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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,

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,

Appellants.

**APPELLANTS' STATEMENT OF GROUNDS FOR
DIRECT REVIEW**

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I. INTRODUCTION

Washington has one of the most regressive tax systems in the United States. In 2019, the Legislature took a small step towards addressing the regressive nature of the state Business and Occupation (B&O) tax by imposing a surtax on extremely profitable financial institutions that operate in Washington. The surtax applies to all financial institutions operating in the state that meet a specified income threshold. It is measured only by gross income derived from in-state business activities, and it draws no distinctions based on whether a company's headquarters is within or outside of Washington. The surtax became effective January 1, 2020, and during the first three months of the year over 150 large financial institutions, including several Washington financial institutions, paid the surtax, which raised over \$34 million in tax revenue.

The Washington Bankers Association and the American Bankers Association (hereinafter "Associations") challenged the surtax. Rather than utilizing the established method for seeking judicial review of state excise taxes provided in RCW 82.32.180, the Associations claimed standing to sue on behalf of their members who might have to pay the tax in the future. The Superior Court held that the Associations had standing to sue and invalidated the law. The court reasoned that the facially neutral surtax

discriminates “in effect and in purpose against interstate commerce in violation of the dormant Commerce Clause[.]” Judgment, p. 2.

This Court should grant direct review because the Superior Court invalidated on flawed constitutional grounds a facially neutral tax measure designed to ask more from extremely profitable financial institutions that operate in Washington. Direct review is also warranted because the Superior Court’s ruling has broad fiscal and tax policy implications, undermining legislative efforts to address the regressive nature of Washington’s tax system and to fully fund important state services. Finally, the Superior Court’s conclusion that the Associations had standing to challenge the surtax also merits this Court’s review.

II. NATURE OF THE CASE AND DECISION

A. The Legislature Enacts a Surtax on Profitable Financial Institutions Measured by Their Washington Business Activities

For over 80 years, Washington has imposed B&O tax on the “act or privilege of engaging in business activities[.]” in the state. RCW 82.04.220. The tax applies to all businesses that have a substantial nexus with the state. Banks and other financial institutions providing in-state financial services are no exception, and are taxed under the “service and other” tax classification on their apportioned gross income from in-state business activities. RCW 82.04.290(2); RCW 82.04.460(2).

This appeal involves a recent amendment to the state’s B&O tax code that imposes a 1.2 percent surtax on “specified financial institutions.” RCW 82.04.29004 (copy attached as Appendix A).¹ The Legislature enacted the surtax as a means to help combat wealth inequality and to make strides towards a more progressive tax system. Laws of 2019, ch. 420, § 1 (copy of the session law is attached as Appendix B). The surtax also provides revenue to fund important government services.

A “specified financial institution” 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). The surtax applies to both in-state and out-of-state financial institutions that meet the one billion dollar consolidated net income threshold. *See* RCW 82.04.29004(2)(d) (defining “financial institution” without regard to the state in which the entity was chartered or maintains its principal address). That said, the surtax applies only to that portion of the gross income received by a specified financial institution from its Washington business activity. *See* RCW 82.04.29004(1) (“The additional tax is equal to the gross income of the business taxable under

¹ A surtax is an additional tax on something already taxed. Here, the surtax is in addition to the regular tax imposed under the service and other tax classification.

RCW 82.04.290(2) multiplied by the rate of 1.2 percent.”).² Thus, to give a very simple example, if a “specified financial institution” had worldwide income of \$5 billion, but its income from Washington activity were only \$1 million, both the ordinary B&O tax as well as the new surtax would apply only to the \$1 million of Washington income.

The surtax became effective on January 1, 2020. Laws of 2019, ch. 420, § 2(1). During the first three months of 2020, the state received surtax payments exceeding \$34 million from 153 taxpayers meeting the statute’s definition of a “specified financial institution,” including three taxpayers with their principal offices located within Washington.

Several months before its effective date, the Associations filed this action under the Uniform Declaratory Judgments Act (UDJA), claiming that the surtax discriminates against interstate commerce in violation of the dormant Commerce Clause.³ Although not subject to the surtax, the Associations contend they have a right to sue on behalf of their members—none of whom joined the lawsuit and none of whom filed separate actions for refund under the statutory method required by RCW 82.32.180.

² The amount of gross income of a financial institution taxed under RCW 82.04.290(2) is computed using the single-factor apportionment method specified in RCW 82.04.460(2) and WAC 458-20-19404.

³ The Associations also asserted that the surtax violated article II, section 36 of the state Constitution. The trial court granted the State’s CR 12(b)(6) motion to dismiss the state constitutional claim.

B. Legal Principles Pertaining to the Dormant Commerce Clause

The Commerce Clause vests in Congress the authority “[t]o regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.” U.S. Const. art. I, § 8, cl. 3. “Implicit in this affirmative grant [of authority to Congress] is the negative or ‘dormant’ Commerce Clause—the principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce.” *State v. Heckel*, 143 Wn.2d 824, 832, 24 P.3d 404 (2001).

