No. 21-1066

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE INSTITUTE FOR PROFESSIONALS IN TAXATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

KYLE O. SOLLIE
Counsel of Record
MICHAEL I. LURIE
MATTHEW L. SETZER
REED SMITH LLP
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8852
ksollie@reedsmith.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

The Institute for Professionals in Taxation (IPT) is a non-profit educational organization founded in 1976.[1] IPT serves more than 6,000 members, representing approximately 1,200 corporations, firms, and taxpayers throughout the United States and Canada. IPT's membership includes small businesses as well as most of the Fortune 1000 companies, and represents the spectrum of business and industry sectors, including agriculture, manufacturing, retail, communications, finance, transportation, and energy. IPT is dedicated to promoting the uniform and equitable administration of state and local taxation, minimizing the costs of tax administration and compliance, and promoting equitable and non-discriminatory taxation of multistate businesses.

Although this Court's precedent applies a "virtually *per se*" rule barring facially neutral state laws with discriminatory effects on interstate commerce, the lower courts have struggled to determine whether a given state law has a discriminatory effect. This case presents one such instance where a state law that is neutral on its face imposes a burden that falls almost exclusively on out-of-state businesses, yet the state court found that the law does not have a discriminatory effect.

In particular, Washington State—which does not have a substantial number of large financial institu-

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[1] Pursuant to Supreme Court Rule 37.6, IPT states that no counsel for a party authored this brief in whole or in part and that no person other than IPT or IPT's counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, IPT states that Petitioner and Respondent have consented, in writing, to IPT's filing of this *amicus* brief.

tions located in-state—has enacted a surtax on the receipts of any financial institution, if the financial institution has more than $1 billion of worldwide net income. The record in this case shows that the Washington legislature designed the surtax to use a financial institution's worldwide net income as a proxy for whether the financial institution is engaged in interstate commerce; as a result, the surtax applies almost exclusively to out-of-state financial institutions. Despite this damning evidence, the Washington Supreme Court held that the surtax does not have a discriminatory effect on interstate commerce.

This case happens to involve a surtax on financial institutions, but the underlying principles are important to all of IPT's members. If Washington is permitted to impose a surtax that has the effect of almost exclusively targeting out-of-state financial institutions (operating in interstate commerce), other States will be enticed to enact facially neutral taxes that exclusively target out-of-state businesses. Indeed, IPT has observed a troubling trend of State legislatures proposing and enacting such taxes in recent years.

In order to stop this trend, IPT urges this Court to grant the petition for certiorari and to clarify that a state law that targets almost exclusively out-of-state businesses has a discriminatory effect on interstate commerce.

SUMMARY OF THE ARGUMENT

The question presented in the petition is whether a Washington tax statute, that does not explicitly name out-of-state businesses as its target but has the effect of discriminating against those businesses because they operate in interstate commerce, violates the dormant Commerce Clause. This question extends

beyond the field of state taxation. The question can implicate any regulation of a business's activity.

Courts have struggled with applying a consistent rule to statutes that are facially neutral, but use some variable as a proxy to discriminate against interstate commerce. That struggle stems from confusion over this Court's decisions in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In *Hunt*, this Court found that a North Carolina regulation that had the effect of "burdening interstate sales of Washington apples" by Washington apple growers was per se invalid. 432 U.S. at 350. Because North Carolina could not meet its burden of justifying the discriminatory effect, this Court held that the regulation violated the Commerce Clause.

By contrast, in *Exxon* this Court upheld a state statute that prohibited oil producers and refiners from owning gas stations, even though the prohibition only affected out-of-state businesses. Due to confusion over the scope of *Exxon*, the lower courts have struggled to apply a consistent rule to statutes that discriminate in this way.

This case provides a good vehicle for this Court to clarify that a facially neutral state law that, in effect, imposes a burden almost exclusively on businesses operating in interstate commerce discriminates against interstate commerce. The record in this case establishes that the Washington surtax disproportionately falls on out-of-state businesses: "99.74% of surtax revenue comes from institutions based out of state; 98% of financial institutions subject to the surtax have their principal places of business outside of Washington State; and 100% of the entities paying the surtax are subject to it only because they are affiliated

with extensive interstate banking networks." Pet. at 2. Moreover, the record shows that Washington enacted the surtax because the surtax "would not affect local banks" and would put out-of-state banks at a competitive disadvantage. App. at 31 n.7. Thus, contrary to the Washington Supreme Court's decision below, there is no doubt that Washington's surtax has the effect of discriminating against interstate commerce. Washington has not proffered a credible, non-discriminatory purpose for the surtax, so Washington cannot justify the discriminatory effect of the surtax.

