No. 19-

IN THE

Supreme Court of the United States

ROBERT C. STEINER and WENDY STEINER-REED,
Petitioners,

v.

UTAH STATE TAX COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Utah's tax code extends a credit for income taxes paid to other States but does not extend a similar credit for income taxes paid to foreign countries or make other adjustments for foreign income. The result is a double taxation of income that state residents earn from foreign commerce.

The question presented is whether this scheme discriminates against foreign commerce in violation of the dormant Commerce Clause.

PARTIES TO THE PROCEEDING

Robert C. Steiner and Wendy Steiner-Reed, petitioners in this Court, were the appellants-cross-appellees in the Utah Supreme Court.

The Utah State Tax Commission, respondent in this Court, was the appellee-cross-appellant in the Utah Supreme Court.

RELATED PROCEEDINGS

Utah Supreme Court:

Steiner v. *Utah State Comm'n*, No. 20180223-SC (Utah Aug. 14, 2019).

Third Judicial District Court, Salt Lake County, State of Utah:

Steiner v. *Utah State Tax Comm'n*, No. 170901774 (Utah Dist. Ct. Jan. 30, 2018).

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PETITION FOR A WRIT OF CERTIORARI

Robert C. Steiner and Wendy Steiner-Reed respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Utah in this case.

OPINIONS BELOW

The Utah Supreme Court's opinion is reported at 449 P.3d 189. Pet. App. 1a-32a. The ruling and order of the Third Judicial District Court of Salt Lake County, Utah on the parties' cross-motions for summary judgment is unreported. Pet. App. 33a-51a. The Utah State Tax Commission's administrative order is unreported. Pet. App. 52a-73a.

JURISDICTION

The Utah Supreme Court entered judgment on August 14, 2019. Pet. App. 1a. On October 18, 2019, Justice Sotomayor extended the time within which to petition for certiorari to and including December 12, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 8, clause 3 of the U.S. Constitution provides:

> The Congress shall have Power * * * [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes * * * .

The relevant provisions of the Utah Tax Code are set forth in the appendix to this petition. Pet. App. 74a-77a.

INTRODUCTION

State courts, no less than federal courts, have an obligation to faithfully enforce the U.S. Constitution as interpreted by this Court's decisions. When it comes to the Commerce Clause, however, the Utah Supreme Court has cast that fundamental principle of vertical *stare decisis* aside. Based on its perception that this Court's decisions embody "haphazard policy judgments" rather than "any unifying legal theory," the Utah Supreme Court has announced that it will "decline to extend" this Court's dormant Commerce Clause "precedent into new territory—even in ways that might seem logical in other jurisprudential realms." Pet. App. 8a-9a.

Applying that principle in this case led the Utah Supreme Court to a judgment that is irreconcilable

with this Court's precedents. Petitioners Robert Steiner and Wendy Steiner-Reed, residents of Utah with taxable income from foreign commerce, challenged Utah's policy of granting a tax credit for taxes paid on income from business activities in other States without granting a similar credit or other offset for taxes paid on income from business activities in foreign countries. As a result, under Utah's tax scheme, the Steiners' income from domestic commerce is taxed only once, but foreign income is taxed twice: once by the foreign jurisdiction and once by Utah. This is discrimination in favor of domestic commerce.

Two of this Court's cases should have easily resolved the Steiners' challenge in their favor. *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992), explained that the Commerce Clause forbids a State from displaying a "preference for domestic commerce over foreign commerce," and *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787, 1797-1800 (2015), reaffirmed that a state may not discriminate against out-of-state commerce in favor of in-state commerce and clarified that the restrictions on state taxation under the Commerce Clause are applicable to individuals—including shareholders of corporations that pass through their expenses and income to their owners—that reside in the taxing jurisdiction. Utah's Tax Court recognized as much, and ruled in the Steiners' favor.

The Utah Supreme Court, however, disagreed. Because no single case from this Court addressed both foreign commerce and an individual taxpayer, the Utah Supreme Court determined that the dormant Commerce Clause has *no application* to the

facts of this case, holding in effect that the Commerce Clause places no limits on the States' power to impose discriminatory taxes on individuals' income from foreign commerce. In justifying this grudging reading of this Court's cases, the Utah Supreme Court made plain its outright hostility towards this Court's Commerce Clause doctrine, accusing the Court of crafting that doctrine with no "textual or originalist mooring" to support it. Pet. App. 3a. That approach cannot be squared with the court's constitutional obligation to enforce federal law.