Modern dormant Commerce Clause jurisprudence is driven primarily by concerns about economic protectionism. *Dep’t of Revenue of Kentucky v. Davis*, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273-74, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988)). Thus, it is well established that the “‘negative’ aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.” *Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 718, 153 P.3d 846 (2007) (quoting *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994) (quoting *Limbach*, 486 U.S. at 273-74)).

But States “retain authority under their general police powers to regulate matters of ‘legitimate local concern,’ even though interstate

commerce may be affected.” *Maine v. Taylor*, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) (quoting *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980)); *see also Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976) (“not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States”).

The power to tax is an important aspect of state sovereignty and is respected under our system of federalism. *Union Pac. R.R. Co. v Peniston*, 85 U.S. (18 Wall.) 5, 29, 21 L. Ed. 787 (1873). States retain broad authority to impose taxes to fund important governmental services. *Ryan v. State*, 188 Wash. 115, 130-31, 61 P.2d 1276 (1936). This includes the authority to impose excise taxes on business activity conducted by those engaged in interstate commerce even when the tax has the effect of increasing the cost of doing business. *Chicago Bridge & Iron Co. v. Dep’t of Revenue*, 98 Wn.2d 814, 825-26, 659 P.2d 463 (1983).

While states may not “impose a tax which 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, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995) (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959)), a state tax that applies evenhandedly is not

discriminatory even if its economic impact falls disproportionately on out-of-state businesses. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617-18, 101 S. Ct. 2946, 69 L. Ed. 2d 884 (1981). 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)).

To assist courts in navigating between the competing “negative aspect of the Commerce Clause” and the state and local autonomy favored by our federalism, the Supreme Court has articulated a two-tiered approach for assessing a dormant Commerce Clause challenge. The Court first “ask[s] whether a challenged law discriminates against interstate commerce.” *Davis*, 553 U.S. at 338. Discriminatory laws are those that mandate “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 Env’tl. Quality of Oregon*, 511 U.S. 93, 99, 114 S. Ct. 1345,

128 L. Ed. 2d 13 (1994). A discriminatory state law is “virtually *per se* invalid.” *Id.*

When the challenged law is not discriminatory, the court next asks whether the law imposes some burden on interstate commerce that is “‘clearly excessive in relation to the putative local benefits.’” *Davis*, 553 U.S. at 338-39 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970)). If no clearly excessive burden is established, the dormant Commerce Clause challenge fails.

This Court follows the same two-tiered approach. *Heckel*, 143 Wn.2d at 832.

C. The Trial Court Invalidates the Surtax, Holding That it Discriminates in Effect and Purpose

The Associations filed their complaint seeking declaratory relief in November 2019. Shortly thereafter State Defendants moved under Civil Rule 12(b)(6) to dismiss the Associations’ dormant Commerce Clause challenge for lack of standing. The Superior Court, the Honorable Marshall Ferguson, denied the motion.

The parties then filed cross-motions for summary judgment addressing the merits of the Associations’ constitutional claim. After hearing oral argument, the Superior Court orally granted the Associations’

motion and denied the State Defendants' motion.⁴ The court agreed with the State that the 1.2 percent surtax is neutral on its face, but granted summary judgment to the Associations on their alternative claims that the surtax discriminated against interstate commerce in effect and in purpose. The Superior Court thus did not address the second part of the dormant Commerce Clause analysis, asking whether a nondiscriminatory law's burdens are clearly excessive in relation to the putative local benefits.

After moving for reconsideration, which was denied, the State Defendants timely appealed.⁵

III. ISSUES PRESENTED FOR REVIEW

Petitioners seek direct review by this Court of the following two issues:

1. Is the 1.2 percent surtax enacted by the Legislature, which applies in exactly the same way to in-state and out-of-state businesses and which the trial court concluded was neutral on its face, nevertheless discriminatory and *per se* invalid under the dormant Commerce Clause?
2. Did the Associations have standing to challenge the 1.2 percent surtax under the UDJA when RCW 82.32.180 provides a plain,

⁴ The transcript of the Superior Court's oral ruling is provided as Appendix C. The written order granting summary judgment is provided as Appendix D, and the Judgment invalidating the surtax is provided as Appendix E.

⁵ The order denying reconsideration is provided as Appendix F.

speedy, and adequate remedy for any aggrieved member to challenge the surtax in Thurston County Superior Court?

IV. STATEMENT OF GROUNDS FOR DIRECT REVIEW

This case warrants direct review because the trial court “invalid[ated] a statute . . . upon the ground that it is repugnant to the United States Constitution[.]” RAP 4.2(a)(2). Additionally, this case involves “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination[.]” namely the Legislature’s efforts to fully fund important state services through the facially neutral and fairly apportioned surtax. RAP 4.2(a)(4). Finally, the trial court’s decision that the Associations have standing under the UDJA is inconsistent with decisions of this Court and merits review. RAP 4.2(a)(3).

