No. 21-1066

IN THE
Supreme Court of the United States

WASHINGTON BANKERS ASSOCIATION ET AL.,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF REVENUE ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* WASHINGTON STATE TAX PRACTITIONERS IN SUPPORT OF PETITIONERS

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April 4, 2022

QUESTION PRESENTED

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?

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BRIEF OF *AMICI CURIAE*
WASHINGTON STATE TAX PRACTITIONERS
IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici curiae ("Practitioners")[1] are lawyers practicing state and local tax law in Washington State. Practitioners regularly represent taxpayers of all kinds in evaluating their state and local tax liabilities and in audits and disputes with the Department of Revenue, including cases before the Washington Supreme Court. Practitioners also regularly apply this Court's Due Process Clause and Commerce Clause precedents and other federal law as they bear on taxpayers' Washington state tax issues.

Practitioners coalesced as an initiative to help inform this Court of the broader factual and legal contexts in which disputes involving taxation arise.

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission. Petitioners and Respondents have granted consents to the filing of this *amicus curiae* brief.

Some individual Practitioners and/or their respective law firms represent or have represented Petitioner Washington Bankers Association and/or individual financial institutions that are members of one or both Petitioner associations. Some individual Practitioners have been employed in the past by Respondent State of Washington, Department of Revenue. No client or former employer of any individual Practitioner requested the filing of this brief or participated in any aspect of its preparation.

Practitioners have filed amicus briefs with the Court previously (in each case with a slightly different group composition) in *Trump v. Vance*, 140 S. Ct. 2412 (2020), *North Carolina Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019), and *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In *Trump v. Vance*, Practitioners supported the position of the agency investigating potential taxpayer abuses. In the earlier cases, Practitioners supported the taxpayers' positions.

Practitioners join this brief solely as individuals and not as representatives of the law firms or associations with which they are affiliated. Each Practitioner is currently in private practice. Among them are Practitioners who have served in the past as President of the Washington State Bar Association; who have served in the past as chairs of the Association's State and Local Taxes Committee; or who have taught state and local taxation at the University of Washington School of Law. One is a Fellow of the American College of Tax Counsel and one is a Fellow of the American Academy of Appellate Lawyers. Their experience is not limited to representing taxpayers; three have worked in the past for the Washington State Department of Revenue as a former Assistant Director for Interpretation and Appeals, as a Special Assistant to the Director, and as an administrative law judge. A full list of *amici* appears in Appendix A.

The Petitioners properly ask the Court to address a conflict among lower courts on how to assess the validity under the Commerce Clause of state tax and regulatory statutes that affect large, multistate

businesses differently from local businesses. Practitioners hope to assist the Court by illustrating how this conflict is exacerbated by jurisprudential differences regarding the impact of federal law in state-court tax decisions.

SUMMARY OF ARGUMENT

1. Petitioner identifies a sharp division of authority in the lower courts regarding how "to recognize that a law imposing disfavored treatment based on a proxy for extensive interstate commerce" does or does not unlawfully discriminate against interstate commerce. Pet. at 2. This division is exacerbated by a profound conflict in jurisprudence at the state-court level in tax cases. It is a fact, regardless of whatever subjective reasons may exist, that some state supreme courts will vindicate the federal constitutional rights of taxpayers against the State and others will not. The Washington Supreme Court is one that does *not* grant taxpayers relief on federal constitutional claims against the State Department of Revenue. By our count, it has been 45 years since the Washington Supreme Court granted relief to a taxpayer on federal constitutional grounds that the Department did not concede was due. Since that long-ago decision, in *Ass'n of Wash. Stevedoring Cos. v. Wash. Dept. of Revenue*, 88 Wash.2d 315, 559 P.2d 997 (1977), taxpayers' win-loss record is 0-26.

If this Court denies the writ and permits uncertainty about whether discrimination by proxy is impermissible to continue, we know the jurisprudential pattern in some States, like Washington, will persist in seeing no problems where the legislature places heavier burdens on those who

participate most broadly in interstate commerce. Granting the writ, on the other hand, and clarifying the law on the question presented could mitigate the disparity among the States regarding application of federal rights generally.

