No. 19-136

IN THE

Supreme Court of the United States

SABAN RENT-A-CAR, LLC, ET AL.,

Petitioners,

v.

ARIZONA DEPARTMENT OF REVENUE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The dormant Commerce Clause prohibits states from enacting laws regulating commerce that "fall by design" on nonresidents in a "predictably disproportionate way." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 579 (1997). Yet Ariz. Rev. Stat. § 5-839 authorizes a tax on car rentals in Maricopa County that was deliberately designed to force nonresidents to bear a share of the taxation burden out of proportion to their use of rental cars—through exemptions covering the types of rental vehicles residents typically use and the reasons they typically rent. The Arizona Supreme Court disregarded the unambiguous and unrebutted evidence of the tax's protectionist purpose because it found that the tax did not have a disproportionate effect on nonresidents. And it found this solely because the tax was levied on, and paid by, rental car companies rather than the nonresidents themselves.

Accordingly, the Questions Presented are:

1. Whether a car-rental tax designed to foist a disproportionate share of the tax's burden onto nonresidents is nonetheless immune from dormant Commerce Clause scrutiny simply because the tax is assessed on the companies that rent the cars rather than the nonresidents who are the ultimate targets for the tax.

2. Whether evidence that a tax was intended to impose a disproportionate burden on nonresidents is relevant in determining whether a statute imposes an impermissibly discriminatory design.

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INTEREST OF *AMICUS CURIAE*

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case concerns Cato because the state tax at issue violates fundamental constitutional provisions. The Constitution prevents a state from imposing taxes that discriminate against citizens of other states and interstate commerce, and purposefully shunting its revenue needs onto citizens of other states.[1]

SUMMARY OF ARGUMENT

The petition here presents two fundamental concerns. First, the state tax aimed at out-of-state car renters violates both the Commerce Clause and the Privileges and Immunities Clause. Among the main

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[1] In accord with Rule 37, no counsel for a party authored the brief in whole or in part. Further, no party, counsel for a party, or any person other than *Amicus* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. This brief was originally submitted with a motion. With the consent of all parties, it was thereafter refiled without a motion. An inadvertent communications failure by *amicus* counsel in seeking consent resulted in respondents not being given the full required ten days of notice before the initial submission. After being given notice, however, respondents provided their consent.

reasons for calling the Constitutional Convention in 1787 were the protectionist measures the states were enacting against each other under the Articles of Confederation. To address those concerns, the Framers designed the Commerce Clause to encourage interstate commerce to flourish and to preclude the states from discriminating against their sister states to protect their own interests. Recognizing the importance of these principles, this Court has rejected state laws that discriminate against interstate commerce. And this Court's intervention is needed to clarify and police how those principles apply to state taxes designed to target out-of-state citizens.

Here, by intentionally crafting the tax burden to fall disproportionately on out-of-state parties renting cars, while exempting most use by locals, the state legislature enacted a statute that impermissibly discriminates against out-of-staters—and the rental companies that service them—exercising their constitutionally protected right of travel to come to Arizona to engage in interstate commerce. That the discrimination is carried out through exceptions to the tax is of no moment. The Constitution and this Court's precedents are well equipped to address even such a "marvelously ingenious" means of discrimination against interstate commerce conducted by citizens of other states.

A second fundamental concern with the state tax here is that, as constructed, it constitutes a form of taxation without representation. From the founding of our Country it was well understood that "the very act of taxing, exercised over those who are not represented, appears to me to be depriving them of

one of their most essential rights, as freemen; and if continued, seems to be in effect an entire disfranchisement of every civil right." James Otis, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED 57–58 (Boston & London, J. Almon 1764). Here, the state's unambiguous effort to tax car rental companies and their customers based on use of rental vehicles by out-of-state parties, while exempting most uses by locals from the same tax, is contrary to that basic principle. The state is improperly shifting its own tax burdens on unrepresented parties. This Court should grant review and reject this nefarious practice.

