which was why the Court went on to analyze the market-participation exception as a legitimate state interest." *Mississippi Dep't of Revenue v. AT&T Corp.*, 202 So. 3d 1207, 1217 (Miss. 2016) (citing *Davis*, 553 U.S. at 338-39). Washington is not a market participant with this surtax, and it could have applied its higher tax threshold in a nondiscriminatory manner by using the post-apportioned income of a financial institution. Instead, Washington elected to use a discriminatory methodology by seeking to apply a surtax using extraterritorial values not related to a financial institution's in-state activity.

The discriminatory imposition of this surtax warrants review by this Court.

B. Washington's Financial Institution Surtax Violates Fair Apportionment.

As noted in *Goldberg v. Sweet*, "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). The internal consistency test of fair apportionment is a straightforward measure that "asks whether the adoption of a rule by all States 'would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Wynne*, 575 U.S. at 564 n.7 (citing *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185 (1995)). In other words, if every state imposed the same type of tax, would there be excessive taxation? *See id.* at 562.

While the focus on fair apportionment is often related to the apportionment of an interstate business's income to a state, its scope is not limited solely to the apportionment of income to a state. Other applications, such as a state not providing full credit to taxes paid to another state, have also been considered. *Id.* at 545. This case is similar in that the direct apportionment of a financial institution's income to Washington is not at issue. But that should not restrain this Court's review of Washington's surtax under the fair apportionment prong. Instead, it is important for this Court to evaluate the fair apportionment of a tax scheme that uses external factors that are not directly related to a taxpayer's activity in the state to impose an increased tax rate.

Here, Washington's surtax violates the principle of fair apportionment not based on its application to a financial institution's post-apportionment income, but rather because it uses a financial institution's pre-apportionment global net income to determine whether it is subject to a higher tax rate.

Every financial institution in the world with at least $1 billion in global income, with some minimum level of activity in Washington, is subject to its surtax, regardless of how *de minimis* the in-state activity. While *amicus* takes no direct issue with states imposing graduated business tax rates (addressed in further detail below), how can the imposition of a tax rate that is not related to the business activity of a taxpayer in a state be internally consistent? The mere fact a financial institution has over $1 billion in global income should not determine a state's imposition of a higher graduated tax rate.

What must govern is the business activity conducted in that state—not a business's worldwide activity.

While it is left to state policy makers on whether a state imposes graduated tax rates, the imposition of a higher tax rate still needs to reflect the income associated with the business activity to a state to prohibit a state imposing higher taxes on large taxpayers with less economic activity in a state. If every state used this method, all financial institutions above $1 billion would be subject to all the states' surtaxes because the threshold is based on pre-apportioned global income; it is not determined by using the income post-apportioned to a state.[6] "Such a multiplication of

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[6] For example, assume a financial institution operates in one foreign country (*e.g.,* Canada which borders Washington) and two U.S. states. Both states imposed a base tax rate of 2%; however, if a financial institution has $1 billion or more of pre-apportioned global net income, the states increase the tax rate to 4% on all post-apportioned income. The financial institution has global income of $1,001,000,000 ($100 million to a foreign country, $900 million to State A, and $1 million to State B. (Assume both states use the same apportionment formulas to apportion their income.) Based on the level of in-state activities, State A's post-apportionment income is $900 million, and State B's is $1 million. Even though the financial institution's in-state activity (*e.g*., economic activity) is below $1 billion in each state, by using pre-apportioned global net income, both states subject the financial institution to their 4% tax on all post-apportioned income. In contrast, competing financial institutions with less than $1 billion of pre-apportioned global net income (*e.g.*, many intrastate and some interstate/international financial institutions) would not have the surtax applied to them. This results in a financial institution in the two states exceeding the $1 billion global net income threshold, paying $36,040,000 in tax on its income ($900,000,000 x 4% + $1,000,000 x 4%), versus other similarly situated taxpayers below the surtax threshold in those states with income apportioned to the state paying $18,020,000 in tax on its income ($900,000,000 x 2% + $1,000,000 x 2%). Thus, with two similarly situated taxpayers with the same amount of economic activity in a state, based on post-apportioned income, the taxpayer with over $1 billion in global net income pays a

state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the [C]ommerce [C]lause to remove." *Gwin*, 305 U.S. at 440.

