Honorable Marshall Ferguson, Dept. 31

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

WASHINGTON BANKERS ASSOCIATION, a Washington Public Benefit Corporation, and AMERICAN BANKERS ASSOCIATION, a District of Columbia Non-Profit Corporation, Plaintiffs, 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, Defendants.	NO. 19-2-29262-8 SEA DEFENDANTS' MOTION FOR RECONSIDARATION **Noted for June 4, 2020 -- without oral argument per KCLCR 59(a)**

I. INTRODUCTION AND RELIEF REQUESTED

The Court recently entered judgment in favor of Plaintiffs, declaring that the 1.2 percent surtax imposed by RCW 82.04.29004 is "illegal, invalid, and unenforceable because it discriminates in effect and in purpose against interstate commerce in violation of the dormant Commerce Clause of the United States Constitution." Judgment, at 2. The Court should reconsider and vacate that judgment. The effect and purpose of the surtax is to impose an additional tax on all financial institutions that conduct business in Washington as part of a consolidated financial group with net income of one billion dollars or more. Whether a financial institution has its principal office inside or outside of Washington is entirely irrelevant under the

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law. Additionally, the United States Supreme Court has made clear that the dormant Commerce Clause is not offended by a facially neutral state law that applies evenly to in-state and out-of-state businesses merely because those subject to the law maintain their principal business locations outside the state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-18, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). The surtax is facially neutral, applies evenly to in-state and out-of-state financial institutions, and should be upheld.

Courts are correctly circumspect in wielding their power to invalidate laws enacted by the legislative branch. Given the important questions posed in this declaratory judgment action, reconsideration is warranted under CR 59(a)(8) and (a)(9). On reconsideration, the Court should (1) vacate its prior ruling and (2) uphold the facially neutral, fairly apportioned Washington surtax.

II. STATEMENT OF MATERIAL FACTS

This case involves a recent amendment to the State's business and occupation (B&O) tax that imposes a 1.2 percent surtax on "specified financial institutions" that receive gross income from in-state business activities. RCW 82.04.29004(1). The stated purpose of the surtax is to combat the growing "wealth disparity in the country between the wealthy few and the lowest income families" by imposing an additional tax on financial institutions with net annual incomes of one billion dollars or more. Laws of 2019, ch. 420, § 1. The surtax became effective on January 1, 2020. *Id.*, § 2(1).

A "specified financial institution" subject to the surtax is defined as "a 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 . . . ." RCW 82.04.29004(2)(e)(i). During the first three months of 2020, Defendant Department of Revenue received surtax payments from 153 taxpayers meeting this definition. Decl. of Kathy L. Oline, ¶¶ 7-8. Three of those 153 taxpayers currently list a principal office location within Washington. *Id.*, ¶ 9. Under the law, those three Washington

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taxpayers are treated exactly the same as taxpayers with out-of-state business locations. In all cases, the surtax is measured only by the portion of the financial institution's in-state business activity. *See* RCW 82.04.29004(1) (the surtax is measured by the same Washington apportioned gross income of the business taxable under RCW 82.04.290(2)).

Several months before its effective date, the Washington Bankers Association and American Bankers Association (collectively "Associations") filed this action seeking to invalidate the 1.2 percent surtax. After the parties moved for summary judgment, the Court concluded that the surtax was facially neutral. The Court, however, granted summary judgment to the Associations on their alternative claims that the surtax discriminated against interstate commerce in "effect and in purpose." Judgment, at 2. State Defendants then filed this timely Motion for Reconsideration.

III. ISSUE

Should the Court vacate its prior ruling in favor of the Associations and uphold the facially neutral 1.2 percent surtax?

IV. EVIDENCE RELIED ON

This motion is based upon the records and files herein as well as the declaration of Kathy L. Oline with attached Exhibit 1.