ARGUMENT

I. THE COMMERCE CLAUSE BARS A STATE FROM CRAFTING A TAX THAT DISCRIMINATES AGAINST OUT-OF-STATE CITIZENS

A. The Commerce Clause Was Added to the Constitution to Prevent States from Passing Laws that Harm or Discriminate Against Interstate Commerce

The 1787 Constitutional Convention was held to revise the federal system of government in light of the flaws of the Articles of Confederation. Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 470–519 (2d ed. 1998). Of particular concern was the interstate commerce situation. The Annapolis Commission, which included James Madison and Alexander Hamilton, recommended to Congress that all thirteen states send delegates to Philadelphia

in May 1787 "to take into consideration the trade and commerce of the United States." Catherine Drinker Bowen, MIRACLE AT PHILADELPHIA 9 (1966). The specific ways in which states discriminated against interstate commerce during the Confederation varied. For instance, the states with direct access to the Atlantic imposed duties on shippers from interior states. Bowen, *supra*, at 9. New Jersey had its own customs service and nine states had their own navies. *Id.* And Although the Articles had given the national Congress "the sole and exclusive right and power of regulating" the value of coins it or the states made, seven states printed their own money, which had to be kept within each state's boundaries. Articles of Confederation, art. IX; *see also* Bowen, *supra*, at 9. In sum, "States were marvelously ingenious at devising mutual retaliations." *Id*. As Madison said, "Most of our political evils may be traced to our commercial ones." *Id*. at 10.

With interstate commerce as one of their primary concerns, the delegates to the Constitutional Convention met in Philadelphia to revise the Articles. See Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 444 (1941). "It seems to have been common ground that the general government as constituted—or reconstituted—by the convention was to possess a power of regulating commerce. . . [The shape of that power] depended on the larger preliminary question of the place of Congress and of the general government in the revised political system." *Id*. at 432. Indeed, "the matter of commercial regulation was to the delegates a mere detail of application." *Id.* at 435. The Commerce Clause

was accepted in the Constitutional Convention and in the ratifying conventions without opposition and with little public criticism. *Id*. at 444–45.

The Constitution did not enumerate all of the "marvelously ingenious" mechanisms by which the states might discriminate against interstate commerce to protect their own interests. The newly minted document did, however, confer on Congress the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes," U.S. Const. art. I, § 8, with the goal of creating "[a]n unrestrained intercourse between the States," The Federalist No. 11 (Alexander Hamilton). Regarding this power to regulate domestic commerce, Madison wrote in Federalist No. 42 that

> [a] very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter, and the consumers of the former.

The Federalist No. 42 (James Madison). Such protectionist practices, Madison concluded, "would nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility." *Id.*

And although the wording of the Commerce Clause does not explicitly address the judiciary's province of reviewing and striking down state laws that impinge upon interstate commerce, "when it came to deciding which branch was to be given primary responsibility for ensuring state fidelity to federal law, the Convention opted ultimately for the judiciary." Barry Friedman & Daniel T. Deacon, *A Court Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1902–03 (2011); *see also id.* at 1896–903 (explaining that, in general, the Framers eschewed the solution to the problem of impermissible state laws offered by dormant Commerce Clause skeptics—namely, congressional invalidation of state legislation—in favor of judicial review). Thus, as this Court explained in *Comptroller of the Treasury v. Wynne*, what became referred to as the dormant Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." 135 S. Ct. 1787, 1794 (2015).

B. The Commerce Clause Prohibits States from Enacting Discriminatory Taxes that Improperly Benefit Intrastate Commercial Interests to the Detriment of Out-of-State Commercial Interests

The Commerce Clause, "by its own force, prohibits discrimination against interstate commerce, whatever its form or method." *S.C. State Highway Dep't v. Barnwell Bros., Inc.*, 303 U.S. 177, 185 (1938). The Clause seeks to avoid this sort of "economic Balkanization," where states discriminate against out-of-

state residents and businesses. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997). Impermissible "[e]conomic protectionism is not limited to attempts to convey advantages on local merchants; it may include attempts to give local consumers an advantage over consumers in other States." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986). The Clause bars a state from enacting a tax as "a means of gaining a local benefit by throwing the attendant burdens on those without the state." *S.C. State Highway Dep't*, 303 U.S. at 186. "It was to end these practices that the commerce clause was adopted." *Id.*

It is fundamental that the Commerce Clause precludes states from "discriminat[ing] between transactions on the basis of some interstate element." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977). That concept is not new. In *Case of the State Freight Tax*, 82 U.S. 232, 271, 279–80 (1872), the Court invalidated a Pennsylvania tax on freight passing between Pennsylvania and other states, absent any legislation by Congress. The Court explained that the Commerce Clause itself prevents them from regulating in a way that discriminates against interstate commerce. *See id.* at 279–80. Since then, this Court has struck down numerous such state and local laws that discriminate against interstate commerce. *See, e.g.*, *Welton v. Missouri*, 91 U.S. 275, 278, 283 (1875) (state law requiring peddlers of certain out-of-state goods to obtain license); *Guy v. City of Baltimore*, 100 U.S. 434, 440, 443–44 (1879) (law allowing Baltimore mayor to impose wharfage fee on vessels carrying out-of-state goods); *Walling v. Michigan*, 116

U.S. 446, 454 (1886) (state tax on out-of-state actors shipping liquor into the state).

"Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45 n.2 (1940).

The Commerce Clause applies not only to state laws that discriminate against out-of-state interests but also to local laws that discriminate against non-local interests. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 386 (1994) (striking down a municipal ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality; the ordinance would have benefited the municipality to the detriment of both out-of-state businesses and non-local in-state ones). And of particular relevance here, a state may not impose a tax that discriminates against interstate commerce. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

While there is no question that an out-of-stater can be charged a fairly apportioned tax for doing so, "[t]he Commerce Clause forbids the States to levy taxes [in a manner] that discriminate[s] against interstate commerce." *See MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008). "[H]istory, including the history of commercial conflict that preceded the Constitutional Convention as well as the

uniform course of Commerce Clause jurisprudence animated and enlightened by that early history," has demonstrated that even discrimination as seemingly pedestrian as disproportionate rental car taxes "can interfere with the project of our Federal Union." *Id.* Here, to "countenance discrimination of the sort that [Arizona's] statute represents would invite significant inroads on our 'national solidarity.'" *Id.*

C. The Arizona Rental Car Tax Is Tailored to Disproportionately Place the Tax Burden on Out-of-State Commercial Interests

This Court has declared that "a tax may violate the Commerce Clause if it is facially discriminatory, has a discriminatory intent, or has the effect of unduly burdening interstate commerce." *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 75 (1989). Although the Arizona Supreme Court suggested that Petitioners "abandon[ed] prior assertions that the surcharge is facially discriminatory and unduly burdens interstate commerce," Pet. App. 7—a claim that Petitioners firmly reject, Cert. Pet. 14 n.11—the state tax at issue here satisfies all three of these disjunctive criteria for unconstitutionality.

While the Arizona legislature opted not to include the originally proposed language explicitly exempting all "vehicle rentals to Arizonians," Cert. Pet. 11, the legislature proceeded to design the language and structure of the state tax to essentially accomplish the same end. The legislature elected to tax nonresidents indirectly through collecting the surcharge from the

rental car companies that service nonresidents—while simultaneously exempting typical state resident uses of vehicles (and thus largely exempting local companies that primarily service such uses) from taxation. Although the legislature cloaked these provisions in language that appears neutral at first glance, discrimination remains plain from the face of the statute. As this Court said when discussing related concepts in the speech regulation and discrimination context in *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015), "[s]ome facial distinctions . . . are obvious, defining [the regulation] by particular subject matter, and others are more subtle, defining [the regulation] by its function or purpose. Both are . . . subject to strict scrutiny." Again, there are many marvelously ingenious ways states can discriminate against interstate commerce on the face of statutory provisions that do not state outright that all state residents are exempt from regulation.

Here, the language of the state tax draws the discriminatory line between out-of-state and intrastate commercial interests. The tax-burdened side of the line is predominated by out-of-state visitors that account for the vast majority of the short-term car rental surcharges, as noted in the Arizona Supreme Court's decision below. *See* Pet. App. 8. On the tax-exempt[2] side of the line are the carve-outs for longer-term rentals, temporary replacement vehicles, off-road vehicles, employee vanpool vehicles, and so

[2] In some contexts, where local renters are not fully exempt, the state tax is substantially discounted (*e.g.*, in the case of some temporary replacement vehicle situations). *See* Cert. Pet. 12.

on—basically the categories encompassing how most all Arizona residents would use their rental vehicles, since few would need short-term rentals like out-of-state visitors would. Accordingly, the reality is that the tax is carefully crafted so that out-of-state commercial interests are heavily tax-disadvantaged in their use of rental vehicles, in stark contrast to in-state commercial interests that are burdened little or not at all in their rental usage. This discriminatory design and effect are evident even apart from reference to legislative history.

The case of *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997), presents both analogous circumstances and the applicable standard that must control here: namely, whether the state tax is impermissibly designed to impose a "predictably disproportionate" share of the tax's burden onto nonresidents. *Id.* at 579–80. For the reasons stated above and those that will follow, the answer here is in the affirmative; moreover, the Arizona Supreme Court's attempts to distinguish *Camps* are unavailing.

