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 IN OPPOSITION

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QUESTION PRESENTED

For over a century, this Court has held that States may impose graduated tax rates based on a company's size or profitability. This Court has also repeatedly held that when determining what tax rate applies, States may consider a taxpayer's nationwide or worldwide income. Based on these settled rules, States routinely charge higher tax rates to more profitable businesses and exempt smaller businesses from a range of state taxes and regulations.

Applying these principles, in 2019 Washington adopted a higher corporate tax rate for financial institutions with over $1 billion in annual profits. The tax applies only to revenue such businesses earn in Washington. The tax does not turn in any way on where a business is headquartered. There are many businesses based in Washington that owe the tax, and many businesses based outside of Washington that do extensive business in Washington but do not owe the tax because their profits fall below $1 billion. The tax does not, in any way, favor in-state over out-of-state entities. The question presented is:

Does a state tax that treats in-state and out-of-state companies identically violate the dormant Commerce Clause merely because more profitable companies face a higher tax rate?

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INTRODUCTION

Nothing in the Washington Supreme Court's unanimous decision below warrants this Court's review. The Washington court faithfully applied this Court's precedent and created no split amongst lower courts, and petitioners offered no persuasive evidence on the sole issue they ask this Court to review. This Court should deny certiorari.

Washington imposes a gross receipts tax on businesses operating in the state. Like many states, Washington charges different rates based on the company's industry and profitability. For example, Washington exempts small businesses with annual revenue below $125,000, and charges higher rates to companies at certain profit levels in some industries.

In 2019, Washington adopted a graduated tax rate for financial institutions operating in the state. The tax applies only to revenue financial institutions earn in Washington, and it does not depend in any way on where the company is based. Most financial institutions pay 1.75% of their Washington revenue in tax, but companies with annual profits above $1 billion pay 2.95%. Several financial institutions based in Washington pay the additional tax, and many financial institutions based outside of Washington that do business in the state do not owe the tax, because their profits are below $1 billion.

Petitioners challenged the tax before it took effect, claiming that it discriminated on its face, in purpose, and in effect. The Washington Supreme Court rejected all of these arguments. Petitioners seek review only on their discriminatory effects claim, but they satisfy none of this Court's criteria for certiorari.

First, the decision below is entirely consistent with this Court's precedent. This Court has never suggested that charging a higher tax rate based on corporate income discriminates against interstate commerce. To the contrary, this Court has repeatedly authorized States to set tax rates by referring to nationwide or worldwide income, as here. This Court has also repeatedly held that a state tax is not discriminatory merely because it is primarily (or even solely) paid by companies based outside the state. The decision below faithfully applied this case law, while petitioners largely ignore it.

Second, the decision below creates no disagreement among lower courts about any legal principle. States routinely apply higher tax rates to more profitable businesses and exempt smaller businesses from taxes and regulations. Petitioners' theory would call all such laws into question. While fact-bound cases in the lower courts have generated different outcomes as to whether certain other regulatory distinctions discriminate against interstate commerce, none of those cases involved a tax distinction based on corporate income, as here.

Finally, this case offers a poor vehicle to address the question presented. Petitioners ask this Court to address only how to decide whether a law has discriminatory effects, yet they challenged this law before it took effect and offered no evidence of its real effects. Their allegations of discriminatory purpose are inaccurate and irrelevant to their claim. Ultimately, they simply ask this Court to reassess their claim of discriminatory effects and reach a different result. That is no basis for certiorari.

STATEMENT OF THE CASE

A. Washington Enacted a Progressive Tax on Wealthy Financial Institutions Operating in the State, Whether Based in Washington or Elsewhere

Washington imposes a gross receipts tax, known as the business and occupation or "B&O" tax, for "the act or privilege of engaging in business activities" within the state. Wash. Rev. Code § 82.04.220(1). The tax applies to virtually all businesses, including banks and other financial institutions, except small businesses with gross receipts of less than $125,000 per year. Wash. Rev. Code § 82.32.045(5)(a), *amended by* 2022 Wash. Sess. Laws, ch. 295, § 2. Any financial institution engaged in business within the state, regardless of its corporate domicile or principal office location, is subject to B&O tax on gross income derived from its Washington business activities. Currently, Washington imposes a B&O tax rate of 1.75% for most financial institutions and other service businesses. Wash. Rev. Code § 82.04.290(2)(a)(i).

In 2019, Washington enacted an additional 1.2% B&O tax that applies to extremely profitable financial institutions operating in the state. 2019 Wash. Sess. Laws 3661-63 (ch. 420, § 2), *codified as* Wash. Rev. Code § 82.04.29004. The tax applies only to revenue earned in Washington. Pet. App. 3a. The express purpose of the additional tax is to raise revenue to "fund[] schools and essential services," combat "wealth disparity . . . between the wealthy few and the lowest income families," and make

Washington's tax system less regressive. 2019 Wash. Sess. Laws 3661 (ch. 420, § 1)[1] (*codified as* Finding *in* Wash. Rev. Code § 82.04.29004); *see also* Pet. App. 4a (discussing legislative findings).

The Washington legislature achieved these goals by imposing the additional tax on only "[s]pecified financial institutions" operating in the state. Wash. Rev. Code § 82.04.29004(1). A "specified financial institution" is any financial institution "that is a member of a consolidated financial institution group that reported on its consolidated financial statement for the previous calendar year annual net income of at least one billion dollars . . . ." Wash. Rev. Code § 82.04.29004(2)(e)(i); Pet. App. 64a. Washington's legislature chose the $1 billion net income threshold to limit the tax to only those extremely wealthy financial institutions that have "profited the most from the recent economic expansion . . . ." Pet. App. 4a (quoting section 1 of the Act). As a result of the additional tax, Washington's B&O tax on financial institutions is a graduated tax, with most financial institutions paying the lower 1.75% rate, while extremely profitable "specified financial institutions" pay the rate of 2.95%.

[1] The relevant Washington session law, and other public documents relating to the 2019 legislation, are available through the Washington State Legislature bill information website, https://app.leg.wa.gov/billsummary?BillNumber=2167&Year=2019&Initiative=false.

The tax is fairly apportioned. Pet. App. 3a n.1 (citing Washington's apportionment statute, Wash. Rev. Code § 82.04.460). It is "not measured against a financial institution's national or global income," but instead "is limited (apportioned) to only the income associated with Washington business activity." Pet. App. 20a.