A. This Court Should Determine Whether the Facially Neutral Surtax is *Per Se* Invalid under Established Dormant Commerce Clause Principles

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.*, 511 U.S. at 99. “[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) (internal quotation marks and citation omitted).

The 1.2 percent surtax does not provide differential treatment encroaching on dormant Commerce Clause concerns. Rather, 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. The location where a financial institution is chartered or maintains its 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 law that did not “distinguish between persons and entities located in Washington State and those located outside Washington State”).

Additionally, a state tax is not invalid merely because only a small portion of those subject to it happen to be located within the state. *Commonwealth Edison*, 453 U.S. at 617-18. To conclude otherwise would make the constitutionality of a state tax hinge on decisions entirely within the control of those subject to it. That is, the tax would be constitutional under the dormant Commerce Clause if enough impacted taxpayers elected

to maintain their principal headquarters in the taxing state, but it would be invalid if that number fell below some undefined threshold.

No authority supports the notion that a facially neutral state tax can be undone by the business decisions of those subject to the law. 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 true in *Commonwealth Edison*, 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 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"). In light of this established law, this Court should grant direct review to determine whether the Superior Court erred when it concluded that the facially neutral surtax discriminates against interstate commerce in practical effect.

This appeal also raises important issues relating to the co-equal legislative branch. The Associations allege that the Legislature acted with a discriminatory purpose by "targeting" only out-of-state financial institutions. This Court should grant direct review to determine whether it is appropriate for the Superior Court to accept as true allegations of a "discriminatory [legislative] purpose" without weighing the disputed

evidence and making a finding that the Legislature indeed intended to discriminate against interstate commerce by favoring local business.

Courts are 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). Moreover, 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 alleging that the Legislature enacted a state law for a discriminatory purpose must prove that the law's stated objectives "could not have been a goal of the legislation." *Int'l Franchise Ass'n Inc. v. City of Seattle*, 803 F.3d 389, 400 (9th Cir. 2015) (quoting *Rocky Mountain Farmers Union*, 730 F.3d at 1097-98). To meet that 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.

This Court should grant review to determine whether the Superior Court erred when it concluded as a matter of law that the Legislature acted with a discriminatory purpose, rendering the surtax *per se* invalid.

B. The Superior Court’s Ruling that the Associations have Standing to Sue under the UDJA Merits Direct Review

The Associations assert that they have associational standing to seek declaratory relief on behalf of their members. Their view conflicts with decisions of this Court. The UDJA is not an appropriate means of seeking review in cases like this where the Legislature has enacted a specific statute “that diverts the superior courts’ jurisdiction into an alternate procedure that a party must use[.]” *New Cingular Wireless PCS, LLC v. City of Clyde Hill*, 185 Wn.2d 594, 600, 374 P.3d 151 (2016); accord, *Wash. Trucking Assoc. v. Emp’t Sec. Dep’t*, 188 Wn.2d 198, 223-24, 393 P.3d 761 (2017) (a challenge to employment taxes “must proceed” under statutory method established by the Legislature).

The method provided by the Legislature for seeking judicial review of the State’s excise tax laws is set out in RCW 82.32.180. That provision “is a conditional, partial waiver of the sovereign immunity” of the State and establishes the proper method to challenge RCW 82.04.29004 or any other excise tax statute. *Lacey Nursing Ctr., Inc. v. Dep’t of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995). Neither the Legislature nor this Court has carved out an exception for “associations” of potentially aggrieved taxpayers. Consequently, this Court should grant direct review to determine whether the lower court erred in allowing an exception here.

V. CONCLUSION

This Court should grant direct review to determine the important constitutional and tax policy issues raised by this appeal.

RESPECTFULLY SUBMITTED this 27th day of July, 2020.

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I certify that on this date, I electronically filed this document with the Clerk of the Court using the Washington State Appellate Courts' e-file portal, which will send notification of such filing to all counsel of record at the following:

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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 27th day of July 2020 at Olympia, WA.

s/ Leena Vanderwood
LEENA VANDERWOOD
Legal Secretary

RCW 82.04.29004**Additional tax on financial institutions.**

(1) Beginning January 1, 2020, in addition to any other taxes imposed under this chapter, an additional tax is imposed on specified financial institutions. The additional tax is equal to the gross income of the business taxable under RCW 82.04.290(2) multiplied by the rate of 1.2 percent.

(2) The definitions in this subsection apply throughout this section unless the context clearly requires otherwise.

(a) "Affiliated" means a person that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with another person. For purposes of this subsection (2)(a), "control" means the possession, directly or indirectly, of more than fifty percent of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting shares, by contract, or otherwise.

(b) "Consolidated financial institution group" means all financial institutions that are affiliated with each other.

(c) "Consolidated financial statement" means a consolidated financial institution group's consolidated reports of condition and income filed with the federal financial institutions examination council, or successor agency.