To begin with, the Arizona Supreme Court asserted that "[t]he disproportionate burden in *Camps Newfound/Owatonna* referred to the costs placed only on non-residents for using in-state services," Pet. App. 11, presumably in contrast to the court's observation that some out-of-staters use temporary replacement vehicles, *see id.* at 12. This is not accurate, however, given that in *Camps* most *but not all* of the campers were nonresidents. *See* 520 U.S. at 567. The fact that there are some outliers (*i.e.*, some Maine resident campers in *Camps*, or some

nonresident replacement vehicle renters in the instant case) does not materially alter the "predictably disproportionate" burden analysis. *See id.* at 579–80 ("Given the fact that the burden of Maine's facially discriminatory tax scheme falls by design in a predictably disproportionate way on out-of-staters, the pernicious effect on interstate commerce *is the same as in our cases involving taxes targeting out-of-staters alone*." (emphasis added)).

The Arizona Supreme Court further observed that, unlike in *Camps*, the case here involves "disparate impact on non-residents that stems solely from the fact that they consume more of the uniformly taxed good or service than in-state consumers." Pet. App. 11. But this is a significant and determinative error, given that it is *not* simply that nonresidents consume more of the taxed service, residents consume less, and both sides are taxed accordingly. Instead, the reality is that when most residents rent vehicles, *little to no taxes* are levied, while when most nonresidents rent vehicles, the state harvests substantial and disparately burdensome revenues. Thus, this case is not like *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), in which nonresidents bore most of the coal tax burden because they proportionally consumed more coal than residents. Here, as in *Camps*, the predictably disproportionate burden on nonresidents renders the state tax unconstitutional.[3]

[3] Similarly, the Court of Appeals below rejected Petitioners' reliance on *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 200–01 (1994) (concerning a tax imposed on both in-state and out-of-

In further similitude with *Camps*, this case does not involve direct taxation of nonresidents, but indirect taxation of nonresidents through the companies that transact with them. In *Camps*, this Court recognized "that here the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer." 520 U.S. at 580. The Court further explained that "[t]his distinction *makes no analytic difference*. . . . [T]he imposition of a differential burden on *any part of the stream of commerce*—from wholesaler to retailer to consumer—is invalid, because a burden placed *at any point* will result in a disadvantage to the out-of-state producer." *Id.* (emphasis added) (internal citation and quotation marks omitted). Just because the Arizona legislature elected to tax rental companies as opposed to end consumers (presumably in attempting to insulate this provision from strict scrutiny) does not change the fact that the state tax impermissibly protects in-state interests by disproportionately burdening out-of-state interests.

Such discrimination against businesses based on their ties to interstate commerce is itself constitutionally impermissible. It is worth emphasizing that the Commerce Clause's prohibition

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state milk producers, but which burdened out-of-state interests in a predictably disproportionate way because it was accompanied by a subsidy that only applied to in-state milk producers), given this case does not involve any subsidies or reimbursements for Arizona residents, *see* Pet. App. 58. For the reasons stated above, however, *W. Lynn Creamery is* analogous, since the nonresidents in both cases are tax-disadvantaged by provisions that disproportionately protect in-state commercial interests.

on discrimination is distinct from other constitutional protections from discrimination in that it concerns a class of commerce rather than a class of people. It protects interstate commerce as opposed to wholly in-state commerce. To that end, the Clause applies regardless of whether a law's burden falls on end customers or on the companies that provide them services. The crux of the matter is not who the regulated party is or where he or she is located but whether the law at issue discriminates against interstate commerce.

The Arizona Supreme Court acknowledged that car rental companies pass on these costs to their customers. *See* Pet. App. 4 ("Although the surcharge is imposed on car rental companies, *they can and do pass its cost on to their customers*." (emphasis added)). In any event, the precise degree to which car rental companies pass on taxes to customers is not determinative. Under *Camps*, the key question is whether the law actually provides an incentive to curb service to nonresidents. On that subject, this Court explained that "[t]he Maine law expressly distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market, *singling out* camps that serve mostly in-staters for beneficial tax treatment, and *penalizing* those camps that do a principally interstate business." 520 U.S. at 576 (emphasis added). Accordingly, the Court held that "[a]s a practical matter, the statute *encourages affected entities to limit their out-of-state clientele*, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market." *Id.* (emphasis added).

As in *Camps*, the inevitable impact here is that any in-state companies that cater their services to in-state customers will receive beneficial tax treatment, while companies that primarily serve out-of-state customers are disproportionately burdened by the state tax. The fact that two rental car companies in Arizona will receive disparate tax treatment based on one discriminatory criteria alone—practically speaking, the extent to which they rent vehicles for short-term use by out-of-state visitors—renders this law unconstitutional, without even addressing the issue of discriminatory intent.