The need for review is urgent in this case. In recent years, several State legislatures have proposed or enacted facially neutral laws with discriminatory effects, similar to Washington's surtax. Allowing the Washington Supreme Court's decision in this case to stand will embolden the States. The Court should grant certiorari in order to stop the unfortunate trend of discriminatory state laws in its tracks.

ARGUMENT

I. A State law that is facially neutral, but that has the practical effect of discriminating against interstate commerce, is "virtually *per se* invalid."

This Court has long held that State laws that are facially neutral, but that have the practical effect of discriminating against interstate commerce, are "virtually *per se* invalid." *See Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see, e.g.*, *Best & Co. v. Maxwell*, 311 U.S. 454, 457 (1940) (striking North Carolina statute that levied flat fee on merchants who display samples in rented rooms); *Brimmer v. Rebman*, 138 U.S. 78, 82–83 (1891) (striking Virginia statute that required local inspection for

meat that was shipped more than 100 miles because it disadvantaged out-of-state abattoirs); *Robbins v. Shelby Cnty. Taxing Dist.*, 120 U.S. 489 (1887) (striking Tennessee law that imposed a tax on "drummers" because the tax fell more heavily in interstate commerce). The prohibition on facially neutral state laws with discriminatory effects remains a key component of Commerce Clause doctrine that shelters interstate commerce from economic protectionism. *See generally* Brannon P. Denning, Bittker on the Regulation of Interstate and Foreign Commerce § 6.06[A][2][a] (2nd Ed. 2022–1 Cum. Supp.). If a State enacts a facially neutral law that has the practical effect of discriminating against interstate commerce, the State bears the burden of proving that the discriminatory harm is justified by a nondiscriminatory purpose that cannot be achieved through nondiscriminatory means. *Hughes v. Oklahoma*, 441 U.S. 322, 337–38 (1979).

The seminal modern case analyzing a facially neutral state law with a discriminatory effect is *Hunt v. Washington State Apple Advertising Commission*, which involved a challenge to a North Carolina regulation that required closed containers of apples to bear only the federal grade of the apples. 432 U.S. 333 (1977). On its face, the North Carolina statute seemed to display no geographic animus because apples from all states were ostensibly treated the same. The problem was that Washington State ran its own "inspection and grading system" that was independent of the federal grading system. *Id.* at 338. Apples grown in Washington were regularly shipped in preprinted containers that displayed the Washington grade in addition to the federal grade, and at the time of packaging "the ultimate destination of" a given container of apples was unknown. *Id*.

As a result of the North Carolina regulation, Washington apple growers that shipped apples into North Carolina were forced to modify their practices, either by forgoing a Washington grade altogether, "manually obliterat[ing] the Washington grades from closed containers to be shipped to North Carolina at a cost of from 5 to 15 cents per carton," "repacking apples" into containers, or "abandoning the use of preprinted containers entirely." *Id*. at 347. North Carolina did not have its own grading system, so North Carolina apple growers were not burdened by the North Carolina statute. The burden and costs of North Carolina's regulation thus fell exclusively on out-of-state businesses.

The Court held that although North Carolina's statute appeared facially neutral, it had "the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them." *Id*. at 350. The Court found it significant that North Carolina's regulation had been adopted at the urging of in-state apple producers and raised the cost of doing business on out-of-state apple growers. *See id.* at 352.

North Carolina attempted to justify its labeling requirement by arguing that it reduced the potential for consumer confusion based on inconsistent grading standards, but the Court found that this was insufficient to justify the discriminatory effect of its statute. *See id.* at 353–54. The Court explained that when a facially neutral state law has a discriminatory effect on interstate commerce, "the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Id*. at 353; *see also C&A*

Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 393 (1994) (stating justifications for discriminatory statutes "must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the local problem"); *Maine v. Taylor*, 477 U.S. 131 (1986) (holding State statute banning import of bait fish justifiable when it was the only way to prevent importation of parasites). The Court was skeptical that the regulation provided any benefit to consumers, as it noted that consumers generally do not buy apples in the closed containers that were regulated. *See Hunt*, 432 U.S. at 353. As the State did not carry its heavy burden of justifying the regulation's discriminatory effect, the Court held that the regulation violated the Commerce Clause. *Id.*

Hunt shows that a state cannot use a criterion that seems neutral on its face, such as whether a container of apples displays a grade other than the federal grade, as a proxy to discriminate against interstate commerce. As the Court explained, the use of a seemingly neutral criterion can have the "practical effect" of targeting only businesses engaged in interstate commerce and enabling discrimination; for example, by prohibiting the use of apple grades other than the federal grade, North Carolina was able to "insidiously" discriminate against interstate commerce creating a burden that fell exclusively on out-of-state businesses. *Hunt*, 432 U.S. at 351.