(d) "Financial institution" means:

(i) Any corporation or other business entity chartered under Titles 30A, 30B, 31, 32, and 33 RCW, or registered under the federal bank holding company act of 1956, as amended, or registered as a savings and loan holding company under the federal national housing act, as amended;

(ii) A national bank organized and existing as a national bank association pursuant to the provisions of the national bank act, 12 U.S.C. Sec. 21 et seq.;

(iii) A savings association or federal savings bank as defined in the federal deposit insurance act, 12 U.S.C. Sec. 1813(b)(1);

(iv) Any bank or thrift institution incorporated or organized under the laws of any state;

(v) Any corporation organized under the provisions of 12 U.S.C. Sec. 611 through 631;

(vi) Any agency or branch of a foreign depository as defined in 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

(vii) A production credit association organized under the federal farm credit act of 1933, all of whose stock held by the federal production credit corporation has been retired;

(viii) Any corporation or other business entity who receives gross income taxable under RCW 82.04.290, and whose voting interests are more than fifty percent owned, directly or indirectly, by any person or business entity described in (d)(i) through (vii) of this subsection other than an insurance company liable for the insurance premiums tax under RCW 48.14.020 or any other company taxable under chapter 48.14 RCW;

(ix)(A) A corporation or other business entity that receives more than fifty percent of its total gross income for federal income tax purposes from finance leases. For purposes of this subsection, a "finance lease" means a lease that meets two requirements:

(I) It is the type of lease permitted to be made by national banks (see 12 U.S.C. Sec. 24(7) and (10), comptroller of the currency regulations, part 23, leasing (added by 56 C.F.R. Sec. 28314, June 20, 1991, effective July 22, 1991), and regulation Y of the federal reserve system 12 C.F.R. Part 225.25, as amended); and

(II) It is the economic equivalent of an extension of credit, i.e., the lease is treated by the lessor as a loan for federal income tax purposes. In no event does a lease qualify as an extension of credit where the lessor takes depreciation on such property for federal income tax purposes.

APPENDIX A

(B) For this classification to apply, the average of the gross income in the current tax year and immediately preceding two tax years must satisfy the more than fifty percent requirement;

(x) Any other person or business entity, other than an insurance general agent taxable under RCW **82.04.280**(1)(e), an insurance business exempt from the business and occupation tax under RCW **82.04.320**, a real estate broker taxable under RCW **82.04.255**, a securities dealer or international investment management company taxable under RCW **82.04.290**(2), that receives more than fifty percent of its gross receipts from activities that a person described in (d)(ii) through (vii) and (ix) of this subsection is authorized to transact.

(e)(i) "Specified financial institution" means 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, not including net income attributable to noncontrolling interests, as the terms "net income" and "noncontrolling interest" are used in the consolidated financial statement.

(ii) If financial institutions are no longer required to file consolidated financial statements, "specified financial institution" means any person that was subject to the additional tax in this section in at least two of the previous four calendar years.

(3) The department must notify the fiscal committees of the legislature if financial institutions are no longer required to file consolidated financial statements.

(4) To aid in the effective administration of the additional tax imposed in this section, the department may require a person believed to be a specified financial institution to disclose whether it is a member of a consolidated financial institution group and, if so, to identify all other members of its consolidated financial institution group. A person failing to comply with this subsection is deemed to have intended to evade tax payable under this section and is subject to the penalty in RCW **82.32.090**(7) on any tax due under this section by the person and any financial institution affiliated with the person.

(5) Taxes collected under this section must be deposited into the general fund.

[**2019 c 420 § 2.**]

NOTES:

Finding—2019 c 420: "The legislature finds that in the decade since the great recession, some economic sectors have rebounded, stronger than ever, while many Washington families struggle to afford basic necessities, all while also carrying the burden of funding schools and essential services. The wealth disparity in the country between the wealthy few and the lowest income families is wider than in any other developed nation and continues to grow. Additionally, Washington's tax system disproportionately impacts those with the least ability to pay. As a percentage of household income, middle-income families in Washington pay two to four times the amount of taxes as compared to top earners in the state. Low-income Washington families pay six times more in taxes than the wealthiest residents. The legislature concludes that those wealthy few who have profited the most from the recent economic expansion can contribute to the essential services and programs all Washington families need." [**2019 c 420 § 1.**]

APPENDIX A

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 2167

Chapter 420, Laws of 2019

66th Legislature
2019 Regular Session

FINANCIAL INSTITUTIONS TAX

EFFECTIVE DATE: July 28, 2019

Passed by the House April 26, 2019
Yeas 53 Nays 43

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 28, 2019
Yeas 25 Nays 24

CYRUS HABIB

President of the Senate

Approved May 21, 2019 10:43 AM

JAY INSLEE

Governor of the State of Washington

CERTIFICATE

I, Bernard Dean, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 2167** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BERNARD DEAN

Chief Clerk

FILED

May 21, 2019

**Secretary of State
State of Washington**

SUBSTITUTE HOUSE BILL 2167

Passed Legislature - 2019 Regular Session

State of Washington

66th Legislature

2019 Regular Session

By House Finance (originally sponsored by Representative Tarleton)

READ FIRST TIME 04/26/19.