The tax contains no exemptions, deductions, or credits benefiting in-state businesses over their out-of-state counterparts. Companies owe the tax regardless of their corporate domicile; they receive no benefit from being based in Washington and face no added cost if based outside of Washington. And in practice, the tax has applied to numerous financial institutions with a commercial domicile or principal office in Washington. Pet. App. 14a (citing Clerk's Papers 371); BIO App. at 2a-3a.[2] Roughly eight percent of the businesses that pay the tax are based in Washington. BIO App. at 3a. Meanwhile, numerous financial institutions based outside of Washington, but doing business in the state, do not pay the tax because they do not have $1 billion in global

[2] The data the Washington Supreme Court relied on to determine the number of Washington-based financial institutions that paid the additional tax was limited to just the first three months of tax collections. Pet. App. 4a. Since then, the State has collected the additional tax from over twenty Washington-based financial institutions, representing over eight percent of all financial institutions that have paid the tax. BIO App. at 2a-3a.

profits. BIO App. at 3a. For example, Umpqua Bank, which is headquartered in Oregon, has 64 branches in Washington,[3] and does not owe the tax because its total profit is below $1 billion. BIO App. at 4a. First Interstate Bank, headquartered in Montana, has eighteen branches in Washington,[4] and likewise does not owe the tax because its total profit falls below $1 billion. BIO App. at 4a. The only relevant factors for imposing the higher tax rate are whether the financial institution meets the definition of a "specified financial institution" in Wash. Rev. Code § 82.04.29004(2)(e)(i), and whether it conducts business activity in the state. These factors apply equally to in-state and out-of-state businesses.

In short, the tax distinguishes based solely on corporate income; it draws no distinction between in-state and out-of-state businesses. Thus, an out-of-state bank earning over $1 billion in net profits would pay the same B&O tax rate even if it chose to move its corporate domicile to Washington, because the state of incorporation has nothing to do with whether the institution is subject to the tax or the amount of the tax.

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[3] Umpqua Bank, *64 Locations in Washington*, https://locations.umpquabank.com/wa#:~:text=64%20Locations%20in%20Washington&text=We%27ve%20made%20it%20easy,store%2C%20all%20in%20one%20place (last visited Apr. 28, 2022).

[4] First Interstate Bank, *18 First Interstate Bank Branches in Washington*, https://locations.firstinterstatebank.com/wa.html (last visited Apr. 28, 2022).

B. The Washington Supreme Court Upheld the Tax

Several months before the additional tax became effective, petitioners (the Washington Bankers Association and American Bankers Association, hereafter "Washington Bankers") filed an action seeking to invalidate the tax. The Washington Bankers first argued that the Washington legislature passed the tax without meeting state constitutional requirements addressing when bills are introduced. The trial court rejected this argument as unsupported, and the Washington Bankers did not appeal that ruling. *See generally* Pet. App. 35a n.10 (summarizing the Washington Bankers' failed state constitutional claim).

The Washington Bankers also argued that the tax impermissibly discriminated against interstate commerce. The trial court rejected the Washington Bankers' claim that the tax discriminated on its face, but agreed that the tax had a discriminatory effect and purpose. Pet. App. 55a.

The Washington Supreme Court unanimously reversed, holding that the tax "does not discriminate against interstate commerce in effect or in purpose. Rather, it applies equally to all financial institutions meeting the $1 billion income threshold, irrespective of whether they are based inside or outside of Washington." Pet. App. 45a.

With respect to the Washington Bankers' claim that the tax had a discriminatory effect, the court first explained that this Court "has routinely upheld state statutes against discriminatory effect claims when such laws mainly and even *solely* apply to

out-of-state interests." Pet. App. 11a (citing, among other cases, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978)).

The court next explained that the Washington Bankers had failed to offer persuasive evidence of any actual discriminatory effect on interstate commerce, arguing only that the tax imposed an "added cost," which alone could not demonstrate prohibited discriminatory effect. Pet. App. 16a.

Finally, the court distinguished cases cited by the Washington Bankers as involving materially different state laws that either imposed a barrier to competition on out-of-state entities or granted a benefit to in-state entities. Pet. App. 17a-19a (discussing and distinguishing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), and *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008)); Pet. App. 24a-25a (discussing and distinguishing *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), and *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, 834 F.3d 110 (1st Cir. 2016)). Unlike these cases, the facially neutral, fairly apportioned Washington tax does not prevent or limit out-of-state competition, and applies "equally to in- and out-of-state entities" that earn "revenue related to Washington business activity." Pet. App. 26a.

The court also thoroughly discredited the Washington Bankers' claim of a discriminatory purpose by pointing out that the Washington Bankers had "mischaracterize[d]" remarks made by the prime sponsor of the legislation and had ignored "the explicit

legislative findings and purpose of the tax measure." Pet. App. 26a-27a. The court further explained that the Washington Bankers relied on snippets of legislative debate taken entirely out of context. Pet. App. 29a-30a. The comments cited as evidence of an improper legislative motive actually pertained to proposed amendments to the tax *that did not pass* and that "would have provided B&O tax credits contrary to the goals of the underlying legislation." Pet. App. 31a.

The court found the relevant legislative history entirely consistent with the Washington legislature's express, nondiscriminatory intent. Pet. App. 28a-29a, 31a-33a. That intent "was not to penalize out-of-state financial institutions but to raise revenue for state services by imposing a progressive tax on the most prosperous taxpayers." Pet. App. 28a.

REASONS TO DENY REVIEW

For over a century, this Court has routinely held that graduated corporate taxes based on a company's size or profitability do not offend any constitutional limits on a state's taxing authority. *See, e.g.*, *Fox v. Standard Oil Co.*, 294 U.S. 87, 100 (1935) (citing cases). Additionally, it has long been settled that States may refer to nationwide or worldwide property or income in setting their graduated tax rates. *See, e.g.*, *Maxwell v. Bugbee*, 250 U.S. 525, 539 (1919); *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424-25 (1937). For three distinct reasons, the Washington Bankers offer no compelling reason for this Court to reevaluate these longstanding rules or to review Washington's progressive tax on extremely wealthy financial institutions operating in the state.

First, this Court's precedent supports the Washington Supreme Court's decision below. This Court has repeatedly authorized States to set tax rates by referring to nationwide or worldwide property or income, and it has never suggested that a tax rate distinction based on corporate income discriminates against interstate commerce in effect or purpose. Washington's tax completely satisfies this Court's test for reviewing dormant Commerce Clause challenges to state and local taxes, set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

Second, there is no conflict in the lower courts as to whether States may distinguish between taxpayers based on their corporate income. States routinely apply higher tax rates to larger or more profitable businesses, and also routinely exempt smaller businesses from a wide range of taxes and regulations. The Washington Bankers' theory would call all such laws into question. While fact-bound cases in the lower courts have generated different outcomes in considering whether certain other regulatory distinctions discriminate against interstate commerce, none of those cases have involved an apportioned tax or drawn a distinction based on corporate income, as here.