That said, in addition to the facial discrimination inherent in the statute's design, as well as the predictably disproportionate burden it has on interstate commercial interests, the blatantly discriminatory intent evident throughout the state tax's legislative history further establishes the unconstitutional nature of the provision. Thus, for the reasons set forth in the petition, *see* Cert. Pet. 10–13, 27–30, the Arizona Supreme Court erred in concluding that the extensive evidence of discriminatory intent was irrelevant as to the constitutionality of the state tax.[4]

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[4] This Court has recognized that the essential inquiry must be whether the challenged provision "is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To the extent that the Arizona legislature had "legitimate local concerns" when enacting the state tax, that does not preclude a finding that the statute was also impermissibly motivated by discriminatory intent. However, this Court

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Although at least some among the Arizona legislature acknowledged that explicitly exempting all Arizonans from the state tax would be unconstitutional, *see* Cert. Pet. 11, it seemingly went to great lengths to accomplish the same ultimately unconstitutional end. As this Court noted in another case involving disproportionately burdensome taxation, "[Dormant] Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. Rather our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). Applying such an analysis here leads to the conclusion that the state tax violates the Commerce Clause by "'discriminat[ing] between transactions on the basis of some interstate element.'" *Wynne*, 135 S. Ct. at 1794 (quoting *Boston Stock Exchange*, 429 U.S. at 332 n.12). Such discrimination is contrary to our founding principles, and inevitably burdens interstate commerce by incentivizing local businesses to curb service to nonresidents. Accordingly, this Court should grant certiorari to clarify the law on this important (and legislatively

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has also stated that "[t]he virtually per se rule of invalidity [against economic protectionism] . . . applies not only to laws motivated solely by a desire to protect local industries from out-of-state competition, but also to laws that respond to legitimate local concerns by discriminating arbitrarily against interstate trade." *Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 (1992) (internal citations and quotation marks omitted).

exploited) subject, and to uphold these crucial constitutional principles.

II. THE ARTICLE IV PRIVILEGES AND IMMUNITIES CLAUSE ALSO BARS DISCRIMINATORY TAXES LIKE THE ARIZONA TAX

The discriminatory rental car tax here also implicates the Privileges and Immunities Clause, U.S. Const. art. IV, § 2. That Clause "originally was not isolated from the Commerce Clause, now in the Constitution's Art. I, § 8. In the Articles of Confederation, where both Clauses have their source, the two concepts were together in the fourth Article." *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 379 (1978). The Clause represents an "assurance of equality of all citizens within any State." *Id.* at 380. "The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own." *Id.* at 382 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939) (opinion of Roberts, J.)).

While the Privileges and Immunities Clause does not require "a State to open its polls" to out-of-state citizens, or allow them to run for office, *Baldwin*, 436 U.S. at 383, it does require that the State "treat all citizens, resident and nonresident, equally" as to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity, *id.*

In the case of *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), which found a discriminatory state

tax upon nonresident traders to be void, this Court said:

> Beyond doubt those words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to *pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation*; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to *be exempt from any higher taxes or excises than are imposed by the State upon its own citizens*.

Id. at 430 (emphasis added). These protections are not "absolute," but the Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Toomer v. Witsell,* 334 U.S. 385, 396 (1948).

Here, the discriminatory Arizona tax implicates at least three well-established rights under the Privileges and Immunities Clause: specifically, the rights of a citizen of one state to (1) travel to another state, (2) do business in another state, and (3) be exempt from higher taxes than those that are imposed by another state upon its own citizens.

The right to travel to another state is a firmly established constitutional right. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("[T]he constitutional right to travel from one State to another is firmly embedded in our jurisprudence." (internal quotation marks omitted)); *Shapiro v. Thompson*, 394 U.S. 618, 630–31 (1969) (same). The "right to travel" includes "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State." *Saenz*, 526 U.S. at 500. "A state law implicates the right to travel when it actually deters such travel, . . . when impeding travel is its primary objective, . . . or when it uses any classification which serves to penalize the exercise of that right." *Att'y Gen. v. Soto-Lopez*, 476 U.S. 898, 903 (1986).