1 AN ACT Relating to tax revenue; adding a new section to chapter
2 82.04 RCW; and creating a new section.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4 NEW SECTION. **Sec. 1.** The legislature finds that in the decade
5 since the great recession, some economic sectors have rebounded,
6 stronger than ever, while many Washington families struggle to afford
7 basic necessities, all while also carrying the burden of funding
8 schools and essential services. The wealth disparity in the country
9 between the wealthy few and the lowest income families is wider than
10 in any other developed nation and continues to grow. Additionally,
11 Washington's tax system disproportionately impacts those with the
12 least ability to pay. As a percentage of household income, middle-
13 income families in Washington pay two to four times the amount of
14 taxes as compared to top earners in the state. Low-income Washington
15 families pay six times more in taxes than the wealthiest residents.
16 The legislature concludes that those wealthy few who have profited
17 the most from the recent economic expansion can contribute to the
18 essential services and programs all Washington families need.

19 NEW SECTION. **Sec. 2.** A new section is added to chapter 82.04
20 RCW to read as follows:

1 (1) Beginning January 1, 2020, in addition to any other taxes
2 imposed under this chapter, an additional tax is imposed on specified
3 financial institutions. The additional tax is equal to the gross
4 income of the business taxable under RCW 82.04.290(2) multiplied by
5 the rate of 1.2 percent.

6 (2) The definitions in this subsection apply throughout this
7 section unless the context clearly requires otherwise.

8 (a) "Affiliated" means a person that directly or indirectly,
9 through one or more intermediaries, controls, is controlled by, or is
10 under common control with another person. For purposes of this
11 subsection (2)(a), "control" means the possession, directly or
12 indirectly, of more than fifty percent of the power to direct or
13 cause the direction of the management and policies of a person,
14 whether through the ownership of voting shares, by contract, or
15 otherwise.

16 (b) "Consolidated financial institution group" means all
17 financial institutions that are affiliated with each other.

18 (c) "Consolidated financial statement" means a consolidated
19 financial institution group's consolidated reports of condition and
20 income filed with the federal financial institutions examination
21 council, or successor agency.

22 (d) "Financial institution" means:

23 (i) Any corporation or other business entity chartered under
24 Titles 30A, 30B, 31, 32, and 33 RCW, or registered under the federal
25 bank holding company act of 1956, as amended, or registered as a
26 savings and loan holding company under the federal national housing
27 act, as amended;

28 (ii) A national bank organized and existing as a national bank
29 association pursuant to the provisions of the national bank act, 12
30 U.S.C. Sec. 21 et seq.;

31 (iii) A savings association or federal savings bank as defined in
32 the federal deposit insurance act, 12 U.S.C. Sec. 1813 (b)(1);

33 (iv) Any bank or thrift institution incorporated or organized
34 under the laws of any state;

35 (v) Any corporation organized under the provisions of 12 U.S.C.
36 Sec. 611 through 631;

37 (vi) Any agency or branch of a foreign depository as defined in
38 12 U.S.C. Sec. 3101 that is not exempt under RCW 82.04.315;

1 (vii) A production credit association organized under the federal
2 farm credit act of 1933, all of whose stock held by the federal
3 production credit corporation has been retired;

4 (viii) Any corporation or other business entity who receives
5 gross income taxable under RCW 82.04.290, and whose voting interests
6 are more than fifty percent owned, directly or indirectly, by any
7 person or business entity described in (d)(i) through (vii) of this
8 subsection other than an insurance company liable for the insurance
9 premiums tax under RCW 48.14.020 or any other company taxable under
10 chapter 48.14 RCW;

11 (ix) (A) A corporation or other business entity that receives more
12 than fifty percent of its total gross income for federal income tax
13 purposes from finance leases. For purposes of this subsection, a
14 "finance lease" means a lease that meets two requirements:

15 (I) It is the type of lease permitted to be made by national
16 banks (see 12 U.S.C. Sec. 24(7) and (10), comptroller of the currency
17 regulations, part 23, leasing (added by 56 C.F.R. Sec. 28314, June
18 20, 1991, effective July 22, 1991), and regulation Y of the federal
19 reserve system 12 C.F.R. Part 225.25, as amended); and

20 (II) It is the economic equivalent of an extension of credit,
21 i.e., the lease is treated by the lessor as a loan for federal income
22 tax purposes. In no event does a lease qualify as an extension of
23 credit where the lessor takes depreciation on such property for
24 federal income tax purposes.

25 (B) For this classification to apply, the average of the gross
26 income in the current tax year and immediately preceding two tax
27 years must satisfy the more than fifty percent requirement;

28 (x) Any other person or business entity, other than an insurance
29 general agent taxable under RCW 82.04.280(1)(e), an insurance
30 business exempt from the business and occupation tax under RCW
31 82.04.320, a real estate broker taxable under RCW 82.04.255, a
32 securities dealer or international investment management company
33 taxable under RCW 82.04.290(2), that receives more than fifty percent
34 of its gross receipts from activities that a person described in
35 (d)(ii) through (vii) and (ix) of this subsection is authorized to
36 transact.