Third, this case provides a poor vehicle to address the question presented. The Washington Bankers ask this Court to address only how to decide whether a law has discriminatory effects, yet they challenged Washington's law before it even took effect

and offered no evidence of how it operates in practice. Much of their Statement focuses on allegations of discriminatory purpose, but the Washington Supreme Court properly debunked those allegations, and the Washington Bankers present no legal argument about that issue here. Ultimately, they merely invite this Court to reweigh the evidence (or lack of evidence) of discriminatory effect in the hope that a second review will reach a different result. This Court should decline. *See Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in the denial of certiorari) (this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case").

A. The Washington Supreme Court's Decision Creates No Conflict with This Court's Decisions, as This Court Has Never Suggested that State Distinctions Based on Corporate Income Violate the Dormant Commerce Clause

The Washington Bankers claim that the Washington Supreme Court's decision is "irreconcilable" with this Court's precedent. *See* Pet. 19-28. The Washington Bankers are wrong. The tax upheld below does not discriminate against interstate commerce and meets all other established dormant Commerce Clause requirements. Additionally, Washington is not taxing extra-jurisdictional income. Rather, it has imposed a progressive tax on the Washington revenue of financial institutions that is directly associated with their ability to pay.

1. The Washington Tax Meets All of this Court's Dormant Commerce Clause Requirements

The Commerce Clause vests in Congress the authority "[t]o regulate Commerce . . . among the several States[.]" U.S. Const. art. I, § 8, cl. 3. It also imposes on the States a negative limitation that serves to prevent "economic protectionism[,] that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Dep't of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337-38 (2008) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74 (1988)). As applied to state taxes, the "dormant" Commerce Clause prohibits state taxation that "'discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197 (1995) (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959) (alteration in *Oklahoma Tax Comm'n*)). "Thus, States are barred from discriminating against foreign enterprises competing with local businesses" or from discriminating against "activity occurring outside the taxing state[.]" *Id.* at 197.

It is well established that a state tax does not discriminate against interstate commerce merely because its economic impact falls primarily or exclusively on businesses based out of state. *Commonwealth Edison*, 453 U.S. at 618. Many industries, from oil and gas to biomedical engineering to tobacco, have their headquarters concentrated in just a few states, but that has never been understood to prohibit all other states from taxing income of those

companies. To conclude otherwise, as this Court succinctly held, "would require a significant and, in our view, unwarranted departure from the rationale of our prior discrimination cases." *Commonwealth Edison*, 453 U.S. at 619.

The principle articulated in *Commonwealth Edison* makes perfect sense. A company that chooses to maintain its headquarters outside a state while, at the same time, conducting business within the state, should not be protected from the state's neutral tax laws based on where it chooses to incorporate. To conclude otherwise would allow a company doing extensive business in a state to avoid the state's neutral taxes on in-state income simply by moving its headquarters. No relevant authority supports that illogical result.

The tax at issue here is not a protectionist measure designed to provide a competitive advantage to local business. It is a progressive measure designed to ask more of all wealthy financial institutions, in-state and out-of-state alike, that conduct business in Washington. Consistent with the holding in *Commonwealth Edison*, the tax does not offend the dormant Commerce Clause merely because the majority of financial institutions subject to the surtax have elected to conduct their in-state business activities from a corporate headquarters elsewhere. To accept the notion that a state tax could be rendered invalid based on the business address or state of incorporation of those subject to the tax would be an extreme restriction on state sovereignty and an "unwarranted departure" from this Court's prior discrimination cases.

The Washington tax also meets all other dormant Commerce Clause requirements, as this Court has routinely sustained "'nondiscriminatory, properly apportioned'" taxes on interstate business activity "'when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return.'" *Complete Auto*, 430 U.S. at 287 (quoting *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975)). This Court has repeatedly applied the "*Complete Auto* standard" when evaluating a state tax against a Commerce Clause challenge. *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, 490 U.S. 66, 72-73 (1989). Under that standard, a state tax is permissible when it applies in practical effect "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." *Complete Auto*, 430 U.S. at 279.

Washington's tax on wealthy financial institutions operating in the state easily meets the four *Complete Auto* criteria. The tax applies only to financial institutions with substantial nexus with the state and only to their revenue in Washington. Wash. Rev. Code § 82.04.220(1). It is fairly apportioned, as recognized by the Washington Supreme Court and implicitly conceded by the Washington Bankers. Pet. App. 20a-21a; Pet. 26. It applies evenly to in-state and out-of-state enterprises, satisfying the discrimination prong of *Complete Auto*, as discussed above. And the Washington Bankers have not argued, much less established, that the tax

exceeds the "'protection, opportunities and benefits' for which the State can exact a return." *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 312 (1994) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

Apportionment of the tax base is a crucial feature of most state business activity taxes. As this Court has previously held, unapportioned taxes—while not per se invalid, *see Oklahoma Tax Comm'n*, 514 U.S. at 199—create a risk of providing an unfair advantage to local businesses. For instance, in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 286 (1987), this Court invalidated Pennsylvania's unapportioned highway use tax that, in practical effect, imposed a cost per mile on out-of-state carriers "that is approximately five times as heavy as the cost per mile borne by local trucks[.]"

By contrast, apportionment of the tax base greatly reduces the risk of taxing out-of-state activity and is a key attribute of many nondiscriminatory state taxes, a point emphasized in *Trinova Corp. v. Michigan Department of Treasury*, 498 U.S. 358 (1991). *Trinova Corp.* involved a challenge to Michigan's value-added tax. In that case (as here), the party challenging the tax could not "point to any treatment of in-state and out-of-state firms that is discriminatory on its face[.]" *Id.* at 384. Instead, the challenger argued that the dormant Commerce Clause "'has a deeper meaning that may be implicated'" when evaluating a facially neutral state tax. *Id.* at 385 (quoting *Am. Trucking Ass'ns*, 483 U.S. at 281). This Court agreed that the Commerce Clause requires something more than "mere facial neutrality." *Id.* at 385. But fair apportionment

sufficed to provide that "something more." *See Trinova Corp.*, 498 U.S. at 385 ("The 'deeper meaning' to which *American Trucking* refers is embodied in the requirement of fair apportionment[.]"). Because Michigan taxed only a fairly-apportioned slice of interstate business activity, the taxpayer could show no actual discrimination. Instead, (like the Washington Bankers here) the taxpayer's discrimination claim boiled down to a "vague accusation" of inconsistent treatment of businesses located outside the state. *Id.*

The Court in *Trinova Corp.* clearly recognized that a fairly apportioned state tax is unlikely to discriminate against interstate commerce. This has been a consistent theme in numerous cases decided over the past sixty years. *See, e.g.*, *General Motors Corp. v. Tracy*, 519 U.S. 278, 298 n.12 (1997) ("In the realm of taxation, the requirement of apportionment . . . assur[es] that interstate activities are not unjustly burdened by multistate taxation."); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983) ("[I]n the interstate commerce context . . . the anti-discrimination principle has not in practice required much in addition to the requirement of fair apportionment."); *Nw. States Portland Cement*, 358 U.S. at 462 (fair apportionment prevents state taxes that place interstate commerce at a competitive disadvantage).