The tax is also externally inconsistent. External consistency looks at "the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. *Jefferson Lines* noted how sales taxes, which incidence falls primarily on a purchaser, can differ from direct taxes on a business. *Id.* at 190. Washington's surtax, however, is a direct tax on a business that uses formulary apportionment. A state is not permitted to "tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982); *see also Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 459 (1983).[7] How, for example, is imposing a higher tax rate on a business with global income over $1 billion, but only $1 million of post-apportioned income (economic activity) in a state, fairly attributable to that business's activity in the state? The use of global income to calculate the tax

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disproportionately greater tax on the same level of income attributed to those states. This demonstrates a prime example of exterritorial taxation that violates Commerce Clause jurisprudence.

[7] *See also Northwood Constr. Co. v. Twp. of Upper Moreland*, 579 Pa. 463 (Pa. 2004). The Supreme Court of Pennsylvania struck down a gross receipts tax imposed by a township on 100% of a business's gross receipts as violating the external consistency test. "Rather, we conclude that the appropriate inquiry remains whether the Township has taxed only that 'portion of the revenues from the interstate activity which reasonably reflects the [in-]state component of the activity being taxed.'" *Id.* at 489 (citing *Goldberg*, 488 U.S. at 262).

rate also clearly attempts to tax value earned outside of Washington's borders.

This Court should review Washington's imposition of its surtax based on a financial institution's worldwide income, not on its actual activity in the State, to determine if it violates both the internal and external consistency tests for fair apportionment.

II. STATES CAN ADOPT GRADUATED CORPORATE TAX RATES ONLY IF THEY UTILIZE METHODOLOGIES THAT DO NOT VIOLATE THE COMMERCE CLAUSE.

About one-third of the states with corporate income taxes have graduated tax rate structures. There is, however, a fundamental difference between those graduated tax rates and the Washington surtax on large financial institutions. In the fourteen states with graduated corporate income taxes, the higher tax rate brackets are applied based on net income after apportionment to the state. For Washington's financial institution surtax, however, the application of the graduated tax rate is based on net global income before any apportionment of that income to the State. Washington's methodology is a constitutionally impermissible formula that discriminates against interstate and international financial institutions in violation of the Commerce Clause. If the Court does not grant the Petition for writ of certiorari, it will embolden other states to cross the line and impose discriminatory tax rates on interstate commerce.

A. The Washington Supreme Court's Reliance on the Precedential Value of Post-Apportionment Graduated Corporate Tax Rate Structures Is Flawed.

The Washington Supreme Court concurred with the Washington Department of Revenue's (hereinafter "DOR") analysis of the precedential nature of and rationale for other states' graduated corporate income tax statutes.[8] First, in justifying the surtax, the court affirmed the DOR's position on graduated tax rates and noted "[n]umerous states impose graduated tax rates on a corporation's income, including Alaska, Iowa and Oregon." *Wash. Bankers Ass'n*, 495 P.3d at 812. The Washington Supreme Court also noted that the DOR listed fourteen states that impose corporate income taxes with graduated rates (addressed in more detail below). *Id.* at 825. Similarly, in explaining the justification for graduated tax rates, the court utilized the same "ability to pay" rationale as the DOR: "RCW 82.04.29004 is a progressive measure designed to tax financial institutions located in Washington and beyond state lines. Similar to the federal income tax and other graduated state structures, RCW 82.04.29004 applies a higher tax rate to those entities most able to pay it: prosperous corporations." *Id.* at 824 (citing *Quarty v. United States*, 170 F.3d 961, 967 (9th Cir. 1999).

