No. 19A

IN THE

Supreme Court of the United States

ROBERT C. STEINER AND WENDY STEINER-REED,

Applicants,

v.

UTAH STATE TAX COMMISSION,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

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October 17, 2019

APPLICATION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicants Robert C. Steiner and Wendy Steiner-Reed respectfully request a 30-day extension of time, to and including December 12, 2019, within which to file a petition for a writ of certiorari to review the decision of the Supreme Court of Utah in this case.

1. The Supreme Court of Utah issued its decision on August 14, 2019. *See Steiner* v. *Utah State Tax Comm'n*, No. 20180223 (Appendix A). Unless extended, the time to file a petition for certiorari will expire on November 12, 2019. This application is being filed more than ten days before the petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1257(a).

2. The Utah Supreme Court's decision below directly contradicts this Court's holdings in *Comptroller of the Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015), and *Kraft General Foods, Inc.* v. *Iowa Department of Revenue & Finance*, 505 U.S. 71, 80 (1992). First, although *Wynne* found no reason "why the dormant Commerce Clause should treat individuals less favorably than corporations," 135 S. Ct. at 1797, the Utah Supreme Court held that "it is clear that they can be treated differently," App. 16. Applying that principle, the Utah Supreme Court held that Utah could "tax the entirety of [a taxpayers'] foreign income based"

solely "on their residency on the state," following the *dissent* in *Wynne*. *Id.* at 17 (citing 135 S. Ct. at 1813 (Ginsburg, J., dissenting)). And the Utah Supreme Court upheld a Utah law treating income earned in foreign countries less favorably than income earned in Utah or another State, *id.* at 18-19, even though this Court held in *Kraft* that a state law violates the Foreign Commerce Clause if it "imposes a burden" on foreign commerce "that it does not impose on domestic" commerce. 505 U.S. at 80.

3. The Steiners are married Utah taxpayers who filed joint tax returns for the 2011, 2012, and 2013 tax years. App. 2. Robert Steiner is an S shareholder with taxable income from an S corporation with subsidiaries that pass their income through to him for tax purposes, several of which are foreign entities with foreign business operations. *Id.* at 3. Accordingly, a significant portion of Steiners' taxable income comes from foreign commerce.

4. Utah allows a credit for income taxes paid in other states but does not allow a credit for income taxes paid to foreign countries. *Id.* The Steiners claimed an equitable adjustment excluding their foreign income, arguing that failure to offer such an adjustment ran afoul of the foreign dormant Commerce Clause. *See id.* at 3-4. Utah's Tax Court allowed that equitable adjustment in light of the Steiners' constitutional arguments. *Id.* at 5.[1]

[1] The Steiners also argued that Utah's failure to apportion their domestic income violated the domestic dormant Commerce Clause. App. 4-5. The Utah Supreme Court rejected that argument (*id.* at 12-14) and the Steiners will not be seeking review of that holding in this Court.

5. The Utah Supreme Court reversed in relevant part. *Id.* at 2. The court first rejected the notion that the foreign dormant Commerce Clause has *any* application to the taxation of individual, rather than corporate, income, notwithstanding this Court's contrary holding in *Wynne* regarding the domestic dormant Commerce Clause. The Utah Supreme Court explained that it refuses to "break new ground" in Commerce Clause jurisprudence: It has announced that it will "decline to extend" this Court's Commerce Clause precedent "into new territory—even in ways that might seem logical in other jurisprudential realms." *Id.* at 6, 14 (citing *DIRECTV* v. *Utah State Tax Comm'n*, 364 P.3d 1036 (Utah 2015)). Because this Court has not yet addressed "the Dormant Foreign Commerce Clause" in a case involving "an individual taxpayer (or S corporation shareholder)," the Utah Supreme Court assumed the Clause places no limits on the States' power in such cases. *Id.* at 15. Thus, despite *Wynne*'s conclusion that residency alone "says nothing about whether [a] tax violates the Commerce Clause," 135 S. Ct. at 1799, the Utah Supreme Court authorized the State to "tax the entirety of the Steiners' foreign income based on their residency in the state," App. 17.

6. The Utah Supreme Court also disagreed that Utah's system, which treats foreign income less favorably than domestic income, discriminates against foreign commerce. The Court conceded that its holding would "possibly subject the Steiners to a double tax" on their foreign income. *Id.* at 18. The Court instead believed that the *federal* credit for foreign taxes adequately addressed the problem,

even though *Kraft* held that discrimination cannot "be offset by other taxes imposed * * * by other States and by the Federal Government." 505 U.S. at 71.

The Utah Supreme Court justified its refusal to follow *Kraft* by invoking the principle of "passive congressional approval," App. 18 & n.18, announced in *Barclays Bank PLC* v. *Franchise Tax Board of California*, 512 U.S. 298 (1994). But the court did not explain how the passive approval principle in *Barclays*, which addressed a tax that was "otherwise constitutional," 512 U.S. at 323, could be extended to the situation here, where the tax flunks the foreign dormant Commerce Clause.

7. The Utah Supreme Court's decision directly conflicts with this Court's precedent on a weighty federal issue. "The Foreign Commerce Clause recognizes that discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole." *Kraft*, 505 U.S. at 79. Moreover, the Utah Supreme Court's stated refusal to apply this Court's Commerce Clause precedent where it is otherwise "logical" to do so (App. 6) undermines our federal system. *See Cooper* v. *Aaron*, 358 U.S. 1, 18 (1958). This Court's review is accordingly needed to bring the Utah Supreme Court's jurisprudence back into alignment with this Court's and restore uniformity on this important federal issue.

8. The Steiners have retained Neal Kumar Katyal of Hogan Lovells US LLP as counsel to file a petition for writ of certiorari. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters,

including: (1) a reply brief in *City of Oakland* v. *Wells Fargo & Co.*, No. 19-15169 (9th Cir.), due October 25; (2) summary judgment briefing in *United States ex rel. Krahling* v. *Merck & Co., Inc.*, No. 10-cv-4374 (E.D. Pa.), due October 25; (3) a petition for rehearing en banc in *Enigma Software Group USA, LLC* v. *Malwarebytes, Inc.*, No. 17-17351 (9th Cir.), due October 28; (4) a merits reply brief in *McKinney* v. *Arizona*, No. 18-1109 (S. Ct.), due November 25, with oral argument scheduled on December 11; and (5) a merits response brief in *Romag Fasteners Inc.* v. *Fossil Inc.*, No. 18-1233 (S. Ct.), due November 26. Applicants request this extension of time to permit counsel to research the relevant legal and factual issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for certiorari to and including December 12, 2019.

Respectfully submitted,

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