A properly apportioned state tax prevents the state from taxing value earned outside its borders. This is true even if the tax falls on extremely large corporations engaged in interstate or international commerce. *Barclays Bank*, 512 U.S. at 312; *Container Corp.*, 463 U.S. at 171.

The Washington Bankers discuss a number of cases that they contend are "irreconcilable" with the Washington Supreme Court's decision, but each is inapt. Several of the cases struck down laws that explicitly favored in-state over out-of-state commerce. For instance, they mistakenly contend that the decision below cannot be squared with *Camps Newfound/Owatonna*, 520 U.S. 564. Pet. 19, 21. But in that case, this Court invalidated a facially discriminatory property tax exemption that applied with full force to charities operated principally for the benefit of state residents, but provided a more limited or no tax benefit to charities that principally benefited nonresidents. *Camps Newfound/Owatonna*, 520 U.S. at 575-76. The Washington tax contains no similar exemption, and does not confer any benefit to in-state businesses that is denied to out-of-state businesses.

The Washington tax also differs in key respects from the tax invalidated in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), which involved North Carolina's "intangibles tax" that applied to the value of corporate stock owned by persons in the state. Under that tax, "residents were entitled to calculate their tax liability by taking a taxable percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina." *Id.* at 328. Thus, a taxpayer owning stock in a corporation doing no business in North Carolina was taxable on 100% of its value, while a taxpayer owning stock in a corporation doing all of its business in North Carolina was not taxed at all. *Id.*

The tax at issue here is easily distinguishable. Washington's tax on extremely profitable financial institutions does not include a deduction mechanism similar to the deduction that doomed the North Carolina tax. More importantly, the amount of a company's revenue subject to Washington's tax does not *increase* based on the amount of business conducted outside the state. To the contrary, it is measured by the apportioned gross income from in-state activity. *See* Pet. App. 3a n.1. The apportionment mechanism fairly attributes gross income to the degree the specified financial institution conducts business *in the state*; and similar apportionment mechanisms have been approved many times over. *See, e.g.*, *Nw. States Portland Cement*, 358 U.S. at 460. That is the exact opposite of North Carolina's tax—where the tax base increased "to the degree" the issuing corporation conducted business outside the state. *Fulton Corp.*, 516 U.S. at 333.

The Washington Bankers also err in relying on two other cases originating from North Carolina, *Best & Co. v. Maxwell*, 311 U.S. 454 (1940), and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *See* Pet. 20-21. Neither case involved a fairly apportioned tax. Rather, *Best & Co.* involved a flat (unapportioned) licensing fee that had the effect of discouraging the free flow of commerce, and *Hunt* involved a regulation on in-state advertising that effectively barred out-of-state apple growers from advertising the superior quality of their products. In both cases, the challengers demonstrated an actual discriminatory effect. *Best & Co.*, 311 U.S. at 456-57; *Hunt*, 432 U.S. at 353.

The Washington tax is much different. Unlike unapportioned taxes and disparate restrictions on advertising, this tax applies evenhandedly to in-state and out-of-state businesses, and erects no economic barriers to competition from outside the state. Those with sufficient consolidated net income to meet the $1 billion threshold pay the additional tax regardless of their principal business location, and those with consolidated net income under $1 billion pay only the standard B&O tax regardless of their principal business location. As noted above, many businesses that are based in Washington are subject to the tax, and many banks that are based outside of Washington but do extensive business in the state are exempt from the tax. The Commerce Clause "is not offended" when, as here, "state boundaries are economically irrelevant." *Am. Trucking Ass'ns*, 483 U.S. at 283.

Finally, the Washington Bankers claim that the decision below conflicts with *Exxon Corp.*, 437 U.S. 117, but there is no conflict. In *Exxon Corp.*, this Court upheld a Maryland law barring certain oil companies from operating retail gas stations even though only out-of-state oil producers were impacted. *Id.* at 126-27. The Washington Bankers claim this law did not "discriminate against interstate commerce because it left unaffected numerous interstate" companies, Pet. 23, but they fail to mention that Washington's tax leaves unaffected many interstate banks operating in Washington, i.e., any bank with less than $1 billion in annual profits. *See supra* 5-6. The Washington Bankers also emphasize that *Exxon Corp.* cited "three ways in which the [Maryland] law might have discriminated but did not": it did 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." Pet. 23 (quoting *Exxon Corp.*, 437 U.S. at 126 (first alteration ours)). They claim that the Washington Supreme Court held that a tax can be discriminatory only if all three characteristics are present. Pet. 23. That is inaccurate. The Washington Bankers did not argue that the tax possessed the first or third characteristics. They argued only that the tax "place[d] added costs upon them." Pet. 23. The Washington Supreme Court correctly held that added costs alone cannot possibly suffice to show discriminatory effects, because every tax and regulation raises costs to some degree. Pet. App. 16a-17a. Nothing in *Exxon Corp.* is to the contrary, and the Washington court cannot be faulted for declining to consider the other two elements when the Washington Bankers never asserted they were present.

2. Washington Is Not Taxing Extra-Jurisdictional Income

The Washington Bankers also err as a matter of law when they contend that States may not apply a higher tax rate triggered by "global profits." Pet. 26. Although the Washington Bankers apparently concede that States may impose graduated business activity taxes, they ignore cases such as *Maxwell* and *Grosjean* that unambiguously hold that States may consider property or income from outside the state when determining the tax rate that applies to in-state property or activity.

In *Maxwell*, 250 U.S. at 534, this Court upheld a New Jersey inheritance tax system that required the inclusion of the decedent's entire estate, including property located outside the state that the state could not tax, in determining the rate that applied to property the state could tax. This Court reasoned that when a state "levies taxes within its authority, property not itself taxable by the state may be used as a measure of the tax imposed." *Id.* at 539. A tax computation that considers out-of-state property "is in no just sense a tax upon the foreign property[.]" *Id.*

The rationale in *Maxwell* also applies to state income and license taxes on in-state business activity. For instance, in *Grosjean*, 301 U.S. 412, this Court upheld a Louisiana "chain store" license tax where the amount of tax an in-state store owed ranged from a low of $10 if the store was part of a group of ten or fewer stores to a high of $550 if the store was part of a group of more than five hundred stores. *Id.* at 418. The tax statute looked to the total number of stores in the group regardless of where each member store was located. The Great Atlantic & Pacific Tea Company and other chain stores challenged the tax, arguing that the state was attempting to tax "property and activities which are beyond the state's jurisdiction," thereby "burdening interstate commerce" by favoring "intrastate chains." *Id.* at 419. This Court rejected that argument, holding that it ignores "the advantages and economic effects of the chain as a whole and of each unit; and ignores the possibility that a chain-store company of national scope might well be incorporated in Louisiana, whose stores in that state would be rated for taxation according to its total stores within and without the state." *Id.* at 422.

