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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON BANKERS ASSOCIATION, a Washington Public Benefit Corporation, and AMERICAN BANKERS ASSOCIATION, a District of Columbia Non-Profit Corporation,

Respondents,

vs.

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,

Appellants.

RESPONDENTS' ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

ROBERT M. MCKENNA (WSBA #18327)
rmckenna@orrick.com
DANIEL J. DUNNE (WSBA #16999)
ddunne@orrick.com
CHRISTINE E. HANLEY (WSBA #50801)
chanley@orrick.com
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Telephone: +1 206 839 4300
Facsimile: +1 206 839 4301

ERIC SHUMSKY (*pro hac vice pending*)
eschumsky@orrick.com

ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, DC 20005-1706
Telephone: +1 202 339 8400
Facsimile: +1 202 339 8500

Attorneys for Respondents

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I. INTRODUCTION

Nothing about this appeal merits this Court's direct review. No novel legal issues are presented. The trial court properly applied well-settled federal constitutional precedent to invalidate a tax whose purpose and effect is to target out-of-state financial institutions and benefit Washington-based banks. Numerous state and federal courts have invalidated much less flagrant examples of economic protectionism (including Washington's own Business & Occupations tax scheme). And if any surtaxes are withheld now, they will be fully paid with statutory interest if the State prevails. This Court should deny direct review because the State can identify no urgency necessitating such action.

In 2019, the Legislature levied a 1.2% B&O surtax on "specified financial institutions" operating in Washington. "Specified financial institutions" were defined purposefully to target the largest out-of-state financial institutions so that the surtax is triggered *only* by engaging in extensive interstate and global commerce. And the surtax hits the Legislature's intended targets with pinpoint precision—98% of surtax-payers are located out of state and they remit 99.74% of the surtax's revenues, according to the evidence submitted by the State. The State argues that the "trigger" for surtax liability—when a financial "group" reports over $1 billion in consolidated net income—is "facially neutral,"

but the facts proving both discriminatory purpose and effect are undisputed and overwhelming, and controlling cases invalidate laws that appear facially neutral but discriminate in purpose or effect.

The surtax was rushed through the Legislature in the final 48 hours of the 2019 Session—in violation of the constitutional requirement that bills be introduced at least *ten* days before adjournment—with minimal staff and legal analysis, public comment, or legislative deliberation. It passed even though legislators from both parties objected that targeting out-of-state banks violated the Dormant Commerce Clause. So it came as no surprise when the Superior Court found the statute unconstitutional.

This Court should deny direct review for three reasons. *First*, the State has not shown a fundamental issue of broad public import that requires urgent determination. With its near-perfect precision in targeting out-of-staters, the outcome of this case will have no effect on the liability of Washington-domiciled taxpayers, and surtax revenues are a relatively small portion of the State budget. The State submits no evidence that taxpayers are withholding the surtax based on the declaratory judgment. Even if they did so, should the State ultimately prevail it will collect all taxes withheld during appeal with substantial statutory interest.

Second, although the surtax was invalided as unconstitutional, this appeal presents no novel issue of law requiring this Court's immediate

review. The Superior Court applied settled precedent—under the federal Dormant Commerce Clause, not state law—to an undisputed factual record and properly held that the purpose and effect of the statute was to target out-of-state financial institutions. Plaintiffs' representational standing to seek a declaratory judgment to benefit their members also presents no novel issues of state law requiring the Court's urgent attention.

Third, in the absence of any demonstrated urgency, the evidentiary questions (including whether the Legislative record shows purposeful discrimination against interstate commerce and whether the record demonstrates discriminatory effect) are best assessed in the first instance by the Court of Appeals. Following that, this Court can determine whether any remaining issue merits discretionary review.

II. NATURE OF THE CASE AND DECISION

A. In the Final Hours of the 2019 Session, the Legislature Rushed Through a Surtax Targeting Out-of-State Banks Operating in Interstate Commerce

Washington levies a Business & Occupations tax on every person and entity conducting business in the state. RCW 82.04.220. The tax is levied on income or revenues derived from business activities within this state. RCW 82.04.460; RCW 82.04.462.[1]

[1] The B&O rate generally applicable to services was 1.5%. RCW 82.04.290. The Legislature subsequently increased that rate to 1.75% for institutions earning gross income over $1 million within the state. Laws of 2020, ch. 2, § 3.