2. The simplest judicial method for resolving a constitutional tax dispute in favor of the tax is to omit reference to pertinent but troublesome analytical elements in this Court's precedents. Practitioners identify examples in the recent body of the Washington Supreme Court's opinions. Given this Court's role as lawgiver in the field of the dormant Commerce Clause,[2] with institutional responsibility "'to formulate the rules' to preserve 'the free flow of interstate commerce'," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945)), taking up and resolving the question presented by naming the necessary analytical criteria would enhance the rule of law and help ensure better uniformity in lower-court approaches to the constitutional protection of interstate commerce.

3. Inadequate current guidance on the question presented does, as Petitioners and other *amici curiae* aver, encourage States to enhance revenues by ever more egregious targeted taxation of income streams and cash flows of an interstate character. In Washington, for example, the legislature enacted a tax on the receipt of home mortgage loan interest *only* for loans originated by financial institutions that are located in more than 10

[2] U.S. Const. art. I, § 8, cl. 3.

States. *See* Wash. Rev. Code § 82.04.29005 (enacted 2012). Prior to enactment, the Washington Legislature sought the Department of Revenue's assurance that the bill would not violate the Commerce Clause. Notwithstanding the statute's express classification based on the physical extent of banks' participation in interstate commerce, the Department argued that it was neutral, since the tax *could* apply to banks headquartered in Washington as well as in other States, if they were large enough, and that some multistate banks would not be subject to the tax, if they were small enough.

4. The Petition requests relief from the Washington surtax because it discriminates against interstate commerce in effect. An additional question litigated below, whether the tax is discriminatory in purpose, has not been brought to this Court. The Washington Supreme Court's discriminatory-effect analysis, *see* Pet. App. 11a-26a, whatever its defects, did not muddy the argument with citation to the bill's legislative intent statement. This was the appropriate approach, because States cannot pursue otherwise permissible legislative purposes *by* discriminating against interstate commerce. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (citation omitted). This Court should therefore not be distracted by any attempt by the State in the Brief in Opposition to rely on the asserted purposes of the tax, which are paraphrased and quoted at Pet. App. 4a. The stated purposes were mere pretense in any case because the tax increase has no economic consequence with respect to the Legislature's stated interest in relieving working families, imposing

additional tax burdens on the "wealthy few," or remedying existing income disparities.

ARGUMENT

I. State Judicial and Executive Disregard of the Thrust of This Court's Commerce Clause Cases Exacerbates the Negative Effects of Judicial Confusion on the Question Presented.

A. Granting the writ could mitigate disparities in Commerce Clause jurisprudential patterns in the States.

The Petition identifies a sharp division of authority in the lower courts regarding how "to recognize that a law imposing disfavored treatment based on a proxy for extensive interstate commerce" does or does not unlawfully discriminate against interstate commerce. Pet. at 2, 10-11. In discerning whether a state law discriminates "in practical effect," *see id.* at 11 (citing cases), lower courts have invalidated state schemes in the presence of "disproportionate targeting," lack of evenhandedness, differential treatment with a high correlation between in-state and out-of-state residence, linking permissible use of products to locally licensed service providers, and differential treatment of "small" and "large" businesses or new versus existing businesses. *See id.* at 11-15. The Petition also shows that the same qualitative factors have been accommodated by lower-court decisions in validating similar taxes and regulations. *See id.* at 16-18. These decisions are "somewhat difficult to reconcile," as the Ninth Circuit has observed. *See International Franchise Ass'n, Inc.*

v. Seattle, 803 F.3d 389, 403 (9th Cir. 2015) (internal quotation and citation omitted).

The conflict of decisions and lower-court recognition that guidance is lacking, *see, e.g., id.* at 404 (noting that, in the context of the dispute in question, "[w]e lack Supreme Court authority"), are exacerbated by a profound conflict in jurisprudence at the state-court level in tax cases. It is a fact, regardless of whatever subjective reasons may exist, that some state supreme courts will vindicate the federal constitutional rights of taxpayers against the State and others will not. The state supreme courts that have granted relief to taxpayers on federal constitutional grounds are peppered across the landscape, from Idaho to New York, without regard to the local prevailing political ethos. A sample of such decisions from the last ten years:

- *Noell Industries, Inc. v. Idaho State Tax Comm'n*, 167 Idaho 367, 470 P.3d 1176 (2020)
- *Maryland State Comptroller of Treasury v. Wynne*, 431 Md. 147, 64 A.3d 453 (2013)
- *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233, 993 N.E.2d 374 (2013)
- *Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dept. of Revenue*, 371 N.C. 133, 814 S.E.2d 43 (2018)
- *Corrigan v. Testa*, 149 Ohio St. 18, 73 N.E.3d 381 (2016)