Applying the holdings in *Maxwell* and *Grosjean*, lower federal and state courts have uniformly held that the tax rate imposed in a graduated state tax system can properly consider nontaxable income or property. As an example, the Tenth Circuit Court of Appeals in *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), upheld a graduated state income tax that included military pay earned by an active duty military member in computing the tax rate that applied to the taxpayer's non-military income. Although Kansas could not tax the military pay under a federal statute, it could include that income in determining the applicable tax rate. *Id.* at 938. Consistent with the holdings in *Maxwell* and *Grosjean*, the Court of Appeals held that "the mere inclusion of military compensation in a formula determining the rate of tax on income from Kansas sources does not constitute a tax on the military income" itself. *Id.*

Similarly, New York's highest court has explained that "[i]t has long been the rule that States may refer to nontaxable out-of-State assets in setting their rates for taxable assets." *Brady v. New York*, 607 N.E.2d 1060, 1063 (N.Y. 1992) (citing *Maxwell* and *Grosjean*), *cert. denied*, 509 U.S. 905 (1993). When the issue is "how to determine the rate on income" the state may tax, states plainly may consider income that is beyond the state's jurisdiction to tax. *Id.* at 1064.

Numerous other courts have reached the same conclusion. *See, e.g.*, *Walters v. State ex rel. Oklahoma Tax Comm'n*, 935 P.2d 398, 402 (Okla. Civ. App. 1996)

(upholding Oklahoma's graduated income tax, concluding that "[u]se of out-of-state income to calculate a tax rate for in-state income in no way represents a tax on the out-of-state income"); *Matteson v. Dir. of Revenue,* 909 S.W.2d 356, 358 (Mo. 1995) (upholding Missouri's graduated income tax that included all of the taxpayer's income in determining the rate that applied to in-state income, citing *Maxwell*); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me.) (same), *cert. denied*, 498 U.S. 819 (1990); *Wheeler v. State*, 249 A.2d 887, 891 (Vt.) (same), *appeal dismissed for want of a substantial federal question*, 396 U.S. 4 (1969). The Washington Bankers and amici curiae point to no contrary cases. *See* Pet. 26-28 (citing no authority holding that graduated state taxes cannot consider "*global* profits" in establishing the applicable tax rate); Br. Amicus Curiae of Council on State Taxation 6-20 (citing no authority holding that states cannot consider "pre-apportionment global net income" in establishing the applicable rate).[5]

There is no principled difference between the higher state tax on in-state chain stores upheld in *Grosjean* and the higher B&O tax on the in-state business activity of extremely profitable financial institutions upheld by the Washington Supreme Court. Additionally, this Court has recently cautioned

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[5] The other amicus briefs filed in support of the petition do not meaningfully address the States' authority to enact graduated tax rates.

against applying its "Commerce Clause decisions [to] prohibit the States from exercising their lawful sovereign powers in our federal system[.]" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018). The rule the Washington Bankers ask this Court to adopt would overturn decades of precedent and call into question the tax policies of countless States. This Court should decline that invitation.

B. Reviewing this Tax Challenge Would Not Resolve Distinctions Made by Lower Courts in Fact-Bound Regulatory Cases

Virtually ignoring the entire body of cases that address tax rate distinctions, the Washington Bankers instead seek to manufacture a conflict from lower court decisions addressing state regulations prohibiting or limiting out-of-state competition. *See* Pet. 10-19. But rather than demonstrate a disagreement on a legal principle, the Washington Bankers merely cite cases that reach different conclusions based on different facts and different regulatory structures, only one of which even involves taxes. Not one of the cases the Washington Bankers cite involves an apportioned tax or a statutory distinction based on corporate income, like Washington's tax. In any event, consideration of total income or profit to set a tax rate simply is not a proxy for interstate commerce, and a contrary conclusion would undermine countless such laws across the country.

1. There Is No Disagreement in the Lower Courts About How to Analyze Apportioned State Taxes

None of the cases the Washington Bankers discuss to claim a circuit split involve apportioned taxes based on profit, which is what is at issue here. Instead, the cases almost exclusively focus on regulatory distinctions that are alleged to prohibit or substantially limit competition in a local market. The Washington tax does not implicate this legal principle because it does not limit competition. Moreover, even if relevant to the tax challenge at hand, the cases cited by Washington Bankers merely demonstrate that different facts and different regulatory regimes lead to different outcomes.

The Washington Bankers start their quest to identify a circuit split with two cases that involved state regulatory schemes that prohibited retail businesses categorized as "formula," "large chain," or "franchise" from competing in a local market. Pet. 12 (citing *Cachia*, 542 F.3d 839; *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008)). In two opinions issued the same day, the Eleventh Circuit found that complete prohibitions on such retail establishments served to "exclude national chain[s] from competition in the local market," thereby "discriminating against interstate commerce." *Cachia*, 542 F.3d at 843; *Island Silver & Spice*, 542 F.3d at 846-47. No such prohibition is at issue here. Financial institutions with over $1 billion in worldwide profits operate extensively in Washington, and the Washington Bankers offer no evidence that the tax has discouraged any such institution from entering the Washington market.

Similarly, the Washington Bankers overstate the import of *Walgreen Co. v. Rullan*, 405 F.3d 50, 56 (1st Cir. 2005), *cert. denied sub nom*. *Perez-Perdomo v. Walgreen Co.*, 546 U.S. 1131 (2006). *See* Pet. 15. There, the First Circuit concluded that a law that allowed Puerto Rico's Secretary of Health to "block a new pharmacy . . . simply because of the adverse competitive effects that the new pharmacy will have on existing pharmacies" (which were almost entirely locally-owned) had the effect of discriminating against interstate commerce, particularly where existing pharmacies wielded "substantial influence in the enforcement" of the regulation. *Walgreen Co.*, 405 F.3d at 55-56. Importantly, the evidence adduced at trial established that the law as applied by the Secretary effectively allowed the established, primarily local, pharmacies "to manipulate the regulatory scheme for [their] own advantage" and effectively prohibit non-locally owned pharmacies from operating in Puerto Rico. *Id*. at 57. Washington's law does no such thing.