When a party seeks reconsideration of an order granting summary judgment, the trial court is permitted to consider new evidence. *See Martini v. Post*, 178 Wn. App. 153, 162, 313 P.3d 473 (2013) (new evidence properly considered); *cf. Chen v. State*, 86 Wash. App. 183, 192, 937 P.2d 612 (1997) (although "nothing in CR 59 prohibits the submission of new or additional materials on reconsideration," the trial court properly rejected new evidence presented on reconsideration where it "contained no new information"). "'In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration.'" *Martini*, 178 Wn. App. at 162 (quoting *August v. U.S. Bancorp*, 146 Wn. App. 328, 347, 190 P.3d 86 (2008)).

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V. ARGUMENTS AND AUTHORITY

Discrimination under the dormant Commerce Clause "means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994). "[T]he party challenging a regulation bears the burden of establishing that a challenged regulation has a discriminatory purpose or effect under the Commerce Clause." *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 956 (9th Cir. 2019) (quotation and citation omitted).

The Associations failed to meet their burden here because RCW 82.04.29004 does not discriminate against interstate commerce in favor of Washington's economic interests. Rather, the 1.2 percent surtax applies to *every* Washington and non-Washington financial institution that is a member of a consolidated financial group with net income of one billion dollars or more. Currently at least 153 taxpayers meet the statute's criteria and are paying the surtax, including three companies with their principal places of business in Washington. Decl. of Kathy L. Oline, ¶ 9.

Importantly, the statute does not distinguish between financial institutions chartered in Washington or somewhere else, or that have their corporate domicile in Washington or somewhere else. The location where a financial institution is chartered or maintains its corporate headquarters is entirely irrelevant. The only relevant factors are (1) whether the financial institution meets the definition of a "specified financial institution" in RCW 82.04.29004(2)(e)(i) and (2) whether it conducts business activity in this state resulting in apportioned gross income subject to the State's B&O tax. Both factors are facially neutral and do not impermissibly burden interstate commerce. *See Filo Foods, LLC v. City of SeaTac*, 183 Wn.2d 770, 809, 357 P.3d 1040 (2015) (upholding facially neutral law that did not "distinguish between persons and entities located in Washington State and those located outside Washington State").

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Additionally, the surtax is not invalid merely because only a small portion of those subject to it happen to maintain their principal offices within the state. *See Commonwealth Edison*, 453 U.S. at 617-18 (upholding facially neutral Montana severance tax even though 90 percent of the tax was imposed on out-of-state utility companies and passed on to "citizens of other States"); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978) (Maryland law that prevented oil refiners and producers from owning retail gas stations in the state was upheld as non-discriminatory even though, in practical operation, there were no in-state refiners or producers). To conclude otherwise would make the constitutionality of the surtax hinge on business decisions entirely within the control of those subject to it. That is, the tax would be constitutional under the dormant Commerce Clause if enough financial institutions elected to maintain their principal headquarters in Washington, but it would be invalid if that number fell below some undefined threshold.

No relevant authority supports the notion that a facially neutral state tax can be undone by business decisions of those subject to the law. To the contrary, the U.S. Supreme Court has routinely sustained "nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business 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 Transit, Inc. v. Brady*, 430 U.S. 274, 287, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977) (quoting *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S. Ct. 1538, 44 L. Ed. 2d 1 (1975)). Here, the surtax applies solely to the extent of a taxpayer's local activities upon which the State may seek a fair and reasonable return. Thus, as was the case in *Commonwealth Edison*, there is no "real discrimination" in that the tax burden is borne to the extent of local, in-state business operations and not based on any distinction between "in-state and out-of-state" operations. *Commonwealth Edison*, 453 U.S. at 619*; see also Am. Trucking Ass'ns, Inc. v. Scheiner*, 483

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U.S. 266, 283, 107 S. Ct. 2829, 97 L. Ed. 2d 226 (1987) (the dormant Commerce Clause "is not offended when state boundaries are economically irrelevant").[1]

The surtax also serves a legitimate, nondiscriminatory legislative purpose. The act's stated intent is to combat the growing "wealth disparity in the country between the wealthy few and the lowest income families" by imposing the surtax on financial institutions with net annual incomes of one billion dollars or more. Laws of 2019, ch. 420, § 1. Additionally, our Legislature found that the Washington tax system "disproportionately impacts those with the least ability to pay." *Id*. The Legislature's efforts to combat wealth inequality and the regressive nature of the Washington tax system are legitimate policy goals that should be respected. Moreover, courts are required to presume "that the objectives articulated by the legislature are actual purposes of the statute, unless an examination of the circumstances forces [a court] to conclude that they could not have been a goal of the legislation." *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1097–98 (9th Cir. 2013) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981)).