- *General Motors Corp. v. Commonwealth*, 265 A.3d 353 (Pa. 2021)

- *State v. Wayfair, Inc.*, 901 N.W.2d 754 (S.D. 2017)

The Washington Supreme Court is one that does *not* grant taxpayers relief on federal constitutional claims against the State Department of Revenue. The roster of decisions against taxpayers in the last ten years follows:

- *Wash. Bankers Ass'n v. Wash. Dept. of Revenue*, 198 Wash.2d 418, 495 P.3d 808 (2021)

- *PeaceHealth St. Joseph Med. Ctr. v. Wash. Dept. of Revenue*, 196 Wash.2d 1, 468 P.3d 1056 (2020)

- *Avnet, Inc. v. Wash. Dept. of Revenue*, 187 Wash.2d 44, 384 P.3d 571 (2016)

- *Dot Foods, Inc. v. Wash. Dept. of Revenue*, 185 Wash.2d 239, 372 P.3d 747 (2016)

- *In re Estate of Hambleton*, 181 Wash.2d 802, 335 P.3d 398 (2014)

This is a very partial list. By our count, it has been 45 years since the Washington Supreme Court granted any practical relief to a taxpayer on federal constitutional grounds that the Department did not concede was due. Since that last, long-ago decision in

a taxpayer's favor, in *Ass'n of Wash. Stevedoring Cos. v. Wash. Dept. of Revenue*, 88 Wash.2d 315, 559 P.2d 997 (1977), taxpayers' win-loss record is 0-26. The full list of such decisions is set out in Appendix B.[3]

If this Court denies the writ and permits uncertainty about whether discrimination by proxy is impermissible to continue, we know the jurisprudential pattern in some States, like Washington, will persist in seeing no problems where the legislature places heavier burdens on those who participate most broadly in interstate commerce. Granting the writ, on the other hand, and clarifying the law on the question presented could mitigate the disparity among the States regarding application of federal rights generally.

B. Omitting reference to this Court's analysis and precedent is a successful jurisprudential method of sustaining state taxes against federal constitutional claims.

This Court might ask, how does a state supreme court build such an unblemished record of sustaining state taxes against federal constitutional claims? Practitioners have not conducted an analytical survey of all the decisions listed in Appendix B, but our own recent experience suggests that the simplest judicial method for resolving a

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[3] Given that the Washington Supreme Court's review of lower appellate courts' decisions is discretionary, Wash. Rules App. Proc. 13.1(a), many additional decisions rejecting taxpayer relief on federal constitutional grounds are effectively affirmed.

constitutional tax dispute in favor of the tax is to omit reference to pertinent but troublesome analytical elements in this Court's precedents.

Practitioners identify two examples of this method in the recent body of the Washington Supreme Court's opinions.

1. *In re Estate of Hambleton*, 181 Wash.2d 802, 335 P.3d 398 (2014).

The lead argument of one of the taxpayers in this case revolved around the Washington Legislature's express intent to adopt the standard for permissible taxation of "transfers" in the estate-tax context under "established United States supreme court precedents." *See* 2013 Wash. Sess. Laws, 2d Spec. Sess., ch. 2, § 1(5). The Washington Supreme Court omitted the issue entirely from its summary of the taxpayers' positions and never addressed it.

Hambleton involved an amendment of the Washington estate tax statutes. The amendment was enacted during the course of lower-court appeals from two trial-court decisions, one upholding an estate tax assessment under the prior statute and one invalidating it. The two appeals were transferred to the State Supreme Court and consolidated.

Substantively, the amendment sought to overturn a prior decision of the Washington Supreme Court, *In re Estate of Bracken*, 175 Wash.2d 549, 290 P.3d 99 (2012). The Court in *Bracken* interpreted the original Washington estate tax statute, which had been enacted in 2005 expressly for prospective application. In the Court's view, the statute did not

tax the estate of a surviving spouse on the assets in a "QTIP trust" if the trust had been established by the first-deceased spouse's estate pursuant to 26 U.S.C. § 2056(b)(7) before the effective date of the tax. Instead, in *Bracken*, the Court interpreted the statute as treating only the creation of the trust by the estate of the first spouse to die as a taxable "transfer," and that such transfers occurring before the effective date of the tax were not within its scope. *Id.* at 101. The amended statute purported to treat the surviving spouse's death as a stand-alone taxable transfer, *see Hambleton*, 335 P.3d at 405, and expressly included QTIP trust property in the surviving spouse's Washington estate if it was included in his or her federal taxable estate. *Id.*

In the legislative intent statement of the amendatory act, the Washington Legislature opined that the *Bracken* decision departed from federal law and stated its intention to adopt, for the term "transfer," the "broadest possible meaning consistent with established United States supreme court precedents." 2013 Wash. Sess. Laws, 2d Spec. Sess., ch. 2, § 1(5).