Other cases relied upon by the Washington Bankers have found discriminatory effect from laws that essentially render it impossible for out-of-state companies to compete with their in-state counterparts. Pet. 13-14. For example, the Sixth Circuit invalidated an Ohio law that required truck remanufacturers to obtain and provide Ohio customers with binding agreements from local dealers to service their vehicles, which, the court noted, effectively required the out-of-state remanufacturers

to either "start purchasing chassis from in-state dealers, or else stop doing business in Ohio." *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 442 (6th Cir. 2000).

For the same reason, the Sixth Circuit also invalidated a law that prohibited small farm wineries from shipping wine to Kentucky customers unless the wine was purchased by the customer in person at the winery. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 432-33 (6th Cir. 2008). The court found discriminatory effect because the prohibition both made it "economically and logistically infeasible" for the out-of-state small farm wineries to sell to in-state customers, and benefited in-state interests by virtually eliminating competition for in-state wineries and requiring the out-of-state wineries to go through in-state wholesalers. *Id*. at 433.

The Washington Bankers also point to *Family Winemakers*, 592 F.3d at 11, where the First Circuit found discriminatory effect after concluding that "the totality of the evidence" demonstrated that a law limiting distribution options for wineries above 30,000 gallons "significantly alter[ed] the terms of competition between in-state and out-of-state wineries to the detriment of the out-of-state wineries[.]" *See* Pet. 14. The court there painstakingly reviewed the regulatory scheme and found that the "ultimate effect" was to "artificially limit the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors." *Family Winemakers*, 592 F.3d at 12.

None of the above cases had anything to do with taxes or distinctions based on corporate income. Rather, each of them reviewed distinctions that effectively prohibited out-of-state businesses from competing against similarly-situated in-state counterparts to access in-state customers. In contrast, Washington's tax does not limit in any way out-of-state financial institutions from competing with in-state financial institutions.

The Washington Bankers cite two more cases with even less relevance here.

First, the Washington Bankers overstate the Seventh Circuit's holding in *Wiesmueller v. Kosobucki*, 571 F.3d 699 (7th Cir. 2009), where Wisconsin exempted graduates of in-state law schools from the requirement to take the Wisconsin Bar exam to practice law in Wisconsin. Pet. 12-13. The sole issue on appeal was whether the district court erred in dismissing the lawsuit for failure to state a claim. *Wiesmueller*, 571 F.3d at 701. The Seventh Circuit concluded that the "case was dismissed prematurely," and remanded the case for development of a factual record. *Id.* at 707. The court cautioned, however, that it was not professing a "view on the ultimate outcome[.]" *Id.* And, on remand, it appears this claim went nowhere. *Wiesmueller v. Kosobucki*, 667 F. Supp. 2d 1001 (W.D. Wis. 2009) (declining to prematurely address new claim); *Wiesmueller v. Kosobucki*, 2009 WL 4722197 (W.D. Wis. Dec. 4, 2009) (decertifying class). Like the other cases the Washington Bankers rely upon, this case only reinforces that dormant Commerce Clause challenges are highly fact-specific.

Second, the Washington Bankers point to *Jones v. Gale*, 470 F.3d 1261 (8th Cir. 2006), *cert. denied*, 549 U.S. 1328 (2007) (Pet. 14), but there, the Eighth Circuit found the law to be facially discriminatory based on an exemption from the prohibition on corporate farming for "family farm corporations" in which at least one family member resided on or worked on the farm. *Jones*, 470 F.3d at 1267-68. By its own language, the exemption favored locally-owned or managed family farms over family farms owned and managed by out-of-state families. *Id.*

The Washington Bankers contrast the above-described cases with a body of cases they say "allow state and local authorities to use proxies for interstate commerce to disadvantage out-of-state interests." Pet. 16-19. But none of the cases the Washington Bankers cite so hold, and, as with the cases described above, each of the cases is highly fact-dependent.

The Washington Bankers first point to the First Circuit's decision in *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir.), *cert. denied*, 552 U.S. 889 (2007), which upheld a prohibition on franchise and chain-store arrangements being licensed to sell liquor at retail. Pet. 16-17. The First Circuit there, however, found that the plaintiffs had "adduced no evidence that the prohibition on franchise and chain-store arrangements, in itself, has had, or threatens to have, a debilitating or unfair impact either on competition in general or . . . on out-of-state enterprises in particular." *Wine & Spirits Retailers*, 481 F.3d at 14. The First Circuit distinguished the case before it—where the district

court found after a full trial that there was no compelling evidence of discriminatory effect—from another First Circuit case in which "[s]tatistical data adduced at trial 'strongly indicate[d]' that the statute suppressed competition and favored local interests." *Wine & Spirits Retailers*, 481 F.3d at 14 (first alteration ours) (distinguishing and quoting *Walgreen Co.*, 405 F.3d at 56). Rather than recite any rule categorically foreclosing proxy arguments, the First Circuit in *Wine & Spirits Retailers* simply noted that "bare claim[s], without more, fail[] to pass muster," and such claims require "developed augmentation, with evidentiary support." *Id.* at 15. The very fact that the First Circuit has issued decisions falling on both sides of the alleged "circuit split" here only highlights that the Washington Bankers have identified no legitimate legal disagreement. They have instead identified an unremarkable pattern of courts reaching different outcomes based on the evidence about different regulatory schemes.

Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Commission, 945 F.3d 206 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 874 (2020), is also distinguishable on its facts from decisions striking down discriminatory regulations. *See* Pet. 17-18. The evidence in *Wal-Mart* established that a ban on public corporations being licensed to sell liquor applied to in-state and out-of-state corporations alike, and, notwithstanding the ban, out-of-state residents owned and operated multiple stores that were licensed to sell liquor. *Wal-Mart Stores*, 945 F.3d at 220, 223. The Fifth Circuit emphasized that the discriminatory

effects analysis looks at whether a statute provides "a 'competitive advantage to in-state interests vis-à-vis *similarly situated* out-of-state interests.'" *Wal-Mart Stores*, 945 F.3d at 219 (quoting *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 501 (5th Cir. 2001)). Because the ban applied equally to in-state and out-of-state public corporations, and equally excluded other kinds of in-state and out-of-state companies, it was not discriminatory.

The Washington Bankers try to create a conflict between the Ninth Circuit's decision in *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010), and *Family Winemakers* and *Cherry Hill Vineyards*. But these cases do not conflict. Instead, the courts reached different conclusions based on different evidence of discriminatory effects. Specifically, the plaintiffs in *Family Winemakers* and *Cherry Hill Vineyards* did not substantiate their claims with sufficient evidence. *Id.* at 1232, 1235 (distinguishing *Cherry Hill Vineyards*, where the "plaintiffs presented evidence that the requirement favored in-state wineries and burdened out-of-state wineries"). By comparison, the evidence elicited in *Black Star Farms*, 600 F.3d at 1232, established that "'almost twice as many out-of-state wineries than in-state wineries [had] already obtained' the necessary licenses" to be able to sell wine directly to Arizona consumers, which plaintiffs in that case argued benefitted mostly in-state wineries.