Notwithstanding the Legislature's stated purpose for the surtax, the Associations contend that the Legislature's true intent was to subject only out-of-state financial institutions to the surtax. As support, the Associations offer speculation about legislative motive based on selective statements made while the law was being debated in the House and Senate, and snippets of post-enactment "legislative history." Pls.' Mot. for Summ. J. at 4-7.

The evidence the Associations offer fails to meet their burden of proving a discriminatory purpose. A legislature acts with discriminatory purpose when it affirmatively seeks to promote in-state industry at the expense of out-of-state competitors. *Bacchus Imports,*

[1] The holding *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010), is distinguishable. In that case, the Court determined that the "ultimate effect" of the Massachusetts law pertaining to large wineries "artificially limit[ed] the playing field in this market in a way that enables Massachusetts's wineries to gain market share against their out-of-state competitors." *Id.* at 12. The Washington surtax does not "artificially limit the playing field" and does not alter the "market share" of those financial institutions that conduct business activity in the state. Rather, it is a facially neutral, fairly apportioned revenue-raising measure that imposes an additional tax on extremely profitable financial institutions—regardless of geographic location.

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Ltd. v. Dias, 468 U.S. 263, 270-71, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984). That is not the case here.

The primary evidence the Associations have offered of discriminatory purpose are statements by individual legislators during floor debate about the surtax, but "floor statements by individual legislators rank among the least illuminating forms of legislative history." *N.L.R.B. v. SW Gen., Inc.*, ___ U.S. ___, 137 S. Ct. 929, 943, 197 L. Ed. 2d 263 (2017). Even considering the statements of particular lawmakers, none shows an intention to treat in-state and out-of-state banks differently. Representative Tarleton, when describing the surtax to her House colleagues, appeared to use the term "local banks" to mean credit unions and small community banks—without regard to where they maintain their principal headquarters. *See* Pls.' Mot. for Summ. J. at 5 (citing televised floor debate).[2] And in fact, the law treats small banks identically regardless of where they are headquartered: a bank with a few branches in Washington and less than $1 billion in net income does not pay the surtax regardless of whether it is headquartered in Portland, Lewiston, or Olympia. Thus, when viewed as a whole and in light of how the surtax actually works, it is evident that the political debate on the floor of the House was over "Big versus Small," not "In-State versus Out-of-State."

The Ninth Circuit Court of Appeals' decision in *Nat'l Ass'n of Optometrists & Opticians v. Brown*, 567 F.3d 521 (9th Cir. 2009), is highly instructive. There, the Court squarely rejected the notion that statements of the chief sponsor of legislation showing an intent to protect small business indicated impermissible discrimination against interstate commerce. The case involved a California regulatory scheme that prohibited licensed opticians from offering prescription eyewear at the same location in which eye examinations are provided, or from advertising that eyewear and eye examinations are available in the same

[2] The entire floor debate was incorporated by reference into the Associations motion for summary judgment. *See* Pls.' Mot. for Summ. J. at 5, n.7 (incorporating by reference into Statement of Facts the floor debate found at https://www.tvw.org/watch/?eventID=2019041311).

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location. *Id*. at 524. LensCrafters and another national eyewear chain brought a dormant Commerce Clause challenge. The district court granted summary judgment to the challengers, reasoning in part that statements made by the sponsor of the legislation showed evidence of impermissible "economic protectionism" favoring local business. *Id*. at 525.