In April 2019, the State levied an additional B&O surtax targeted at out-of-state banks. In violation of the 10-day requirement of Article II, Section 36 of the Washington Constitution, SHB 2167 was introduced and enacted in the last 48 hours of the 2019 Regular Session. CP 35-39, 49. It levies an additional 1.2% surtax on the gross income of "specified financial institutions," over and above the 1.75% base rate that all banks now pay. *See* RCW 82.04.29004. A "specified financial institution" is any financial institution "that is a member of a consolidated financial institution group that reported … annual net income of at least one billion dollars." RCW 82.04.29004(e)(i). Thus, whether a financial institution is hit with a 68% increase in its B&O tax rate depends on total net income from global operations of a *consolidated* financial institution *group*—including profits earned in interstate commerce (and even foreign commerce) that are indisputably beyond the State's power to tax or regulate—not the revenue it generates exclusively from the Washington operations that *are* subject to state regulation and taxation.

The Legislature's express purpose was to target out-of-state financial institutions. In the House Finance Committee's single public hearing on SHB 2167, Representative Drew Stokesbary questioned whether SHB 2167 raised "potential dormant Commerce Clause impacts if we are only applying taxes to out of state businesses." CP 168 n.6. The

answer was clear. During the rushed House floor debate at 2:40 the next morning, the bill's prime sponsor, House Finance Committee Chair Tarleton, acknowledged that SHB 2167 targeted "literally less than two dozen entities, that are parent companies or their affiliates." *Id*. 169 n.7. She described the targets of SHB 2167 as "the very largest banks in the world that have the capacity [sic] and access to capital all over the world." *Id*. 169 n.9. Chair Tarleton admitted the bill's discriminatory intent:

> "Recognizing that these mega-banks are not actually serving many communities in under-served and rural communities around the state, we have learned in this state's history as well as today that we rely substantially on community banks and credit unions to go where no one else will go. I'd rather see opportunities to expand participation for those entities rather than rewarding those who have chosen not to be there when their profits were at their highest. **So, let's help the community banks and the small credit unions and let's make sure that the largest banks in the world are going to pay the tax.**" *Id*. 169 n.11.
>
> "**So, I'd rather see local institutions working with local banks.** In my own district, Mr. Speaker, we have lots of **local banks** that have supported the fishing community, for example, over literally decades and decades, and I'm hoping that we see a resurgence of that kind of participation in the local economy. *Id*. 169 n.12.

SHB 2167 was debated on the Senate floor on April 28. Senators from both political parties warned that the bill unconstitutionally discriminated against interstate commerce:

- **<u>Sen. Mark Mullet (D), 5th Dist., Issaquah:</u>** I can 100% guarantee to every person in this body that not at one point has [the Senate Banking Committee] looked at this issue that was presented on Friday—out of the blue, from nowhere—in any way, shape or form. And I think, if we

as a body are going to take **a bill that clearly seems to violate the Commerce Clause, it clearly says if you're an out-of-state bank—because the way we've defined the definition of a billion dollars in net profits, not a single bank in Washington meets that definition. So, in-state banks pay half the tax rate of what the out-of-state banks will pay. This is a violation of the Commerce Clause.** *Id*. 170 n.15.

- **Sen. Steve O'Ban (R), 28th Dist., Pierce County:** **You can't have a differential tax scheme, like we're proposing here, that so clearly, so obviously differentiates between in-state and interstate banks without failing the smell test.** *Id*. 170 n.16.

- **Sen. John Braun (R), 20th Dist., Centralia:** Mr. President, this is a bill that just came into existence two days ago. We know that we haven't had a legal analysis from our attorney general. **We know that there are potentially large Commerce Clause [implications].** We've had the private sector weigh in with, I think, very legitimate concerns about whether this is even legal from a federal law standpoint. This bill has come without any significant deliberation from the House to the Senate. It moved in one day through the Senate committee. *Id*. 170 n.14.