Indeed, the Washington Supreme Court (following the DOR's lead) got it one-half right. There certainly is no prohibition under the Commerce Clause

[8] *Wash. Bankers Ass'n*, 495 P.3d at 824-25. The DOR sought review before the Washington Supreme Court of the Superior Court of the State of Washington for King County's decision on summary judgment that the financial institution surtax violated the Commerce Clause. *Id.* at 813.

precluding states from imposing graduated corporate income tax rates based on different levels of post-apportionment net income. Nor is there an innate problem with applying a higher tax rate to larger and more financially successful businesses.

The court, however, omitted a critical factor in its analysis: none of the cases (or statutes) it cited for the validity of graduated income tax rates involved the application of state statutes where the methodology for determining the application of the graduated rates with a business tax was on a pre-apportionment basis, as is the situation with Washington's surtax. Instead, the court conflated the pre-apportionment threshold for application of the surtax with the post-apportionment calculation of the tax. The court cited *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937), quoting "[an apportioned] tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits." *Wash. Bankers Ass'n*, 495 P.3d at 825 (citing *Graves*, 300 U.S. at 313). That, along with its statement on tax credits—"Washington's tax code already distinguishes between profitable taxpayers, providing small businesses with tax credits"—are not relevant to the core issue of this case. *Id.* Rather, the key constitutional infirmity involves the imposition of Washington's surtax using a threshold based on pre-apportioned income, not the subsequent calculation of the tax based on post-apportioned income to the State.

B. All State Corporate Income Taxes With Graduated Rates Apply Their Tax Rate Brackets On A Post-Apportionment Net Income Basis.

The shortcomings of the Washington Supreme Court's analysis are clear from a review of the existing state graduated corporate income taxes. Currently fourteen states, about one-third of all states with corporate income taxes, utilize graduated tax rate structures: Alaska, Arkansas, Hawaii, Iowa, Kansas, Louisiana, Maine, Mississippi, Nebraska, New Jersey, New Mexico, North Dakota, Oregon, and Vermont (see Table 1).

There are many design variations among the fourteen states with graduated corporate income tax rates. For instance, one state has ten different rate classifications (Alaska), one has six rate levels (Arkansas), one has five rate brackets (Louisiana), and one has only two rates (New Mexico). Similarly, in some states the highest rate bracket starts at $25,000 (Vermont), in others at $250,000 (Iowa), and still others at $3.5 million (Maine).

But all fourteen states imposing corporate income tax with graduated rates have one commonality: the threshold for each of the ascending brackets is based on a taxpayer's post-apportionment net income and not on its pre-apportionment global net income (see Table 1). This is why the Washington Supreme Court's reliance on other states with graduated income tax rates to justify the surtax on financial institutions is grossly misplaced. *Id.* at 812.

Table 1: State Corporate Income Tax Statutes with Graduated Rate Structures[9]

State	Tax Rate (%)	Rates Based on Pre- or Post-Apportioned Income?	Number of Brackets	Range
Alaska	2.0 - 9.4	Post-Apportionment	10	$25,000 - $222,000
Arkansas	1.0 - 6.2	Post-Apportionment	6	$3,000 - $100,000
Hawaii	4.4 - 6.4	Post-Apportionment	3	$25,000 - $100,000
Iowa	5.5 - 9.8	Post-Apportionment	3	$100,000 - $250,000
Kansas	4.0 - 7.0	Post-Apportionment	2	Above and Below $50,000
Louisiana	4.0 - 8.0	Post-Apportionment	5	$25,000 - $100,000
Maine	3.5 - 8.93	Post-Apportionment	4	$350,000 - $3,500,000
Mississippi	3.0 - 5.0	Post-Apportionment	3	$4,000 - $10,000

[9] Alaska Stat. § 43.20.011; Ark. Code Ann. § 26-51-205(a)(2); Haw. Rev. Stat. § 18-235-71; Iowa Code § 422.33(a)-(c); Kan. Stat. Ann. § 79-32.110(2)(c); La. Stat. Ann. § 47:287.12; Me. Stat. tit. 36 § 5200(1-A); Miss. Code Ann. § 27-7-5(1); Neb. Rev. Stat. § 77-2734.02(b); N.J. Rev. Stat. § 54:10A-5(c)(1); N.M. Stat. Ann. § 7-2A-5; N.D. Cent. Code §§ 57-38-30, 57-38.4-02(3); Or. Rev. Stat. §§ 317.061, 318.020; Vt. Stat. Ann. tit. 32, § 5832.