In the principal brief filed at the Washington Supreme Court filed by one of the taxpayers, the Estate of Jessie Macbride (Appellant's Supplemental Reply Brief, 2014 WL 223105), the Macbride Estate sought to engage the Court in the effect of this intent statement. The Macbride Estate argued in detail that this Court's precedents concerning indirect taxation of *trust* property – namely, *Whitney v. State Tax Comm'n*, 309 U.S. 530, 538, 540 (1940), and *Estate of Rogers v. Comm'r*, 320 U.S. 410, 413 (1943) – could

not be ignored in giving effect to the legislative intent in a case like *Hambleton*, which was concerned only with taxation of trust property. Moreover, the Macbride Estate argued that *Whitney* and *Rogers* fully supported the *Bracken* result. *See* 2014 WL 223105 at *vi-*12. The Washington Department of Revenue fully engaged with this argument, contending that *Bracken* was wrong and should be overruled.

The Washington Supreme Court failed to acknowledge the issue at all. Its opinion purported to list the taxpayers' arguments. *See* 335 P.3d at 406. The Macbride Estate's principal legislative intent argument was omitted, as if never presented. The Court made no attempt to analyze the scope of constitutional indirect taxation under "established United States supreme court precedents."[4]

2. *PeaceHealth St. Joseph Med. Ctr. v. Wash. Dept. of Revenue*, 196 Wash.2d 1, 468 P.3d 1056 (2020).

In *PeaceHealth*, the Washington Supreme Court upheld a facial discrimination against interstate commerce, in a statute imposing tax only on Medicaid reimbursements from non-Washington Medicaid programs, under the "government function exemption" from Commerce Clause scrutiny. The

[4] The taxpayers in *Hambleton* sought review in this Court via a petition for certiorari, which was denied. 577 U.S. 922 (2015). Their counsel (of whom the counsel of record on this brief was one) determined that the taxpayers were effectively foreclosed from including the question in their petition, given the Washington Supreme Court's failure to decide it.

Court was able to reach that conclusion in part by ignoring that federal law requires States to provide health care access to Medicaid beneficiaries who reside in other States and by failing to consider whether Congress's action overrides the "government function exemption."

Specifically, the Washington B&O tax statute in question provides a deduction to public and nonprofit hospitals for receipts from the Washington State Medicaid program, but not for receipts from other States' Medicaid programs. *See* Wash. Rev. Code § 82.04.4311. In other words, providing hospital services to nonresident Medicaid beneficiaries is taxed and providing the same services to resident Medicaid beneficiaries is not taxed.

The Washington Supreme Court recognized that "'the dormant Commerce Clause precludes States from discriminat[ing] between transactions on the basis of some interstate element.'" *Id.* at 1061 (quoting *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 549 (2015) (other internal quotations omitted)). However, it upheld the statute under the "government function exemption" from Commerce Clause scrutiny extended by this Court in *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008), and *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007).

The Court held that granting the deduction solely for Washington's Medicaid program advanced the State's government function by allegedly providing an indirect subsidy to the State's Medicaid program, 468 P.3d at 1063, an assertion for which there was no evidence (and the Court cited none). The

Court took no notice of facts that impeached this position, omitting any reference to the Legislature's granting a deduction for all Medicare reimbursements (no matter the residence of the beneficiary), to federal law that requires state Medicaid programs to accommodate the provision of services to beneficiaries enrolled in other States' programs, *see* 42 C.F.R. § 431.52, or to federal law that prohibits hospitals from turning away patients from other States. *See* Emergency Management and Active Labor Treatment Act (EMTALA), 42 U.S.C. § 1395dd. More critically, the Court failed to acknowledge that this Court has held that, when Congress has spoken and called for equal access by interstate actors to a given service or program, the analogous marketplace participant exemption from Commerce Clause scrutiny does not apply. *See White v. Mass. Council of Constr. Emp'rs, Inc.*, 460 U.S. 204, 213-14 (1983). Instead, the Court brushed off *White's* relevance and treated the government function and marketplace participant exceptions as analytical silos. *PeaceHealth*, 468 P.3d at 1062 n.4.