SHB 2167 passed the House by a vote of 53-43 and the Senate by a bare majority of 25-24. Laws of 2019, ch. 420. Prior to the House vote and in response to a request from members, the Department of Revenue "ascertained … that at least twenty-two currently reporting taxpayers would likely owe the tax in 2020 and 2021, and each of those twenty-two taxpayers ha[s] their principal place of business outside Washington." CP 236. Representative Amy Walen, Vice Chair of the House Finance Committee, admitted "that [the bill] unfairly gives advantage to smaller community banks and credit unions." *Id*. 229.

Discrimination to benefit local banks was the bill's key feature:

- "[SHB 2167] would impact only 22 of the largest banks in the world. Big banks like JP Morgan Chase, Bank of America, Citibank, Wells Fargo, US Bank, Morgan Stanley, Goldman Sachs, Citigroup and others."
- "Small community banks and credit unions will not pay this rate and in fact [it] will help increase their competitiveness with big banks."

See Id. 225. The End of Session Report heralded that the surtax "only applies to the largest banks—it does not impact community banks or credit unions." *Id.* 223.

Following passage, a bipartisan group of legislators asked Governor Inslee to veto the bill because it "likely [would] be the subject of litigation on grounds that it violates the commerce clause of the United States Constitution by subjecting out-of-state banks to different tax laws than in-state banks." *Id*. 233. Governor Inslee signed SHB 2167 into law effective January 1, 2020, codified at RCW 82.04.29004.

B. The Superior Court Invalidated the Surtax, Holding that it Discriminates in Purpose and Effect

On November 5, 2019, the Plaintiff Associations filed suit alleging that RCW 82.04.29004 violates the Dormant Commerce Clause of the United State Constitution. Following extensive oral argument on cross-motions for summary judgment, Superior Court Judge Marshall Ferguson issued a declaratory judgment on May 15, 2020, holding the statute "to be

illegal, invalid, and unenforceable because it discriminates in effect and in purpose against interstate commerce in violation of the dormant Commerce Clause." Appellants' Statement of Grounds for Direct Review ("St. Dir. Rev."), Appendix E.

III. ARGUMENTS AGAINST DIRECT REVIEW

RAP 4.2(a) limits the circumstances under which a "party may seek review in the Supreme Court of a decision of the superior court." Such review is discretionary, and the State has given no compelling reason why this case should leapfrog the Court of Appeals. The Court should deny direct review and transfer the case to the Court of Appeals to address these questions in the first instance.

A. This Case Presents No Fundamental and Urgent Issues of Broad Public Import

The State fails to establish that the decision below has the sort of fundamental and urgent effect that would merit this Court's immediate review. It principally argues that review is needed because this tax measure implicates the "Legislature's efforts to fully fund important state services." St. Dir. Rev., 10. That argument proves far too much; if it were correct, any Superior Court decision affecting taxation would have to be directly reviewed, even when, as here, the surtax applies only negligibly to Washington-domiciled taxpayers. Moreover, "revenue generation is not a local interest that can justify discrimination against interstate commerce."

C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390, 393, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994). The State also has not shown that it will be urgently affected by the decision below. The Superior Court did not enter a permanent injunction, and the State offers no evidence that financial institutions are refusing to pay the surtax as a result of the judgment. It is equally likely that institutions are continuing to remit taxes pending resolution of this lawsuit and planning to file statutory refund actions if judgment is affirmed. In any event, should the decision ultimately be reversed, any unpaid taxes will be owed to the State with substantial statutory interest. *See* RCW 82.32.050(2), 82.32.060(4)(b).

The State also claims that direct review is needed because the Legislature's avowed purpose was to fight "wealth disparity *in the country*." (Laws of 2019, ch. 420, § 1) (emphasis added). The Legislature's *interstate* (rather than *local*) focus is an argument against, rather than for, immediate review. The Legislature has no prerogative to make national economic policy by imposing higher taxes on "Big Banks" when they engage in extensive interstate commerce. "[N]o single State" may "impose its own policy choice on neighboring States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