In determining whether a state law has a discriminatory effect on interstate commerce, it is irrelevant whether the state law has a negative effect on some in-state businesses. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951). Rather, the analysis looks to whether a law "erect[s] an economic barrier protecting a major local industry against competition from

without the State." *Id*. at 354. For example, in *Dean Milk* the Court struck a Madison, Wisconsin ordinance that prohibited the sale of pasteurized milk, unless the milk was "processed and bottled at an approved pasteurization plant within a radius of five miles from" Madison even though the ordinance also impacted in-state milk producers in other regions of Wisconsin. *Id.* at 350. The Court has explained that "[t]he fact that the ordinance" in *Dean Milk* "also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate its burden on interstate commerce." *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 362–63 (1992).

II. The lower courts have struggled to determine whether a facially neutral statute has a discriminatory effect.

Although the Commerce Clause prohibits facially neutral state laws that have the practical effect of discriminating against interstate commerce, lower courts have struggled to determine if a given state law has a discriminatory effect on interstate commerce. In particular, the lower courts have had difficulty determining whether—and when—discrimination by proxy violates the Commerce Clause. Pet. at 10–19; *see generally* Note, *The Dormant Commerce Clause "Effect": How the Difficulty in Reconciling* Exxon *and* Hunt *Has Led to A Circuit Split for Challenges to Laws Affecting National Chains*, 91 Wash. L. Rev. 1895 (2016).

The lower courts' difficulty stems from this Court's decision in *Exxon Corp. v. Governor of Maryland*. 437 U.S. 117 (1978). The Court decided *Exxon* just a year after *Hunt*, but in *Exxon* it upheld a law that had a disproportionate impact on out-of-state businesses.

In *Exxon*, out-of-state refiners brought a Commerce Clause challenge to a Maryland statute that prohibited oil producers and refiners from owning gas stations. *Id.* at 119–20. As the refiners pointed out, there were no in-state oil producers or refiners so the Maryland statute almost exclusively impacted out-of-state businesses. *See id.* at 125. According to the out-of-state refiners, this meant the Maryland statute was looking to whether a gas station was owned by an oil producer or refiner as a proxy for interstate commerce, as prohibited by *Hunt*. *See id*.

The Court in *Exxon* found that Maryland's statute was distinguishable from North Carolina's apple regulation because the Maryland statute did "not prohibit the flow of interstate goods, place added costs upon them, or distinguish[] between in-state and out-of-state companies in the retail market." *Id*. at 126. As the Court explained, "[t]he fact that the burden" of the Maryland statute fell "on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Id*.

Furthermore, there was substantial evidence that the Maryland legislature had enacted the statute to solve a problem that had arisen during the 1973 oil shortage rather than to discriminate against out-of-state businesses. During the oil shortage, gas "stations operated by producers or refiners had received preferential treatment during the period of short supply." *Id*. at 121. The State conducted a study, and determined that the best way to level the playing field for all gas stations was ensuring equal access to gas during a crisis—thus justifying the statute's discriminatory effect. *See id.*

Justice Blackmun dissented in *Exxon*. Justice Blackmun was concerned that the Court's decision in

Exxon could allow states "to insulate in-state interests from competition by identifying the most potent segments of out-of-state business, banning them, and permitting less effective out-of-state actors to remain." *Id*. at 147 (Blackmun, J., dissenting). If this were to happen, then "effective out-of-state competition" would be "emasculated." *Id*. (Blackmun, J., dissenting). According to Justice Blackmun, *Exxon* thus enabled States to conduct "ingenious discrimination." *Id*. (Blackmun, J., dissenting).

Unfortunately, Justice Blackmun's dissent in *Exxon* turned out to be prophetic. Many States—including Washington in this case—have treated *Exxon* as a license to discriminate against out-of-state businesses as long as they are, as Justice Blackmun said, "ingenious" about it. The ingenuity lies in choosing a proxy that hides any explicit discrimination in the statutory text itself while simultaneously maximizing the harm on interstate commerce and minimizing the harm on intrastate commerce.