Given this Court's role as lawgiver in the field of the dormant Commerce Clause, with institutional responsibility "'to formulate the rules' to preserve 'the free flow of interstate commerce'," *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018) (quoting *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 770 (1945)), taking up and resolving the question presented by naming the necessary analytical criteria would enhance the rule of law and help ensure better uniformity in lower courts' policing of the States' general impulse to give preference to local commerce. *See Wynne*, 575 U.S. at 555-56.

C. Without better guidance on what constitutes substantive and not merely formal neutrality, the States can and do abuse the concept.

Washington provides an even more egregious example of disregard for the concerns that underlie the dormant Commerce Clause in another provision of the B&O tax, which treats financial institutions differently depending on how many States they are located in. Specifically, in 2012, the Legislature enacted a new provision imposing tax on the receipt of home mortgage loan interest, but *only* for loans originated by financial institutions that have locations in more than 10 States. *See* Wash. Rev. Code § 82.04.29005(1). Interest on home mortgage loans remains deductible from "gross income of the business" for loans originated by lenders located in 10 or fewer States under Wash. Rev. Code § 82.04.4292.

In the prior legislative session, when a similar bill was under consideration, legislative staff requested advice from the Department of Revenue about the constitutionality of the 10-State standard. *See* Appendix C ("Application of the Commerce Clause to Proposed §302 of SSB 6143"). The chief legislative liaison for the Department, Drew Shirk, provided an issue statement concluding that limiting the deduction for home mortgage interest using the 10-State standard "probably does not violate the Commerce Clause of the United States Constitution." *Id.* The Department's view was that, notwithstanding the statute's express classification based on the extent of the bank's participation in interstate commerce, the bill was neutral on its face, since the tax *could* apply

to banks headquartered in Washington as well as in other States, if they were large enough, and was nondiscriminatory as applied, given that some multistate banks would still be eligible for the deduction if their geographic scope were small enough.

In a subsequent administrative appeal by multiple financial institutions, the Department justified the statute, saying the differential treatment did not prove "the requisite discriminatory intent to establish a commerce clause violation."

In effect, this particular administrative agency feels free to disregard even the existence of the "discriminatory effect" prong of the antidiscrimination principle.

II. If Respondents Attempt to Defend the Statute in This Case by Relying on the Legislative Intent Statement, the Court Should Disregard the Purported Intent as Both Irrelevant and Not Rationally Related to the Substance of the Act.

The Petition requests relief from the Washington surtax because it discriminates against interstate commerce in effect. An additional question litigated below, whether the tax has a discriminatory purpose, has not been brought to this Court. The Washington Supreme Court's discriminatory-effect analysis, *see* Pet. App. 11a-26a, whatever its defects, did not muddy the argument with citation to the bill's legislative intent statement. This was the appropriate approach, because States cannot pursue otherwise permissible legislative purposes *by*

discriminating against interstate commerce. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880 (1985) (citation omitted). The legislative intent statement is not relevant to the question presented.

Nevertheless, should Respondents rely on the legislative intent statement in their Brief in Opposition, this Court should not be distracted. The intent statement is economically unrelated to what the B&O surtax does.

The Washington Supreme Court paraphrased and quoted the statement as follows:

> For the 1.2 percent B&O tax at issue here, lawmakers made specific findings. LAWS OF 2019, ch. 420, § 1. The legislature found that despite the economic success of Washington industry, Washington families still struggle to meet basic needs while at the same time carrying the burden of funding schools and essential services. *Id.* The disparity in wealth between the highest and lowest income families continues to grow, and the state's regressive tax code disproportionately affects middle and low-income earners. *Id.* To address these disparities, the legislature concluded that "those wealthy few who have profited the most from the recent economic expansion can contribute to the essential services and programs all Washington families need." *Id.*

Pet. App. 4a. The stated purpose was mere pretense. It was expressly predicated on the unfairness of income disparity between the highest and lowest income families and the need to increase the tax contributions from "those wealthy few." The surtax does nothing to advance either interest.

First, the act did not reduce any working family's tax burdens.

Second, the act did not increase any affluent family's tax burdens.