The Utah Supreme Court then purported to apply existing Commerce Clause doctrine to Petitioners' challenge, but it did so in ways that are equally barred by this Court's precedent. The Utah court concluded that any discrimination under Utah's *state* taxation scheme is remedied by the separate *federal* tax credit for income earned abroad. This Court rejected that same justification in *Kraft*. *See* 505 U.S. at 81. The Utah court then attempted to dismiss *Kraft* based on its view that this Court subsequently announced a rule in *Barclays Bank PLC* v. *Franchise Tax Board of California*, 512 U.S. 298 (1994), that Congress may "*sub silentio*" approve a state law like Utah's, and pointed to the lack of any Act of Congress prohibiting or preempting tax codes like Utah's. Pet. App. 26a-27a & n.18. But *Barclays* made abundantly clear that although Congress may "more passively indicate" that a non-discriminatory and "otherwise constitutional" state tax law does not "impair federal uniformity in an area where federal uniformity is essential," Congress may authorize a discriminatory state tax (like Utah's) only by speaking with "unmistakable clarity." 512 U.S. at 323.

Few areas of the law demand national uniformity like the States' treatment of foreign commerce. The Utah Supreme Court's unwillingness to apply the federal law designed to secure that uniformity must be corrected. Certiorari should be granted.

STATEMENT

A. Constitutional Principles

Although the Commerce Clause by its terms confers on Congress legislative power over foreign and interstate commerce, "[i]t has long been understood, as well, to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" *Barclays*, 512 U.S. at 310 (quoting *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)). This "dormant Commerce Clause" has "deep roots," as it reflects the Framers' "'central concern * * * that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.'" *Wynne*, 135 S. Ct. at 1794 (quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979)). The Clause therefore "prohibit[s] States from discriminating against or imposing excessive burdens on interstate" or foreign commerce, *id.*, and from exhibiting a "preference for domestic commerce over foreign commerce," *Kraft*, 505 U.S. at 79. Because taxation is one of the States' primary tools for influencing economic behavior, these prohibitions have a special salience in tax cases. *See* Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. 309, 319 (2017).

To pass Commerce Clause scrutiny, (1) "the activity" taxed must be "sufficiently connected to the State to justify a tax"; (2) the tax must be "fairly related to benefits provided the taxpayer"; (3) the tax must not "discriminate[] against interstate" or foreign commerce; and (4) the tax must be "fairly apportioned," *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 287 (1977). The *Complete Auto* test applies to taxes on both domestic and foreign income. *See Barclays*, 512 U.S. at 310-311 ("a state tax on [foreign] commerce will not survive Commerce Clause scrutiny" if it fails the *Complete Auto* test). And failure to satisfy any one of the requirements is fatal to a tax. *Id.*

In assessing whether a tax is discriminatory, this Court has often referred to an analytical tool known as the "'internal consistency' test." *Wynne*, 135 S. Ct. at 1801-02.[1] Under the test, the Court "hypothetically assum[es] that every" jurisdiction "has the same tax structure," to see whether, if applied everywhere, the tax would place protected commerce "at a disadvantage as compared with commerce intrastate." *Id.* at 1802 (internal quotation marks omitted). For example, in *Wynne* itself, the Court used the test to demonstrate that if every State taxed interstate income the same way Maryland did, a Maryland resident earning income in interstate commerce would "pay more income tax than [a resident earning

[1] Because there is a close relationship between whether a tax is discriminatory and whether it is fairly apportioned, the internal-consistency test has also been used to evaluate the latter requirement too. *See, e.g.*, *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 169-170 (1983). The test operates the same way under both prongs. *Compare id.*, *with Wynne*, 135 S. Ct. at 1802.

income in Maryland] solely because he earns his income interstate." *Id.* at 1803-04. Such a system, the Court held, "fails the internal consistency test." *Id.* at 1803.