Nebraska	5.58 - 7.81	Post-Apportionment	2	Above and Below $100,000
New Jersey	6.5 - 11.5	Post-Apportionment	4	$50,000 - $1,000,000
New Mexico	4.8 - 5.9	Post-Apportionment	2	Above and Below $500,000
North Dakota	1.41 - 4.31	Post-Apportionment	3	$25,000 - $50,000
Oregon	6.6 - 7.6	Post-Apportionment	2	Above and Below $1,000,000
Vermont	6.0 - 8.5	Post-Apportionment	3	$10,000 - $25,000

C. No Other State Broad-Based Business Gross Receipts Tax Utilizes Pre-Apportioned Income For Determining Its Tax Rate Structure.

There is one other comparative state analysis that warrants attention—the tax rate structures of other state broad-based business gross receipt taxes. Along with Washington, four other states have broad-based gross receipts taxes: Nevada, Ohio, Oregon, and Texas (see Table 2). Two of these states, Ohio and Oregon, generally have a single tax rate structure. The other two states, Nevada and Texas, have differential tax rate structures. In both instances, however, the rates are not "graduated" tax rates, but rather differential rates based on the business activity classification of the taxpayer. Under the Texas Margins Tax, there are two different tax rates—one for retail and wholesale companies, and another for all other types of

businesses. Under the Nevada Commerce Tax, there are twenty-six different tax rates based on the business activity classifications of the taxpayers.

Indeed, these differential rate structures parallel the design of the Washington B&O tax for all taxpayers, except for financial institutions. For non-financial institutions, the Washington B&O tax has over thirty different flat tax rates that apply based on a taxpayer's business activity classification (*e.g.,* retailing, wholesaling, manufacturing, etc.). Like the fourteen states with graduated corporate income taxes, the four other states with broad-based gross receipts taxes provide no precedent for the assertion that the application of pre-apportionment graduated tax rate brackets are commonplace and thus acceptable.

Table 2: States with Broad-Based Gross Receipts Taxes[10]

State	Type of Tax	Differential Rates Based On?
Nevada	Commerce Tax	Business Activity
Ohio	Commercial Activity Tax (CAT)	No Differential Rate
Oregon	Corporate Activity Tax (CAT)	No Differential Rate
Texas	Margin Tax/Franchise Tax Rate	Business Activity
Washington	Business & Occupation Tax	35 Entity Classifications Based on Type of Business Activity (In Addition to the Surtax on Financial Institutions)

[10] Nev. Rev. Stat. § 363C.300 (rate of tax based on business category in which business entity is primarily engaged); Ohio Rev. Code Ann. § 5751.03 (Ohio commercial activity tax is imposed at 0.26% of taxable gross receipts exceeding $1,000,000); Or. Rev. Stat. § 317A.125(1) (Oregon corporate activity tax is imposed at $250 plus the product of taxpayer's taxable commercial activity exceeding $1,000,000, multiplied by 0.57%); Tex. Tax Code §§ 171.002, 171.1016; Wash. Rev. Code §§ 82.04.220, 82.04.067, 82.04.230-294.