37 (e)(i) "Specified financial institution" means a financial
38 institution that is a member of a consolidated financial institution
39 group that reported on its consolidated financial statement for the
40 previous calendar year annual net income of at least one billion

1 dollars, not including net income attributable to noncontrolling
2 interests, as the terms "net income" and "noncontrolling interest"
3 are used in the consolidated financial statement.

4 (ii) If financial institutions are no longer required to file
5 consolidated financial statements, "specified financial institution"
6 means any person that was subject to the additional tax in this
7 section in at least two of the previous four calendar years.

8 (3) The department must notify the fiscal committees of the
9 legislature if financial institutions are no longer required to file
10 consolidated financial statements.

11 (4) To aid in the effective administration of the additional tax
12 imposed in this section, the department may require a person believed
13 to be a specified financial institution to disclose whether it is a
14 member of a consolidated financial institution group and, if so, to
15 identify all other members of its consolidated financial institution
16 group. A person failing to comply with this subsection is deemed to
17 have intended to evade tax payable under this section and is subject
18 to the penalty in 82.32.090(7) on any tax due under this section by
19 the person and any financial institution affiliated with the person.

20 (5) Taxes collected under this section must be deposited into the
21 general fund.

Passed by the House April 26, 2019.

Passed by the Senate April 28, 2019.

Approved by the Governor May 21, 2019.

Filed in Office of Secretary of State May 21, 2019.

--- END ---

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

WASHINGTON BANKERS ASSOCIATION, a)
 Washington Public Benefit Corporation,)
 and AMERICAN BANKERS ASSOCIATION, a) No. 19-2-29262-8 SEA
 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.)

HEARING

The Honorable Marshall Ferguson Presiding

May 8, 2020

TRANSCRIBED BY: Reed Jackson Watkins
 Court-Certified Legal Transcription
 206.624.3005

A P P E A R A N C E S

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On Behalf of Plaintiffs:

ROBERT M. MCKENNA

DANIEL J. DUNNE

Orrick, Herrington & Sutcliffe LLP

701 Fifth Avenue, Suite 5600

Seattle, Washington 98104

On Behalf of Defendants:

CHARLES ZALESKY

CAMERON G. COMFORT

JEFFREY T. EVEN

Attorney General of Washington - Revenue and Finance Division

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Olympia, Washington 98504

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1 example, which hasn't -- in this example, this statute which
2 discriminates on its face both as to out-of-state
3 participants and by tying the surtax to the degree of
4 economic activity contacted out of state, it's facially
5 discriminatory and per se illegal and should be held
6 unconstitutional.

7 THE COURT: All right. Thank you.

8 And now -- that will be the last word. If the parties
9 will give me a moment here. Let me go back through my
10 notes.

11 All right. Preliminarily addressing the motion -- the
12 judicial notice motion, I'm finding the materials admissible
13 under ER 1006. So I'm not going to take judicial notice of
14 the materials, but I think that resolves that request.

15 Turning to the commerce clause issue, I conclude that the
16 statute is not facially discriminatory. It does, however,
17 have a discriminatory effect. I also conclude that it is or
18 was discriminatory in purpose based upon the legislative
19 record before the Court.

20 I don't find a violation of the internal consistency test
21 necessarily -- or at least I don't find that issue
22 persuasive. But because I do find that the surtax statute
23 is discriminatory in effect and purpose, I conclude that it
24 does violate the Dormant Commerce Clause and grant summary
25 judgment to the plaintiffs on their declaratory judgment

1 action.

2 Let's see, I know I'm not going to be the last word on
3 this and I know that there were significant authorities that
4 both sides cited that were helpful to their arguments and,
5 frankly, I'm eager myself to see how the rest of this case
6 plays out in the appellate courts if and when that happens.
7 But that's my ruling.

8 Do the parties need any clarification? I did see proposed
9 orders. Do the parties want me to rely on those or do you
10 have updated proposed orders?

11 MR. DUNNE: Your Honor, we submitted a proposed order with
12 reasoning, and I think we should probably revise that to be
13 a simple proposed order that grants the plaintiffs' motion
14 and denies the defendants' motion, unless you would like an
15 order with reasoning. But if you would let us know your
16 preference on that.

17 THE COURT: Sure. And it raises a good point. To clarify
18 for the record, I granted the plaintiffs' motion for summary
19 judgment. I'm also denying the defendants' motion for
20 summary judgment.

21 If you want to confer on a proposed order and submit it,
22 that's fine. Hopefully that -- there will not be a dispute
23 about the form and content. I think my rulings were pretty
24 clear, but I really don't want to have to come back to have
25 another teleconference about what exactly I ordered. So if

1 there are -- if any party needs clarification on my rulings,
2 I'd like to try to resolve that now.