Because "[f]oreign commerce is preeminently a matter of national concern," *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979), "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce," *Kraft*, 505 U.S. at 79. Thus, "[i]n addition to" the *Complete Auto* test, when foreign commerce is implicated, "a court must also inquire, first, whether the tax * * * creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line*, 441 U.S. at 451 (internal quotation marks omitted). As with the *Complete Auto* test, failure to comply with "either of these precepts" renders a tax "unconstitutional." *Id.*

B. Factual and Procedural History

1. Like most States, Utah collects income taxes from its residents. If some portion of that income derives from another State and is subject to income taxes in that State, Utah allows taxpayers to claim a credit on their Utah taxes for the taxes paid to the other States. Pet. App. 5a (citing Utah Code § 59-10-1003). As the Utah Supreme Court has explained, the credit for taxes paid to other States "ensures that Utah residents' income is not subject to taxation by both Utah and another state." *Id.* at 9a. But if the taxpayer's income derives from activities in a foreign country, and is subject to income taxes in that coun-

try, Utah gives no credit at all. *See id.* at 5a. Nor does it provide any other mechanism, such as a deduction or adjustment, that would avoid double taxation of income earned in foreign commerce. *See id*. Utah also taxes the business income that nonresidents earn in Utah at the same rate as income earned by residents. *See* Utah Code §§ 59-10-116, 59-10-103(1)(w)(ii), 59-10-117(1)(b).

Petitioners are married Utah taxpayers who filed joint tax returns for the relevant 2011, 2012, and 2013 tax years. Pet. App. 3a. During those years, Robert Steiner was a shareholder in an S corporation, Steiner, LLC, which "passed through" its income to Mr. Steiner for tax purposes. *Id.* at 4a & n.2.[2] Steiner, LLC is the sole shareholder of Alsco, Inc., a linen supply company that the Steiner family has run for four generations. Alsco has numerous foreign subsidiaries with foreign business operations, which provide the same textile and laundry services in foreign countries for foreign customers as Alsco's business within the United States. Alsco's foreign subsidiaries are, for U.S tax purposes, pass-through entities. *Id.* at 4a. Through Alsco and Steiner, LLC, a significant portion of the Steiners' taxable income comes from foreign commerce.

[2] "S corporations permit shareholders to elect a 'pass-through' taxation system under which income is subjected to only one level of taxation. The corporation's profits pass through directly to its shareholders on a pro rata basis and are reported on the shareholders' individual tax returns." *Wynne*, 135 S. Ct. at 1793 n.1 (internal quotation marks omitted). C corporations, by contrast, "must pay their own taxes because they are considered to be separate tax entities from their shareholders." *Id.*

The Steiners sought to exclude their foreign income from their Utah taxable income under a statutory provision allowing equitable adjustments to avoid double taxation. *Id.* at 5a. The Utah State Tax Commission disallowed the adjustment. *Id.*

The Steiners thereafter petitioned for redetermination, arguing that denying the adjustment would violate the dormant Commerce Clause. *Id.* The Commission upheld the disallowance, holding that it did not have the power to adjudicate the Steiners' constitutional challenge. *Id.* at 6a. The Steiners paid an assessed deficiency of approximately $1.3 million and appealed to Utah's Tax Court. *Id.*

2. Utah's Tax Court reversed. Applying the internal-consistency test, the court concluded that the Steiners' foreign business income is subject to "double taxation" in Utah, and that without an equitable adjustment, "this discrimination violates the foreign Commerce Clause." *Id.* at 41a. The court recognized that "in *Wynne*, the U.S. Supreme Court determined that Commerce Clause protections afforded to C corporations also apply to S corporations and their shareholders," like the Steiners. *Id.* at 37a. The Tax Court rejected the Commission's argument that "applying this holding from *Wynne* * * * would be an unwarranted extension," explaining that although "the Supreme Court may not have specifically contemplated the consequences of its ruling in *Wynne* when applied to the circumstances now before this court," that "does not allow the court to disregard the Court's ruling." *Id.* at 37a-38a. The Tax Court found "no persuasive authority for the argument that *Wynne* must be restricted to questions involving interstate taxation and that the case has no applica-

tion to issues involving foreign commerce." *Id.* at 38a.[3]

3. The Commission appealed this part of the Utah Tax Court's ruling, and the Utah Supreme Court reversed.[4] The Court began by explaining its special rule of *stare decisis* for this Court's dormant Commerce Clause cases. Because the Utah Supreme Court considers this Court's doctrine a "quagmire," *id.* at 30a-31a (internal quotation marks omitted), it refuses to "break new ground" in dormant Commerce Clause jurisprudence, *id.* at 21a. The court will "decline to extend" Commerce Clause precedent "into new territory—even in ways that might seem logical in other jurisprudential realms." *Id.* at 8a-9a (citing *DIRECTV* v. *Utah State Tax Comm'n*, 364 P.3d 1036, 1049 (Utah 2015)).