Finally, the State argues that direct review is warranted because (it contends) the Associations lack standing to bring a declaratory judgment action, and RCW 82.32.180 provides the exclusive avenue for an aggrieved taxpayer to seek judicial review of the State's excise tax laws. St. Dir. Rev., 10, 14. The Superior Court rejected these arguments, correctly ruling that RCW 82.32.180 is inapplicable to this action because it provides the procedure for a *refund* action by an aggrieved taxpayer.[2] The Associations are not taxpayers seeking a tax refund for themselves or their members, but bring a constitutional challenge under the Declaratory Judgments Act in a representative capacity to benefit their affected members. The Superior Court correctly recognized representational standing because the Associations' members are within the "zone of interests" protected by the Dormant Commerce Clause and have suffered injury in fact by being subject to, and paying, the surtax. *See Tyler Pipe Indus., Inc. v. State Dep't of* Revenue, 96 Wn.2d 785, 638 P.2d 1213 (1982) (taxpayer may bring action for declaratory and injunctive relief outside statutory protest procedure). Actions for declaratory judgment are appropriate for representational standing because the relief "generally

[2] "Any person … *having paid any tax* as required and feeling aggrieved by the amount of the tax may appeal to the superior court of Thurston county, within the time limitation for a refund … or, if an application for refund has been made to the department within that time limitation, then within thirty days after rejection of the application, whichever time limitation is later." RCW 82.32.180 (emphasis added).

benefits every member" of the association without "burden[ing] our courts with an increased number of lawsuits arising out of identical facts." *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn. 2d 207, 214, 216, 45 P.3d 186, *am. on denial of recons.*, 50 P.3d 618 (Wash. 2002). The Superior Court broke no new ground and the State does not show that standing is "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." *See* RAP 4.2(a)(4).

B. The Appeal Presents No Novel Issues of State or Federal Law, and Evidentiary Review is Better Suited to Court of Appeals.

Ultimately, the State's arguments are about the merits and evidence, not the need for direct review, and those arguments are mistaken. The major issue presented on appeal is whether the Statute's surtax impermissibly discriminates against interstate commerce in purpose or effect. St. Dir. Rev., 9. With respect to discriminatory effect, the State asserts that the surtax "*applies evenly* to any financial institution that is a member of an affiliated group meeting the one-billion-dollar net income threshold, and it only applies to gross income from in-state business activities." *Id.*, 11 (emphasis added). But the tax targets out-of-state banks with remarkable precision, and for every given dollar they earn providing the same banking services as Washington institutions, the out-

of-staters pay 68% more in B&O taxes than the locals. That is fatal: Even a law "appearing nondiscriminatory" is "not save[d] from invalidation" if it has "facially discriminatory consequences." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 240, 248, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (invalidating Washington B&O statute). *See Rousso v. State*, 170 Wn.2d 70, 78-9, 239 P.3d 1084 (2010) ("[W]e must first determine whether [the statute] discriminates in its language *or direct effect*.") (emphasis added); *Mt. Hood Beverage Co. v. Constellation Brands, Inc*., 149 Wn.2d 98, 110, 63 P.3d 779 (2003) ("[W]e must determine whether the statute . . . has the direct effect of favoring in-state economic interests over out-of-state interests."). The trial court faithfully applied this settled law.

The State does *not* argue that the statute is non-discriminatory because three taxpayers out of 153 who remitted the surtax in the first quarter of 2020 (paying 0.26% of total surtax) are based in Washington. St. Dir. Rev., 4. It cannot argue that, because cases uniformly hold that a law discriminating against out-of-state entities is not saved by its application to a mere handful of in-state businesses.[3]

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[3] *See, e.g.*, *C & A Carbone, Inc.*, 511 U.S at 391 ("The ordinance is no less discriminatory because in-state [entities] are also covered by the prohibition."); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 271, 104 S. Ct. 3049, 82 L. Ed. 2d 200 (1984) (Hawaiian liquor tax had discriminatory effect because "it applies only to locally

Moreover, the State's argument provides another reason that immediate review is unwarranted. When the trial court ruled on May 15, 2020, the State had not identified *any* Washington entity that paid the surtax. Rather, the undisputed record showed that the surtax applied *only* to entities chartered and headquartered outside Washington. CP 197-98. The State's opposition to Plaintiffs' summary judgment motion did not dispute that the surtax "will apply only to up to 29 large financial institutions," all of which "maintain their principal business addresses outside the state," and the State conceded that "this may be a 'practical' effect of the tax as applied." CP 250; *see also id.*, 245-46. Only on reconsideration did the State choose to introduce additional new evidence (even though it was previously available) that three of the 153 taxpayers (i.e., fewer than 2%) are from Washington. The State's tardily created record is best reviewed in the first instance by the Court of Appeals.