The States, in their ingenuity, have found many proxies that allow them to target and discriminate against interstate commerce through facially neutral statutes. Courts have found that States have unconstitutionally targeted and discriminated against interstate commerce using proxies such as: the sulfur content of coal, *Mapco, Inc. v. Grunder*, 470 F. Supp. 401 (N.D. Ohio 1979); the length of fishing vessels, *Atlantic Prince, Limited v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1989); area codes of commercial phone numbers, *State ex rel. Brady v. Preferred Florist Network, Inc.*, 791 A.2d 8, 19 (Del. Ch. 2001); design features of stores, *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008); grandfather clauses that favor existing businesses, *Walgreen*

Co. v. Rullan, 405 F.3d 50 (1st Cir. 2005); and the size of a winery, *Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010).

Although some courts have struck state laws that use proxies to target and discriminate against interstate commerce in violation of the Commerce Clause, other courts have found that nearly identical state laws do not discriminate against interstate commerce. This phenomenon is perhaps best illustrated by a pair of cases involving state laws that restricted the use of large fishing boats in state waters.

In *Atlantic Prince, Limited v. Jorling*, a district court found that New York discriminated against out-of-state fishing vessels by prohibiting vessels longer than ninety feet from fishing in New York's waters. 710 F. Supp. 893 (E.D.N.Y. 1989). On its face, New York's rule only prohibited vessels of a certain length, with no express reference to the berthing location of the vessel or the residence of the vessel's owner or operator. However, the court recognized that New York's rule had the practical effect of discriminating against interstate commerce because fishing boats based in New York were typically smaller than ninety feet, while fishing boats based outside New York were typically larger than ninety feet. *See id*. at 897 (citing legislator statement noting that proposed legislation for the ninety foot length requirement "would not present a problem for New York residents"). Accordingly, the court found that the statute was "clearly . . . discriminatory in practical effect" and applied strict scrutiny to the length restriction. *Id*. at 898–99. Moreover, the court rejected the state's purported interest of "conservation and preservation" of fish in the New York waters. *Id*. at 899. The court found little evidence that New York actually sought to

preserve its fish population. Therefore, the court found that New York's length restriction violated the Commerce Clause.

By contrast, in *Davrod Corp. v. Coates*, the First Circuit upheld a Massachusetts law that prohibited the use of fishing boats larger than 90 feet. 971 F.2d 778, 781 (1st Cir. 1992). The court found that Massachusetts' statute did not discriminate against interstate commerce. The court found the restriction burdened "interstate transactions only incidentally" since it "applies to all fishing vessels, wherever berthed." *Id.* at 789. Thus, rather than requiring the State "to justify" the restriction "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake," *Hunt*, 432 U.S. at 353, the court instead placed the burden on the private party to prove that the impact of the restriction on interstate commerce was "clearly excessive in relation to the putative local benefits" under this Court's *Pike*-balancing test. *Davrod Corp.*, 971 F.2d at 787 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). The court found that the private party had not borne this burden, and as a result, upheld the statute. *See id.* at 790.

Atlantic Prince and *Davrod Corp.* involved nearly identical state laws and records, but reached different conclusions. *See id.* at 797 n.26 (Coffin, J., dissenting) (explaining that *Atlantic Prince* was "indistinguishable in any meaningful way from" *Davrod Corp.* because both cases involved a state law that "was neutral on its face, but adversely affected out-of-state boats ('almost exclusively')"). This is emblematic of the confusion permeating the lower courts on the proper application of *Hunt* to facially neutral state

laws that use proxies to target and discriminate against out-of-state businesses.

III. This case provides a good vehicle for the Court to clarify that a facially neutral state law that imposes a burden almost exclusively on out-of-state businesses has a discriminatory effect on interstate commerce, and that a State bears the burden of justifying such a law.

This case provides another instance where a facially neutral state law used a proxy to target out-of-state businesses, yet the lower court found that the statute does not discriminate against interstate commerce. The law at issue in this case is a Washington surtax on "specified financial institutions," which are defined as financial institutions with more than $1 billion in global net income. Revised Code of Washington 82.04.29004. A financial institution subject to this surtax must pay nearly double the tax that another financial institution would pay to Washington, and thus substantially increases the cost for a large financial institution to do business in Washington.