Third, the B&O tax, as a gross receipts tax on business cash flows, is notorious for the lack of transparency as to who really bears how much of the economic burden. "Gross receipts taxes do not only impact business owners and shareholders. Consumers and workers also bear the tax incidence, in the form of higher prices and lower wages." G. Watson, "Resisting the Allure of Gross Receipts Taxes: An Assessment of Their Costs and Consequences," https://taxfoundation.org/gross-receipts-tax/ (Feb. 6, 2019). A detailed assessment of the Washington tax system commissioned by the State Legislature acknowledged the same problem. "To the extent that such taxes are passed on to consumers in the form of higher prices, the taxes are not transparent." *Tax Alternatives for Washington State (Nov. 2002) Prepared Pursuant to Chapter 7, Section 138, Laws of 2001*, ch. 4, p. 28, https://dor.wa.gov/about/statistics-reports/tax-structure-final-report. And to the extent the B&O tax is absorbed by shareholders or C-suite executive compensation, Washington's additional tax on large banks is almost entirely exported to those constituencies located out of state.

Fourth, the Washington Legislature, having commissioned the foregoing report on the State's tax system, knows well that the B&O tax is a larger generator of tax revenue than most States' business taxes. "Taxes initially imposed on businesses, notably the B&O tax, constitute a larger share of state revenue in Washington than in most other states." *Id.*; *see also id.* at 29 ("Our proportion of state taxes collected from businesses compared to households is dramatically different from norms: 46 percent from business in Washington compared to a western states average of 30 percent."). The regressivity of Washington's tax system is not the result of the B&O tax rates' being too low.

Fifth, targeting financial institutions with annual net income of $1 billion or more as stand-ins for "those wealthy few" is irrationally underinclusive, because the vast majority of billion-dollar American businesses are not financial institutions. *See* "Fortune 500," https://fortune.com/fortune500/2018/search/ .

In summary, the bank surtax raises new revenues, but it has no economic relationship with the asserted purposes of the act.

CONCLUSION

For the foregoing reasons, *Amici Curiae* Washington State Tax Practitioners respectfully request that the Court grant the writ requested by Petitioners.

Respectfully submitted,

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April 4, 2022

APPENDIX

APPENDIX A

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APPENDIX B

Unbroken String – 26 Washington Supreme Court Decisions Supporting Department of Revenue on Federal Constitutional Issues

1977-2021

1. *Wash. Bankers Ass'n v. Wash. Dept. of Revenue*, 198 Wash.2d 418, 495 P.3d 808 (2021)

2. *PeaceHealth St. Joseph Med. Ctr. v. Wash. Dept. of Revenue*, 196 Wash.2d 1, 468 P.3d 1056 (2020)

3. *Avnet, Inc. v. Wash. Dept. of Revenue*, 187 Wash.2d 44, 384 P.3d 571 (2016)

4. *Dot Foods, Inc. v. Wash. Dept. of Revenue*, 185 Wash.2d 239, 372 P.3d 747 (2016)

5. *In re Estate of Hambleton*, 181 Wash.2d 802, 335 P.3d 398 (2014)

6. *Flight Options, LLC v. Wash. Dept. of Revenue*, 172 Wash.2d 487, 259 P.3d 234 (2011)

7. *Lamtec Corp. v. Wash. Dept. of Revenue*, 170 Wash.2d 838, 246 P.3d 788 (2011)

8. *TracFone Wireless, Inc. v. Wash. Dept. of Revenue*, 170 Wash.2d 273, 242 P.3d 810 (2010)

9. *Nelson v. Appleway Chevrolet, Inc.*, 160 Wash.2d 173, 157 P.3d 847 (2007)

10. *W.R. Grace & Co. v. Wash. Dept. of Revenue*, 137 Wash.2d 580, 973 P.2d 1011 (1999)

11. *Digital Equip. Corp. v. Wash. Dept. of Revenue*, 129 Wash.2d 177, 916 P.2d 933 (1996) (affirming taxpayer's substantive federal constitutional claim on one issue but denying all practical relief)

12. *Nordstrom Credit, Inc. v. Wash. Dept. of Revenue*, 120 Wash.2d 935, 845 P.2d 1331 (1993)

13. *Am. Nat. Can Corp. v. Wash. Dept. of Revenue*, 114 Wash.2d 236, 787 P.2d 545 (1990)