D. Except For Maryland, The Washington Surtax Based On Pre-Apportioned Worldwide Income Is An Aberration.

The Washington surtax applies to very large, almost exclusively out-of-state financial institutions, increasing their statutory tax rate by 70%. As indicated in Part I, the pre-apportionment trigger of at least $1 billion in global net income ensures that for most financial institutions the impact is primarily derived from business activity not occurring in Washington.[11] The fact that the tax on the impacted financial institutions is subsequently applied to post-apportionment gross receipts does not undo the discriminatory effect caused by limiting the application of the surtax to businesses based on pre-apportionment global net income.

Unfortunately, one other state, Maryland, has followed in the footsteps of Washington. Maryland has recently enacted a narrow-based gross receipts tax called a digital services tax, effective January 1, 2022. Md. Code Ann., Tax-Gen. § 7.5-103. That tax also has a graduated tax rate structure based on pre-apportionment global net income.

While the Maryland tax is narrowly levied on the gross receipts from digital advertising services, the Maryland statute shares the Washington B&O surtax's utilization of a graduated rate structure that is applied based on the amount of pre-apportionment global annual gross revenue and not post-apportionment gross receipts. The Maryland digital services tax graduated rate structure is as follows: 2.5% for companies with $100 million to $1 billion of global annual gross revenue from all sources; 5% for

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[11] Pet'rs' Pet. for Writ of Cert. at 17.

over $1 billion to $5 billion; 7.5% for over $5 billion to $15 billion; and 10% for over $15 billion. *Id*.

Far from substantiating the constitutionality of the Washington B&O tax on financial institutions' statutory design, however, the Maryland digital services tax's application of graduated tax rates based upon global net gross receipts highlights the risk of this Court not granting certiorari in this case. Maryland represents the first copycat statute that utilizes pre-apportionment global net income to determine the application of its graduated tax rate brackets, but it may not be the last. If the Washington Supreme Court's validation of Washington's scheme is allowed to stand, it will serve as both a green light and a road map for other states to impose discriminatory and unconstitutional tax burdens on out-of-state companies using pre-apportioned income as a threshold for graduated tax rates.

III. THE FAILURE OF THE WASHINGTON SUPREME COURT TO APPLY THIS COURT'S COMMERCE CLAUSE PRECEDENTS IS TROUBLING GIVEN THAT ACCESS TO FEDERAL COURTS IS EXTREMELY LIMITED IN STATE TAX CASES.

The Washington Supreme Court's failure to evenhandedly apply this Court's Commerce Clause precedents is particularly troubling because access to federal courts is extremely limited in state tax cases. There are two constraints that severely limit lower federal courts from adjudicating state and local tax matters: the Tax Injunction Act and the comity doctrine. The Tax Injunction Act, which is jurisdictional, bars suits in federal court to "enjoin, suspend or

restrain" the "assessment, levy or collection" of state taxes, except where no "plain, speedy and efficient remedy" is available in state court. 28 U.S.C. § 1341. Under a similar but distinct limitation, the comity doctrine, "federal courts refrain from 'interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.'" *Direct Mktg. Ass'n*, 575 U.S. at 15 (citing *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 422 (2010)).

Both the Tax Injunction Act and the comity doctrine constrain taxpayers' access to lower federal courts in state tax litigation. Such jurisdictional restrictions are unique to state tax controversies. Other statutory or constitutional disputes involving environmental, health care, voting rights, or educational issues have no similar impediment. As a result, state taxpayers must rely almost exclusively on state courts to arbitrate potential federal constitutional challenges of state taxes.

The Washington Supreme Court's erroneous construction of this Court's precedents constitutes a failure to responsibly exercise its duty, and this Court is the last remaining backstop to prevent the withering away of important constitutional protections. Left unchecked, state courts have a powerful tool to insulate their actions from the purview of the U.S. Constitution—simply by limiting the application of constitutional principles to only those fact patterns that are identical to previous ones litigated before this Court. This erodes taxpayers' confidence in what is largely a voluntary tax compliance system. We urge this Court to accept certiorari to correct the Washington Supreme Court's significant misstep, and

to forestall any future damage its precedent might cause.

CONCLUSION

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

Respectfully submitted,

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