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[3] The Utah Tax Court directed, as a matter of Utah statutory tax law, that the constitutionally impermissible discrimination be cured by applying an equitable adjustment to exclude the Steiners' foreign income. But the Tax Court recognized—as the Steiners do—that Utah's legislature could remedy the discrimination through a credit rather than a deduction if it so chose. Pet. App. 50a; *see Wynne*, 135 S. Ct. at 1806 (recognizing that "Maryland could cure the problem with its current system by granting a credit for taxes paid to other States"). Utah's legislature has other options, too, including apportionment, that could eliminate the constitutional deficiencies in Utah's taxation scheme.

[4] The Utah Supreme Court affirmed the Utah Tax Court's separate holding rejecting the Steiners' claim that Utah must apportion their income earned in other States—as opposed to providing a credit for income taxes paid to other States—in order to satisfy the interstate dormant Commerce Clause. *See* Pet. App. 20a. The Steiners are not seeking review of that holding.

Approaching the case from that perspective, the court held that a State "may tax the entirety of [its residents'] income based on their residency in the state." *Id.* at 25a. The court concluded that the foreign dormant Commerce Clause does not apply to individual, as opposed to corporate, income taxes. The court dismissed *Wynne*'s conflicting statement that "it is hard to see why the dormant Commerce Clause should treat individuals less favorably than corporations," 135 S. Ct. at 1797, on the ground that *Wynne* involved interstate commerce and this case involves foreign commerce, Pet. App. 22a-23a. The court also stated that, even if it were inclined to apply the dormant Commerce Clause, it would be "completely at sea" because it viewed this Court as having "provided no guidance whatsoever to lower courts regarding how to treat individuals in the context of foreign commerce." *Id.* at 23a. It specifically rejected the internal-consistency test, finding it "quite impossible" to apply the test "in an international setting"—despite the Utah Tax Court having applied it with no apparent difficulty. *Id.* at 24a.

The court below alternatively found that Utah's system is "consistent" with what it described as "the broader dormant foreign commerce principles th[is] Court has hinted at." *Id.* at 25a. Although it conceded that "the Steiners have suffered a 'double tax detriment' by being taxed by both Utah and a foreign country," *id.* at 29a, it believed that the *federal* credit for foreign taxes adequately addressed the problem, *id.* at 26a. The court acknowledged this Court's contrary holding in *Kraft* that state discrimination against foreign commerce cannot "be offset by other taxes imposed * * * by the Federal Government." 505 U.S. at 81. But it justified its refusal to follow

Kraft by invoking this Court's opinion in *Barclays*. Pet. App. 26a-27a & n.18. There, the Court explained that where a tax is "otherwise constitutional"—that is, where a court has already found that it satisfies the *Complete Auto* test and does not pose an impermissible risk of multiple taxation—"Congress may more passively indicate that certain state practices do *not* impair" the government from speaking with one voice on foreign affairs. *Barclays*, 512 U.S. at 323 (internal quotation marks omitted). The Utah Supreme Court read this passage to allow Congress to signal "passive approval" of even discriminatory laws. Pet. App. 27a n.19. Thus, relying solely on Congress's failure to "prohibit" or "preempt" state laws that "decline to grant a credit for foreign taxes," the court determined that "this Congressional approval immunizes Utah's tax code from judicial scrutiny under the Dormant Foreign Commerce Clause." *Id.* at 27a-28a.

This petition followed.

REASONS FOR GRANTING THE PETITION

The Utah Supreme Court's opinion below is openly hostile to both the dormant Commerce Clause and this Court's opinions setting out the Clause's constraints on state taxation. It cannot be reconciled with this Court's decisions in *Complete Auto*, *Kraft*, and *Wynne*. This Court's intervention is necessary to restore uniformity on this important federal issue and deter state courts from giving this Court's cases less than their full due.