The Washington Bankers also identify *International Franchise Association, Inc. v. City of Seattle*, 803 F.3d 389 (9th Cir. 2015), *cert. denied*, 578 U.S. 959 (2016), as a source of potential conflict,

but again their arguments fall short. *See* Pet. 16. At issue there was a law imposing a minimum wage that mandated earlier adoption by large employers, which was defined to include franchises affiliated with large networks. *Int'l Franchise*, 803 F.3d at 397-98. The Ninth Circuit concluded that at the preliminary injunction stage of proceedings, the franchise association plaintiff did not "provide substantial evidence of discriminatory effects on out-of-state firms" or interstate commerce. *Id.* at 406. "It [did] not show that interstate firms will be excluded from the market, earn less revenue or profit, lose customers, or close or reduce stores," or that "new franchisees will not enter the market or that franchisors will suffer adverse effects." *Id.* at 406-07. The court acknowledged cases like *Cachia* and *Island Silver*, but noted a logical distinction between the measures at issue in those cases, which precluded or substantially limited competition, from those like the one at issue in *International Franchise,* which simply imposed additional regulatory requirements on certain business structures. *Id.* at 404 n.7.

The Washington Bankers fare no better in their attempt to create a conflict from the holding in *Saban Rent-a-Car LLC v. Arizona Department of Revenue*, 434 P.3d 1168 (Ariz.), *cert. denied*, 140 S. Ct. 195 (2019), the only case they cite that even addressed a state tax. *See* Pet. 17. There, the plaintiffs abandoned all other claims and argued only that a rental car surcharge was invalid because it was motivated by the intent to discriminate against out-of-state consumers. *Saban Rent-a-Car*, 434 P.3d at 1172. But, as the Arizona Supreme Court concluded, "the surcharge applies equally to resident and non-resident car rental

agencies . . . and is calculated and imposed without regard to their customers' residencies." *Saban Rent-a-Car*, 434 P.3d at 1172. Nothing about the measure "suggests an intent to treat in-state and out-of-state interests differently or engage in the type of 'economic protectionism' at odds with the Commerce Clause." *Id.* And, under *Commonwealth Edison*, a tax is not discriminatory just because it is borne primarily by out-of-state consumers. *Id.*

Lastly, the Washington Bankers briefly reference *Rosenblatt v. City of Santa Monica*, 940 F.3d 439 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020), which addressed a restriction on vacation rentals. Pet. 17. They suggest without citing any evidence that the restriction "overwhelmingly" affected out-of-state visitors (as opposed to Californians). But the Ninth Circuit noted that the restriction "applies equally to renters and property-owners from outside California, California residents outside of Santa Monica, and Santa Monica residents themselves." *Rosenblatt*, 940 F.3d at 450. And the plaintiffs there did "not adequately allege that the ordinance increases the relative market share of local businesses," or cause a "net negative effect on commerce outside of California." *Id. Rosenblatt* unremarkably confirms that a regulation that only incidentally affects interstate commerce does not exceed dormant Commerce Clause constraints.

Far from demonstrating a circuit split on an issue material to this case, the Washington Bankers' proffered cases show only that lower courts examine each dormant Commerce Clause challenge

individually based on case-specific arguments and evidence. Besides being fact-specific, the cases almost exclusively address restrictions on access to local retail markets. In contrast, this Court has established an entirely distinct body of law addressing constitutional challenges to taxes. Part A *supra* p. 3. Reviewing this tax challenge will not resolve any ambiguity the Washington Bankers complain of in the lower courts regarding regulatory barriers to in-state markets.

2. No Court Has Held that Profitability Is an Impermissible Proxy for Interstate Commerce

Using ability to pay as a basis for different tax rates is not equivalent to discriminating against out-of-state interests. The higher tax rate here applies to hugely profitable financial institutions, wherever they are based. Any out-of-state bank can operate in Washington without owing the surtax unless its consolidated annual net income exceeds $1 billion. And any bank with net income above $1 billion owes the tax, whether based in Washington or not.

The Washington Bankers suggest that the $1 billion income delineation in Washington's graduated tax structure is impermissible because most of the companies that earn $1 billion or more happen to be headquartered outside of Washington. Pet. 10. Accepting this argument would call into question any number of taxes and regulations that states impose on industries—like tobacco or oil—that are primarily headquartered in a few states. But this Court has already rejected the argument that "a state tax must be considered discriminatory . . . if the

tax burden is borne primarily by out-of-state" entities. *Commonwealth Edison Co.*, 453 U.S. at 618. Additionally, in matters of state taxation, "state[s] may tax the large chains more heavily than the small ones, and upon a graduated basis[.]" *Fox*, 294 U.S. at 100. Likewise, states may tax interstate business activity when the tax is fairly apportioned to the business transacted in the state. *Container Corp.*, 463 U.S. at 170-71; *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980). Washington's graduated B&O tax is consistent with all of these cases.

It is no accident that the Washington Bankers cite only one tax case, and no cases that involved a fairly apportioned state tax, in support of their argument that lower court "confusion" mandates this Court's review. Fairly apportioned state taxes like the B&O tax at issue here do not limit competition in the way that a regulatory barrier does.

C. This Case Is a Poor Vehicle to Address Dormant Commerce Clause Principles

Much of the Washington Bankers' petition is irrelevant to the legal question they ask this Court to address, and as to that question, this case presents a terrible vehicle. As the Washington Bankers note, laws can discriminate in violation of the dormant Commerce Clause in three distinct ways: on their face, in purpose, or in effect. Pet. 1. Their petition addresses only the "last category," Pet. 1, claiming that "[t]he lower courts are sharply divided over how to determine that a statute has an impermissibly discriminatory effect[.]" Pet. 10. This framing of the issue may have helped the Washington Bankers

inaccurately claim a legal conflict, but it utterly undermines the idea that this case presents an opportunity to resolve any legal issue.

To begin with, while the Washington Bankers claim that this case presents a perfect opportunity for this Court to explain how courts should resolve whether a law has discriminatory effects, they filed this lawsuit *before Washington's law even took effect*. Claims of discriminatory effect rightly depend on evidence of such effects, *see, e.g.*, *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1040 (10th Cir. 2009) (citing cases), yet the Washington Bankers introduced absolutely no evidence about how this law actually operates in practice.