The Court of Appeals reversed, explaining that a law seeking to protect small businesses without regard to geographic location did not offend the dormant Commerce Clause. The Court said that a legislative intent "to protect California's optometric profession from being taken over by large business interests," did not show an intent to discriminate against out-of-state businesses. *Id.* "Nothing in the statement suggests that the purpose is to protect California optometrists and ophthalmologists from competition from *out-of-state interests*, as opposed to commercial interests generally." *Id*. (emphasis added).

Similarly, nothing in Washington legislators' comments supporting the proposed surtax suggest that its purpose was to benefit only small Washington financial institutions as opposed to small financial institutions generally. And, as discussed above, the surtax does not actually operate to promote only Washington financial institutions. Any financial institution operating in the state, including a Washington institution, is subject to the surtax if is part of a consolidated financial group that meets the one billion dollar net income threshold. Likewise, any financial institution operating in the state, including a non-Washington institution, is excluded from the surtax if is not part of a consolidated financial group meeting that net income threshold.

Courts are naturally reluctant to invalidate a duly enacted law based on speculation over what may have motivated a particular legislator to vote for the law. *United States v. O'Brien*, 391 U.S. 367, 383-84, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968); *accord Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 402 n.4 (9th Cir. 2015) ("contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history") (quoting *Weinberger v. Rossi*, 456 U.S. 25, 35 n.15, 102 S. Ct.

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1510, 71 L. Ed. 2d 715 (1982)). Moreover, even when the stakes are much lower, involving only issues of statutory construction, the statements of individual legislators are generally inadequate to establish the intent of the legislative body. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461, 832 P.2d 1303 (1992). For these reasons, the party challenging a law on Commerce Clause grounds bears the burden of establishing a discriminatory purpose and must prove that the stated objectives of the legislature "could not have been a goal of the legislation." *Int'l Franchise Ass'n,* 803 F.3d at 400 (quoting *Rocky Mountain Farmers Union v. Corey*, 730 F.3d at 1098). To meet this burden, "[t]he challenger must show that the discriminatory effect was a substantial or motivating factor leading to the enactment of the statute." *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 945 F.3d 206, 214 (5th Cir. 2019) (internal quotation and citation omitted). In short, a finding of discriminatory purpose requires substantial evidence, not speculation.

Here, the Associations have not produced evidence proving that Legislature's stated objectives of combating wealth disparity and a regressive tax code "could not have been a goal of the legislation." Nor have they produced substantial evidence supporting a finding of discriminatory purpose. Importantly, the Legislature's stated purpose for imposing the surtax is legitimate, fits squarely within its proper sphere of authority, and is consistent with the "legislative history" the Associations cite as evidence. *See, e.g.,* April 27, 2020, Decl. of Christine Hanley, Ex. A at *4 (portion of the 2019 House Democratic Caucus Staff "End of Session Report" explaining that the surtax "doesn't fully address our upside down tax code, but it does ask some of the wealthiest banks in our state to help with essential services and programs all Washington families need"). Proper respect for the legislative branch counsels against invalidating the surtax based on the minimal record presented by the Associations in support of summary judgment.

Finally, the Associations fail to establish that the "undisputed purpose" of the tax is to favor in-state industry, as was the case in *Bacchus Imports*. *See Bacchus Imports,* 468 U.S. at

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271 (invalidating Hawaii's 20% liquor tax that exempted locally produced brandy and wine where the "undisputed . . . purpose of the exemption was to aid Hawaiian industry"). Speculation as to the motives of legislators or legislative staff is far from "undisputed" evidence of a discriminatory legislative purpose. For this additional reason, the Court should reconsider and reverse its prior ruling.

VI. CONCLUSION

In light of the important fiscal and constitutional issues involved in this case, and in light of the material facts and controlling law, the Court should grant reconsideration, vacate its prior ruling, and enter judgment in favor of State Defendants.

I certify that this memorandum contains 2,990 words, in compliance with the Local Civil Rules.

DATED this 22nd day of May, 2020.

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PROOF OF SERVICE

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

DATED this 22nd day of May, 2020, at Tumwater, WA.

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