Just like the regulation at issue in *Hunt*, Washington's surtax on large financial institutions appears neutral on its face—it applies to any financial institution based on its worldwide income regardless of where the financial institution is located, just as the regulation in *Hunt* applied to apple producers based on labeling regardless of where they were located. But there is no doubt that Washington's surtax uses the size of a financial institution as a proxy for out-of-state commerce, just as North Carolina's regulation used labeling as a proxy. As Petitioners have shown, "99.74% of surtax revenue comes from institutions based out of state; 98% of financial institutions subject

to the surtax have their principal places of business outside of Washington State; and 100% of the entities paying the surtax are subject to it only because they are affiliated with extensive interstate banking networks." Pet. at 2.[2] Furthermore, the record showed that the surtax was enacted because it "would not affect local banks and would in fact help increase their competitiveness with big banks." App. at 31 n.7 (internal quotations omitted). And Washington has offered no evidence that "local benefits flowing from the statute" outweigh the harm from the discrimination or that "nondiscriminatory alternatives adequate to preserve the local interests at stake" are unavailable, as required by this Court's precedent in order to justify a facially neutral state law with a discriminatory effect. *Hunt*, 432 U.S. at 353.[3]

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[2] The fact that Washington's surtax applies to a small number of financial institutions with their principal places of business in Washington does not render the surtax nondiscriminatory. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951).

[3] The Washington Legislature's stated purpose for enacting the surtax was to raise revenue from banks in order to reduce the tax burden on middle-income families. SHB 2167 of 2019. But this stated purpose is not credible. In fact, the surtax's exemption for financial institutions with $1 billion or less in worldwide net income actually runs contrary to this stated purpose because it reduces the State's revenue. And contrary to the Washington Supreme Court's analysis, the surtax does not implement progressive taxation on banks because the surtax is imposed on a bank's gross receipts rather than its net income. *See* App. at 27–28. Due to the surtax, a large multinational bank with low margins would be subject to a higher Washington tax rate than a small Washington bank with high margins, despite the fact that the Washington bank is more profitable. *See United States Glue Co. v. Oak Creek*, 247 U.S. 321, 329 (1918) (observing that, unlike a net income tax, a gross receipts tax can completely "impede or

Based on this substantial evidence of discrimination, the Washington Superior Court (the trial court in this matter) held that Washington's surtax had a discriminatory effect on interstate commerce and enjoined its enforcement. App. at 5, 54–57. As Judge Ferguson of the Superior Court pointed out at oral argument, Washington's surtax would invite retaliation and duplication from other States if allowed to stand. *Washington Bankers Association v. State of Washington*, No. 19-2-29262-8 SEA, Hearing Transcript at 35 (Wash. Super. Ct. May 8, 2020). Judge Ferguson explained that if Washington is allowed to impose a surtax on large financial institutions, which are primarily headquartered in other states, "other states could" enact similarly discriminatory taxes to "target a large Washington industry." *Id.* For example, another State could enact a surtax on "an espresso company," a technology company, or an airplane manufacturer "with net global sales in excess of a billion dollars." *Id.* Such a surtax would have the practical effect of targeting businesses based in Washington, just as Washington's surtax has the practical effect of targeting businesses based outside Washington.[4]

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discourage the conduct of" commerce by making a profitable activity unprofitable).

[4] Judge Ferguson's observation has turned into reality. Maryland has recently enacted a tax on large providers of digital advertising services, Md. Code Ann. Tax-Gen. § 7.5-102, which has a disproportionate impact on technology businesses that are based outside Maryland. *See* Plaintiffs' Consolidated Opposition to Motion to Dismiss and Memorandum in Support of Cross-Motion for Summary Judgment, *Chamber of Commerce of the United States v. Franchot*, No. 1:21-cv-410-DKC (D. Md. July 29, 2021), Doc. No. 31-1.

The Washington Supreme Court granted direct review, and reversed and upheld the surtax. According to the Washington Supreme Court, a person challenging a facially neutral state law "must show the burdens imposed on interstate commerce clearly outweigh the local benefits arising from it." App. at 39. The Washington Supreme Court cited *Exxon* for the proposition that a state law is permissible "when such laws mainly and even *solely* apply to out-of-state interests." App. at 11. The court found that under *Exxon* a facially neutral state law is permissible unless it "prohibit[s] the flow of interstate goods, place[s] added costs on interstate goods, or distinguish[es] between in-state and out-of-state companies in the retail market." App. at 13. Although the surtax increased the cost for out-of-state financial institutions to do business in Washington, App. at 16, the court explained that the surtax was permissible because it did not "prevent financial institutions from entering or operating in Washington" and "it does not prohibit the flow of interstate goods or distinguish between in-state and out-of-state companies in the retail market." App. at 14.[5] The Washington Supreme