The State chalks up the surtax's discriminatory impact to "the business decisions" of large financial institutions to domicile themselves outside Washington. St. Dir. Rev. 12. But the same could be said in any

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produced beverages, even though it does not apply to all such products"); *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 13 (1st Cir. 2010) ("reject[ing] the notion that 'a favored group must be entirely in-state for a law to have a discriminatory effect on commerce.'"). The State's reliance on *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-18, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981) is misplaced; the coal severance tax upheld in that case was levied *exclusively* on in-state entities.

case striking down a discriminatory state law: if out-of-state businesses moved in-state, the law would appear to be less discriminatory. Their "business decisions" to domicile elsewhere are themselves protected by the dormant Commerce Clause. And the State's argument concerns the merits—not why direct review is warranted.

Next, the State argues that direct review is needed to determine whether the Superior Court inappropriately "accept[ed] as true allegations of a 'discriminatory legislative purpose' without weighing the disputed evidence." *Id.* 12-13. But reviewing the evidentiary record for compliance with the standards of CR 56 is a perfect assignment for the Court of Appeals, not a justification for direct review.

Moreover, the Superior Court got it right. There were no genuine issues of material fact as to the legislative record because—as one would expect with publicly available legislative history—the State did not contest the legislative record. CP 332-33; *see also* CR 56(c). And here, the undisputed record contains just the kind of evidence of discriminatory intent that courts regularly rely upon. *See, e.g.*, *Family Winemakers*, 592 F.3d at 7 n.4 (floor statements of a bill's sponsor are "precisely the kind of evidence the Supreme Court has looked to in previous Commerce Clause cases challenging a statute as discriminatory in purpose"). Here, we have numerous and varied statements, all constituting *direct* evidence of

discrimination requiring *no* inferences: (1) SHB 2167's sponsor repeatedly invoking "help[ing] the community banks and the small credit unions" to justify the surtax, CP 180; (2) that same sentiment echoed repeatedly in statements by supporters and the End of Session Report (*id*., 181); (3) senators of both parties *objecting* that the bill violated the Commerce Clause (*id*.); and (4) the Legislature confirming before voting that no Washington banks would pay the surtax. CP 287, 297. What distinguishes this case is how extensive and uniquely uniform the evidence of discriminatory purpose and effect is, given that the bill was passed just two days after introduction.

Of course, all of that also goes to the merits, and fails to explain why direct review of the Superior Court's application of well-established constitutional law deserves this Court's immediate attention.

C. This Court Should Transfer the Case to the Court of Appeals

To the extent the State raises questions about what facts are reflected in an otherwise undisputed legislative record, and whether the record contains *direct* evidence of discriminatory intent requiring no *inferences* as to "purpose," the Court of Appeals is best suited to that task.

IV. CONCLUSION

For the reasons above, the Associations respectfully request that the Court deny direct review and transfer this case to the Court of Appeals.

RESPECTFULLY SUBMITTED this 24th day of August, 2020.

ORRICK, HERRINGTON & SUTCLIFFE LLP

By: *s/Robert M. McKenna*

ROBERT M. MCKENNA (WSBA #18327)
rmckenna@orrick.com
DANIEL J. DUNNE (WSBA #16999)
ddunne@orrick.com
CHRISTINE E. HANLEY (WSBA #50801)
chanley@orrick.com
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7097
Telephone: +1 206 839 4300
Facsimile: +1 206 839 4301

ERIC A. SHUMSKY (*Pro Hac Vice Pending*)
eshumsky@orrick.com
1152 15th Street, NW
Washington, D.C. 20005-1706
Telephone: +1 202 339 8400
Facsimile: +1 202 339 8500

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Answer to Statement of Grounds for Direct Review to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated August 24, 2020.

s/Robert M. McKenna
Robert M. McKenna
Attorney for Respondents

ORRICK, HERRINGTON & SUTCLIFFE LLP

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