3 Mr. Zalesky, any thoughts?

4 MR. ZALESKY: We do not need clarification. This is not
5 something I discussed with the opponents, but one option, if
6 the Court is inclined and the other side is okay with it, is
7 to take the proposed order the State submitted and just
8 switch. Because we did not have any sort of findings or
9 anything like that in the analysis, it was just granting for
10 the State, denying for the plaintiffs. It's probably going
11 to inter-delineate the result, and I think we're good to go.
12 Alternatively, we can work on a proposed order that is --
13 doesn't have any inter-delineation in it.

14 THE COURT: All right. I'm fine to let the parties hash
15 it out. If we reach an -- or if you reach some kind of
16 impasse, then I'll figure out whether I just want to enter a
17 simple granted/denied order or whether there's some other
18 substantive things that should be added. So go ahead and
19 confer on an order, and I'm available to resolve or address
20 any disputes if they arise.

21 MR. DUNNE: Thank you, Your Honor. We'll get an order to
22 you next week.

23 THE COURT: All right. Thank you, Counsel.

24 THE CLERK: All rise. The court is adjourned.

25 (Conclusion of hearing)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand
this 29th day of May, 2020.

Bonnie Reed

Bonnie Reed, CET

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

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

10 Plaintiffs,

11 v.

12 STATE OF WASHINGTON,
13 DEPARTMENT OF REVENUE OF THE
STATE OF WASHINGTON, and VIKKI
14 SMITH, as Director of the Department of
Revenue of the State of Washington,

15 Defendants.
16

Case No. 19-2-29262-8 SEA

**ORDER GRANTING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Hon. Marshall Ferguson

17 THIS MATTER came on for hearing on the parties' motions for summary judgment. Jeffrey
18 T. Even, Deputy Solicitor General, Cameron G. Comfort, Senior Assistant Attorney General, and
19 Charles Zalesky, Assistant Attorney General, represented the Defendants. Robert M. McKenna,
20 Daniel J. Dunne, and Christine Hanley of the firm Orrick, Herrington & Sutcliffe LLP represented the
21 Plaintiffs. The following documents were called to the attention of the Court:

- 22 1. Plaintiffs' Motion for Summary Judgment (Dkt. 24);
23 2. Declaration of Christine Hanley in Support of Plaintiffs' Motion for Summary
24 Judgment, with attached Exhibits A through E (Dkt. 35);
25 3. Declaration of John P. Kinsella in Support of Plaintiffs' Motion for Summary
26 Judgment, with attached Exhibit A as substituted by *praecipe* filed April 27, 2020
27 (Dkt. 30 and 49);

28 ORDER GRANTING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT
19-2-29262-8 SEA

- 1 -

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4. Defendants' Motion for Summary Judgment (Dkt. 22);
5. Declaration of Charles Zalesky in Support of Defendants' Motion for Summary Judgment, with attached Exhibits 1 and 2 (Dkt. 23);
6. Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 41);
7. Declaration of Christine Hanley in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, with attached Exhibit A (Dkt. 42);
8. Declaration of Beth A. Adams in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 43);
9. Declaration of Warrenetta Baker in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 44);
10. Declaration of Andrew T. Gardner in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 45);
11. Declaration of William L. McNairy in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 46);
12. Declaration of Rebecca Paulsen in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 47);
13. Declaration of Gary Schulman in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment (Dkt. 48);
14. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. 40);
15. Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment (Dkt. 51); and
16. Defendants' Reply in Support of Defendants' Motion for Summary Judgment (Dkt. 53).

The Court having considered the documents filed by the parties in support of and in opposition to the parties' motions for summary judgment and having heard oral argument on May 8,

ORDER GRANTING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT
19-2-29262-8 SEA

- 2 -

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2020, and being otherwise fully advised, finds that there are no genuine issues of material fact in dispute and that the Plaintiffs are entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS HEREBY ORDERED that

1. Plaintiffs' Motion for Summary Judgment is GRANTED.
2. Defendants' Motion for Summary Judgment is DENIED.
3. Judgment shall be entered in favor of Plaintiffs and against Defendants.

IT IS SO ORDERED.

DATED, May 15, 2020.


The Honorable Marshall Ferguson

1 Presented by:

2 ORRICK, HERRINGTON & SUTCLIFFE LLP

3 By: s/Robert M. McKenna

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15 *Association and American Bankers Association*

16 Notice of presentation Waived; approved as to form:

17 ROBERT W. FERGUSON

18 Attorney General

19 By: s/Charles Zalesky

20 Jeffrey T. Even (WSBA# 20367)

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29 *Attorneys for Defendants State of Washington,*

30 *Department of Revenue of the State of Washington,*

31 *and Vikki Smith*

32 ORDER GRANTING PLAINTIFFS' MOTION FOR

33 SUMMARY JUDGMENT

34 19-2-29262-8 SEA

- 4 -

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

7 WASHINGTON BANKERS
8 ASSOCIATION, a Washington Public
9 Benefit Corporation, and AMERICAN
10 BANKERS ASSOCIATION, a District of
11 Columbia Non-Profit Corporation,

12 Plaintiffs,

13 v.