[5] The Washington Supreme Court also relied on *Commonwealth Edison Co. v. Montana* for the proposition that a state tax that has a "disparate economic effect" on interstate commerce is permissible, "even when a challenged tax affected *only* out of-state interests." App. at 14. However, *Commonwealth Edison* recognized only that facially neutral state laws that impose an additional cost that falls directly on in-state businesses are permissible, even if in-state businesses then pass the burden of complying with the state law on to out-of-state businesses. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618–20 (1981). Unlike the tax at issue in *Commonwealth Edison*, Washington's surtax is imposed directly on out-of-state financial institutions, so this limited exception does not save Washington's surtax. *See* Pet. at 25 n.8.

Court also found that "raising the cost of doing business alone does not show a discriminatory effect." App. at 16.

The Washington Supreme Court's decision misconstrues *Exxon*, and is in clear tension with this Court's decision in *Hunt*. Washington's surtax on large financial institutions indisputably has a disproportionate effect on out-of-state businesses, see Pet. at 2, and the record suggests that the surtax's $1 billion income threshold was designed to give local banks a competitive advantage against out-of-state banks. App. at 31 n.7. The Washington Supreme Court's conclusion that the surtax does not have a discriminatory effect, even though it falls almost exclusively on out-of-state businesses operating in interstate commerce, is difficult to reconcile with *Hunt*. Furthermore, the fact that the surtax "rais[es] the cost of doing business" for businesses operating in interstate commerce, App. at 16, does show that the surtax has a discriminatory effect. *See Hunt*, 432 U.S. at 351; *see also Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1011 (W.D. Mo. 1998) ("A statute has a discriminatory effect if it raises the cost of doing business for out-of-state producers but does not raise the cost for in-state producers."); *Connecticut Carting Co. v. Town of E. Lyme*, 946 F. Supp. 152, 156 (D. Conn. 1995) ("An ordinance which raises costs of out-of-state business, without affecting others, has a discriminatory effect."). *But see Nat'l Pork Producers Council v. Ross*, 6 F. 4th 1021, 1032 (9th Cir. 2021) ("For dormant Commerce Clause purposes, laws that increase compliance costs, without more, do not constitute a significant burden on interstate commerce."), *petition for cert. pending*, No. 21-468 (filed Sept. 27, 2021).

The Court should grant the petition in this case to resolve the confusion that *Exxon* has spawned in the lower courts. This case provides the Court with a good vehicle to provide such clarification. In effect, and by design, Washington's surtax falls almost exclusively on out-of-state financial institutions, and, Washington has proffered no credible, non-discriminatory purpose for the surtax. Therefore, this case will give the Court a clean opportunity to resolve the confusion in the lower courts over the proper application of *Hunt* and *Exxon*.

This is an ideal time to provide this clarification. In recent years, IPT has observed a troubling trend of State legislatures proposing facially neutral laws with discriminatory effects. In particular, several States have proposed or enacted taxes on large providers of digital advertising services that are facially neutral but have a discriminatory effect on interstate commerce. Md. Code Ann. Tax-Gen. § 7.5-102; Mass. H.B. 2894 of 2022; N.Y. S. 1124 of 2021; Tex. H.B. 4467 of 2021; W.Va. S.B. 605 of 2021. There is no indication that the States will voluntarily choose to limit these discriminatory taxes to financial institutions and digital advertising services, and States could enact similar discriminatory taxes against various industries that are not conducted uniformly throughout the nation (such as agriculture, manufacturing, retail, telecommunications, finance, hospitality, transportation, and energy).

Allowing the Washington Supreme Court's decision in this case to stand will embolden the States and may lead to the "economic Balkanization" anathema to the Commerce Clause. *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 548 (2015). However, by granting certiorari in this case and reaffirming that

facially neutral state laws that impose burdens almost exclusively on out-of-state businesses are "virtually *per se* invalid," the Court can stop this unfortunate trend of discriminatory state laws in its tracks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KYLE O. SOLLIE
Counsel of Record
MICHAEL I. LURIE
MATTHEW L. SETZER
REED SMITH LLP
1717 Arch Street, Suite 3100
Philadelphia, PA 19103
(215) 851-8852
ksollie@reedsmith.com

Counsel for Amicus Curiae

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