14. *Associated Grocers, Inc. v. State*, 114, Wash.2d 182, 787 P.2d 22 (1990) (finding Equal Protection violation; denying relief)

15. *Nat. Can Corp. v. Wash. Dept. of Revenue*, 109 Wash.2d 878, 749 P.2d 1286 (1988)

16. *High Tide Seafoods v. State*, 106 Wash.2d 695, 725 P.2d 411 (1986)

17. *Coast Pac. Trading, Inc. v. Wash. Dept. of Revenue*, 105 Wash.2d 912, 719 P.2d 541 (1986)

18. *Tyler Pipe Indus., Inc. v. Wash. Dept. of Revenue*, 105 Wash.2d 318, 715 P.2d 123 (1986)

19. *Nat. Can Corp. v. Wash. Dept. of Revenue*, 105 Wash.2d 327, 732 P.2d 134 (1986)

20. *Seattle-King County Council of Camp Fire v. Wash. Dept. of Revenue*, 105 Wash.2d 55, 711 P.2d 300 (1985)

21. *United Parcel Service, Inc. v. Wash. Dept. of Revenue*, 102 Wash.2d 355, 687 P.2d 186 (1984)

22. *Chi. Bridge & Iron Co. v. Wash. Dept. of Revenue*, 98 Wash.2d 814, 659 P.2d 463 (1983)

23. *Sears, Roebuck & Co. v. Wash. Dept. of Revenue*, 97 Wash.2d 260, 643 P.2d 884 (1982)

24. *Tyler Pipe Indus., Inc. v. Wash. Dept. of Revenue*, 96 Wash.2d 785, 638 P.2d 1213 (1982)

25. *Wash. Dept. of Revenue v. J. C. Penney Co.,* 96 Wash.2d 38, 633 P.2d 870 (1981) (granting only the partial relief Department conceded was due)

26. *Sator v. Wash. Dept. of Revenue*, 89 Wash.2d 338, 572 P.2d 1094 (1977)

27. *Ass'n of Wash. Stevedoring Cos. v. Wash. Dept. of Revenue*, 88 Wash.2d 315, 559 P.2d 997 (1977) (unambiguously upholding taxpayer's federal constitutional position)

APPENDIX C

Washington Department of Revenue Position on Commerce Clause Compliance in 2010 S.B. 6143

[Electronic mail]

From: Shirk, Drew (DOR)

To: DOR DL Key Legislative

Subject: FW: constitutionality 10 state proposal

Date: Tuesday, April 06, 2010 6:25:02 PM

Attachments: REVISED Sec 302 constitutionality.docx

From: Shirk, Drew (DOR)

Sent: Tuesday, April 06, 2010 6:24 PM

To: Hesselholt, Claire

Subject: constitutionality 10 state proposal

Claire sorry for the delay, your 10 state commerce clause request

[Attachment]

Application of the Commerce Clause to Proposed §302 of SSB 6143.

Issue

Does the proposed limitation on the RCW 82.04.4292 deduction to banks, loan, security and other financial businesses to those with physical locations in 10 or fewer states violate the Commerce Clause?

General Rule

The state may not impose a tax that discriminates against interstate commerce.

Two Tests of the Constitutionality of Tax Statutes.

A tax statute may be found unconstitutional either because it is facially unconstitutional or it may be found unconstitutional as applied.

Facial Constitutionality.

The proposal on its face applies to banks headquartered in-state as well as those headquartered out of state. The proposal does not on its face discriminate against interstate commerce.

Constitutionality as Applied

The test to determine if a tax statute is constitutional as applied depends on its application in fact. There have been and presumably still are out of state and internet based banks that have physical locations in 10 or fewer states that make qualifying loans in Washington. Likewise, up until the demise of Washington Mutual, the bank was headquartered in Washington and would not have qualified for the deduction under this proposal. Thus, the proposal does not discriminate against interstate commerce.

While the deduction may not be available to many out-of-state headquartered banks, that fact in and of itself, will not cause the deduction to be unconstitutional.

This does not mean that national banks will not allege that the limitation is unconstitutional. There is an argument that could be made that the limitation is intended to benefit only in-state banks. However, the fact that some out-of-state Internet banks may qualify for the deduction should foreclose the claim.

Conclusion

The proposal to limit the first mortgage interest deduction to businesses with physical locations in 10 or fewer states probably does not violate the Commerce Clause of the U.S. Constitution.