Regarding the right to conduct business in a sister state, this Court's *Baldwin* opinion concluded that the Clause did not apply to "recreational big-game hunting." 436 U.S. at 383–88. The Court distinguished *Toomer v. Witsell*, 334 U.S. at 396, where the Court struck down a South Carolina statute requiring nonresidents of the State to pay a license fee of $2,500 for each commercial shrimp boat, and residents to pay a fee of only $25, and did so on the ground that the statute violated the Privileges and Immunities Clause. *Id.* at 386. There, the discrimination was improper because it bore on the right to "pursue a livelihood in a State other than his own," or, in other words, to conduct business in the state. *See id.*

And, lastly, the state tax implicates the right of nonresidents to be free from taxes that are not similarly levied upon residents. Of this right, this

Court has held that a "taxing scheme, . . . if it discriminates against all nonresidents, has the necessary effect of including in the discrimination those who are citizens of other states; and, if there be no reasonable ground for the diversity of treatment, it abridges the privileges and immunities to which such citizens are entitled." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920).

Here, the state tax burdens and deters customers' interstate travel to the extent that car rental companies raise the prices of short-term rentals (which are predominately purchased by nonresident customers). Again, as the Arizona Supreme Court conceded, car rental companies pass on these burdensome surcharges to their customers, *see* Pet. App. 4, burdening the nonresident's right to travel. And as in *Toomer,* there is "no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." 334 U.S. at 396.

Similarly, the car rental companies' right to conduct business with out-of-state citizens is burdened, while those that predominately provide services to in-state customers will have a tax-exempted competitive advantage. This scheme "discriminates against all nonresidents," without any "reasonable ground[s] for the diversity of treatment." *Travis*, 252 U.S. at 79. Accordingly, the state tax "abridges the privileges and immunities to which such citizens are entitled." *Id.*

III. A TAX PURPOSEFULLY DESIGNED TO EXEMPT LOCAL CITIZENS AND FALL ON OUT-OF-STATERS RUNS AFOUL OF THE FUNDAMENTAL OBJECTION TO TAXATION WITHOUT REPRESENTATION

The 1765 Stamp Act required all printed documents used or created in the colonies to bear an embossed revenue stamp. The colonial assemblies denounced the law as unfair and illegal on the grounds that they had no representation in Parliament. Protests throughout the colonies ensued. That colonial reaction set the stage for the American independence movement.

This Court has long recognized the importance of that founding principle. In *Thomas v. Gay*, 169 U.S. 264, 276–77 (1898), the Court explained:

> Undoubtedly there are general principles, familiar to our systems of state and federal government, that the people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws, and that taxes must be assessed and collected for public purposes, and that the duty or obligation to pay taxes by the individual is founded in his participation in the benefits arising from their expenditure.

And while a citizen or business of another state is not immune from being taxed in a sister state, a State may not purposefully seek to disproportionally shift

the financing of its governmental function on to the citizens of other states. To do so "is the evil of 'taxation without representation.'" *Indep. Warehouses, Inc. v. Scheele*, 331 U.S. 70, 94–95 (1947) (Jackson, J., dissenting). The founders sought to curtail that "evil"—when aimed at out-of-state citizens—through the Commerce Clause and Privileges and Immunities Clause, as discussed above in Section II.

In the analogous case of *W. Lynn Creamery*, which involved tax subsidies not unlike the tax exemptions at issue here, this Court stated that "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." 512 U.S. at 200. The Court further explained that "because the tax was coupled with a subsidy, one of the most powerful of these groups, Massachusetts dairy farmers, instead of exerting their influence against the tax, were in fact its primary supporters." *Id.* at 200–01.

Here, residents—and any car rental companies that primarily serve them—are largely exempt from paying the state tax, and thus the disproportionate burden born by car rental companies that primarily do business with nonresidents amounts to impermissible taxation without representation. With no representation, nonresident visitors and the companies that service them cannot voice their displeasure at being coerced to pay these taxes. Moreover, visitors cannot vote with their feet since their need for rental cars is essentially inelastic—without rental vehicles,

many of them would be effectively unable to travel, which leaves them with no choice but to pay the increased rental costs associated with these taxes. Concerns with such discrimination against out-of-state interests are most significant in situations like this, where those burdened by the laws lack the voting power to enact or oppose them, rendering the discrimination unlikely "to be alleviated by those political restraints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick*, 309 U.S. at 45–46 n.2.

Accordingly, this "evil of 'taxation without representation'" that is conjured by the state tax provides yet another reason that the Court should grant certiorari.

CONCLUSION

For the forgoing reasons, the petition should be granted and the judgment of the court below reversed.

Respectfully submitted,

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