14 STATE OF WASHINGTON,
15 DEPARTMENT OF REVENUE OF THE
16 STATE OF WASHINGTON, and VIKKI
17 SMITH, as Director of the Department of
18 Revenue of the State of Washington,

19 Defendants.

Case No. 19-2-29262-8 SEA

JUDGMENT

Hon. Marshall Ferguson

20 THIS MATTER came on for hearing on Plaintiffs' Motion for Summary Judgment (Dkt. 24)
21 and Defendants' Motion for Summary Judgment (Dkt. 22) on May 8, 2020. Upon considering the
22 documents filed by the parties in support of and in opposition to the motions for summary judgment
23 and hearing the arguments by counsel, the Court rendered an oral decision granting Plaintiffs' Motion
24 for Summary Judgment and denying Defendants' Motion for Summary Judgment. Following oral
25 argument, the Court entered an Order Granting Plaintiffs' Motion for Summary Judgment and
26 Denying Defendants' Motion for Summary Judgment (the "Order").

27 Consistent with its oral decision and the Order, and Court enters judgment as follows:

SUMMARY OF JUDGMENT

- 28 1. Amount of Judgment: -0-

1 **DECLARATORY JUDGMENT**

2 Pursuant to the Uniform Declaratory Judgment Act, the Court ADJUDGES AND
3 DECLARES RCW 82.04.29004 to be illegal, invalid, and unenforceable because it discriminates in
4 effect and in purpose against interstate commerce in violation of the dormant Commerce Clause of
5 the United States Constitution.

6 IT IS SO ORDERED.

7 DATED, May 15, 2020.

8
9 
10 The Honorable Marshall Ferguson

11
12 Presented by:

13 ORRICK, HERRINGTON & SUTCLIFFE LLP

14 By: s/Robert M. McKenna

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26 *Association and American Bankers Association*

1 Notice of presentation Waived; approved as to form:

2
3 ROBERT W. FERGUSON
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5 Jeffrey T. Even (WSBA# 20367)
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12 *Attorneys for Defendants State of Washington,*
13 *Department of Revenue of the State of Washington,*
14 *and Vikki Smith*

25
26
27
28 JUDGMENT
19-2-29262-8 SEA

- 3 -

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

7 WASHINGTON BANKERS
8 ASSOCIATION, a Washington Public
9 Benefit Corporation, and AMERICAN
10 BANKERS ASSOCIATION, a District of
11 Columbia Non-Profit Corporation,

12 Plaintiffs,

13 v.

14 STATE OF WASHINGTON,
15 DEPARTMENT OF REVENUE OF THE
16 STATE OF WASHINGTON, and VIKKI
17 SMITH, as Director of the Department of
18 Revenue of the State of Washington,

19 Defendants.

Case No. 19-2-29262-8 SEA

**ORDER DENYING DEFENDANTS'
MOTION FOR RECONSIDERATION**

Hon. Marshall Ferguson

20 THIS MATTER came before the Court on Defendants' Motion for Reconsideration. The
21 Court, having reviewed:

- 22 1. Defendants' Motion for Reconsideration;
- 23 2. Declaration of Kathy L. Oline in Support of Defendants' Motion for Reconsideration,
24 with attached Exhibit 1 thereto;
- 25 3. Plaintiffs' Response in Opposition to Defendants' Motion for Reconsideration;
- 26 4. Declaration of Christine Hanley in Support of Plaintiffs' Response in Opposition to
27 Defendants' Motion for Reconsideration, with attached Exhibit A thereto; and
- 28 5. Defendants' Reply in Support of Motion for Reconsideration,

//

//

1 and being otherwise fully advised, now therefore, it is hereby ORDERED:

2 Defendants' Motion for Reconsideration is DENIED.

3 DATED this 15th day of June, 2020.

4
5 _____
6 The Honorable Marshall Ferguson
7

8 Presented by:

9 ORRICK, HERRINGTON & SUTCLIFFE LLP

10 By: s/Robert M. McKenna

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21 *Attorneys for Plaintiffs Washington Bankers*
22 *Association and American Bankers Association*
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King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-29262-8
Case Title: WASHINGTON BANKERS ASSN ET ANO VS STATE OF
WASHINGTON ET AL
Document Title: ORDER DENYING DFS' MOT FOR RECONSID'N

Signed by: Marshall Ferguson
Date: 6/15/2020 2:08:34 PM

digitally signed

Judge/Commissioner: Marshall Ferguson

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: B88EACA7786863768FCA129AD82B6B4E0EBDF7D5
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O=KCDJA, CN="Marshall Ferguson:
/p2rEAvS5hG0hN/2AFk6yQ=="

SOLICITOR GENERAL OFFICE

July 27, 2020 - 4:18 PM

Transmittal Information

Filed with Court: Supreme Court
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