Without any such evidence, the Washington Bankers' "proxy" argument rests almost entirely on a distorted discussion of the legislative history of Washington's tax. They start with the notion that the Washington legislature rushed this tax through the legislative process. Pet. 4. But this has nothing to do with discriminatory effects, and, in fact, the legislation was introduced more than two weeks before the end of Washington's 2019 legislative session and "followed the standard legislative process," which included a robust debate in both the state House and Senate. Pet. App. 34a.

The Washington Bankers also incorrectly claim in their Statement that the Washington legislature enacted the additional tax for a discriminatory purpose. Pet. 5-6. But they never argue that this Court should resolve that issue, and in any event the Washington Supreme Court expressly rejected their factual claims, pointing out that the legislature's

express statement of intent was consistent with the legislative history, Pet. App. 28a-29a, 31a-33a, and that the Washington Bankers improperly based their claim of legislative fraud on snippets of legislative debate taken out of context. Pet. App. 29a-31a.

With these red herrings cast aside, it becomes clear that all the Washington Bankers are asking this Court to do is reweigh the evidence as to discriminatory effects. But they made no record demonstrating such effects. And even presuming there was some merit to their contention that the Washington Supreme Court misapplied the law when it concluded that the tax has no discriminatory effect, this case would still not warrant further review, as this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., concurring in the denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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May 4, 2022

APPENDIX

DECLARATION OF CHARLES ZALESKY

CHARLES ZALESKY hereby declares and states as follows:

1. I am a resident of the State of Washington, am over the age of 18, and have personal knowledge of the facts provided herein.

2. I am an Assistant Attorney General with the Washington Attorney General's Office, assigned to the Revenue and Finance Division. Among my duties is to advise the Washington State Department of Revenue regarding excise tax issues and to represent the Department in excise tax litigation. As part of my duties, I am permitted to access tax return information relevant to cases I am assigned, which is otherwise protected from disclosure under Washington's tax confidentiality statute, Revised Code of Washington § 82.32.330.

3. I am one of the attorneys representing the State of Washington, Department of Revenue, in the litigation initiated by the Washington Bankers Association and American Bankers Association (Petitioners) to challenge the constitutionality of the additional 1.2 percent Business and Occupation (B&O) tax imposed on extremely profitable banks and financial institutions.

WASHINGTON-BASED FINANCIAL INSTITUTIONS ARE PAYING THE ADDITIONAL TAX

4. The additional B&O tax is codified in Washington Revised Code § 82.04.29004, and became effective January 1, 2020. Petitioners initiated their challenge to the tax before its effective date, and by

the time the challenge was resolved at the trial court level in June 2020, the tax had been in effect for less than six months.

5. During the trial court proceedings, the Department was able to provide statistics pertaining to the tax payments it received from specified financial institutions during the first three months of 2020. Those statistics showed that during that three-month period the State received tax payments under the additional tax from 153 taxpayers, three of which listed their state of incorporation or principal business location as Washington State. Although the names and identifying information of those taxpayers that paid the tax is confidential tax information under Revised Code of Washington § 82.32.330, the number of taxpayers paying the tax is not confidential and was part of the record available to the Washington Supreme Court when it rejected the Petitioners' constitutional challenge to the additional tax.

6. In February 2022, I received from the Washington State Department of Revenue updated statistics pertaining to tax payments it received from specified financial institutions. The updated statistics covered the first two years of tax collections. During that two year time period, the Department received payments from 253 specified financial institutions.

7. The Washington Secretary of State maintains an online searchable database of domestic and foreign business entities that are registered with the state, at https://ccfs.sos.wa.gov/#/. Of the 253 taxpayers that paid the surtax during 2020 and 2021, twenty-one are listed with the Washington Secretary of State as incorporated or formed in Washington, or

as having their principal office address in Washington. The twenty-one Washington-based financial institutions represent just over eight percent (8%) of the total number of institutions that paid the tax during its first two years.

NON-WASHINGTON BANKS OPERATING IN THE STATE ARE EXCLUDED FROM THE ADDITIONAL TAX

8. The additional tax imposed by Revised Code of Washington § 82.04.29004 only applies to financial institutions that are part of a consolidated group earning at least one billion dollars during the previous calendar year. The tax does not apply to financial institutions operating in Washington that do not meet this criteria.

9. The website maintained by the FDIC shows that as of April 15, 2022, there are 78 active FDIC-insured banks that have at least one branch in Washington State. https://banks.data.fdic.gov/bankfind-suite/bankfind?activeStatus=1&branchOffices=true&pageNumber=1&resultLimit=100&stalp=WA (last viewed April 21, 2022). Of those 78 currently active banks, 40 list their principal business location as within Washington State, and 38 list their principal business location as outside Washington State.

10. Of the 38 non-Washington banks currently operating within Washington, many are small or mid-sized banks that would not be subject to the additional B&O tax on extremely profitable financial institutions. By way of example, the following twelve non-Washington banks have not reported sufficient net income on their 2021 Federal

Financial Institutions Examination Council (FFIEC) income statement to meet the one billion dollar net income threshold.

- First Interstate Bank, FDIC Cert. # 1105.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $217,007,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=1105&date=12312021
- Gateway First Bank, FDIC Cert. # 15118.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $85,985,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=15118&date=12312021.
- Bank of Eastern Oregon, FDIC Cert. # 16243.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 051 = $7,427,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=16243&date=12312021.
- Umpqua Bank, FDIC Cert. # 17266.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $428,591,000.

  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=17266&date=12312021.

- Community Bank, FDIC Cert. # 17445.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 051 = $3,074,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=17445&date=12312021.
- Twin River Bank, FDIC Cert. # 22993.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 051 = $1,889,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=22993&date=12312021.
- Bank of Hope, FDIC Cert. # 26610.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $215,025,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=26610&date=12312021.
- Glacier Bank, FDIC Cert. # 30788.
  - ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $298,336,000.
  - ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=30788&date=12312021

- Pacific Premier Bank, FDIC Cert. # 32172.

  ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $360,645,000.

  ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=32172&date=12312021.

- Bank of the West, FDIC Cert. # 3514.

  ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 031 = $974,457,000.

  ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=3514&date=12312021.

- Sunflower Bank, National Association, FDIC Cert. # 4767.

  ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $49,182,000.

  ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=4767&date=12312021.

- Northwest Bank, FDIC Cert. # 58752.

  ➢ Net income reported on Schedule R1, line 14, of 2021 FFIEC form 041 = $14,331,000.

  ➢ Available online at https://cdr.ffiec.gov/Public/ViewFacsimileDirect.aspx?ds=call&idType=fdiccert&id=58752&date=12312021.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Tumwater, Washington, this 22nd day of April 2022.

s/ Charles Zalesky

CHARLES ZALESKY