I. THE UTAH SUPREME COURT'S DECISION DEFIES THIS COURT'S PRECEDENTS AND SPLITS WITH THE DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT.

Utah's choice to extend a credit for taxes paid to other States, but not to foreign countries, impermissibly discriminates against foreign commerce in violation of the dormant Commerce Clause. This Court's precedents in *Kraft* and *Wynne* together teach that a tax that is internally inconsistent discriminates against foreign commerce and is unconstitutional, even when it is levied against a State's own residents. The Utah Supreme Court's contrived reasons for reaching a contrary conclusion are untenable in light of this Court's cases.

1. This case comes down to a straightforward application of this Court's precedent. Start with *Kraft*. There, this Court held that exhibiting a "preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause." 505 U.S. at 79. That followed from the longstanding rule that state taxes affecting foreign commerce must satisfy the "nondiscrimination question[] posed in *Complete Auto*" the same as taxes imposed on income derived from other States. *Japan Line*, 441 U.S. at 451; *see also Container Corp. of Am.*, 463 U.S. at 171 ("Besides being fair, an apportionment formula must, under the Commerce Clause, also not result in discrimination against interstate *or* foreign commerce." (emphasis added)). This principle doomed the Iowa tax provision at issue, which excluded "the dividends of *all* domestic subsidiaries" from Iowa's corporate income-tax base, but excluded "the divi-

dends of foreign subsidiaries * * * only to the extent they reflect domestic earnings." *Kraft*, 505 U.S. at 77. In other words, "the only subsidiary dividend payments taxed by Iowa" were "those reflecting the foreign business activity of foreign subsidiaries." *Id.* Because this scheme treated foreign-earned dividends "less favorably" than domestic ones, it "discriminate[d] against foreign commerce and therefore violate[d] the Foreign Commerce Clause." *Id.* at 75, 82.

Wynne, in turn, reiterated that a State may not prefer income earned in that State over income earned out of state, and clarified that the internal-consistency test is a useful tool for identifying such discrimination. In *Wynne*, because Maryland did "not offer its residents a full credit against the income taxes that they pay to other States" on income earned out of state, "some" out-of-state income was impermissibly "taxed twice." 135 S. Ct. at 1792. The Court reached that conclusion by applying the internal-consistency test. *Id.* at 1803-04. The Court explained that if every State had a taxing scheme identical to Maryland's, a taxpayer who earned her income entirely from within Maryland would always pay less than a taxpayer who earned her income entirely in other States. *Id.* The interstate-income taxpayer pays more tax "*solely* because he earns income interstate." *Id.* (emphasis added).

By assuming that every jurisdiction has the same tax system, the internal-consistency test identifies discrimination against interstate commerce that results as a consequence of the tax system's internal logic, as opposed to "interaction with the taxing schemes of other" jurisdictions. *Id.* at 1804. In other words, the test helps reveal a tax scheme that is

truly *discriminatory*, as opposed to a tax scheme that happens to result in taxpayers experiencing differential tax burdens. *See* Knoll & Mason, *supra*, at 337 ("[I]t is a virtue of the test that it identifies discriminatory taxes without invalidating nondiscriminatory taxes that raise risks of double taxation.").

2. *Kraft* and *Wynne* resolve this case in the Steiner's favor. As in *Kraft*, the discrimination between foreign and domestic commerce is apparent from the plain text of Utah's tax code. Utah residents who engage in domestic interstate commerce will receive a tax credit equal to the amount that they pay to other States. Pet. App. 5a; *see also* Utah Code § 59-10-1003(1). But they will receive no similar credit for taxes paid to foreign countries. Pet. App. 5a. Just as Iowa did in *Kraft*, Utah displays a "preference for domestic commerce over foreign commerce" by saddling those who engage in foreign commerce with a higher tax burden. *Kraft*, 505 U.S. at 79. And that preference "creates an incentive for taxpayers to opt for [domestic] rather than [foreign] economic activity," which the dormant Commerce Clause forbids. *Wynne*, 135 S. Ct. at 1792.

The internal-consistency test confirms that this additional tax burden is a consequence of Utah's tax system, rather than its interaction with other tax regimes. Imagine that every jurisdiction's tax code is identical to Utah's. That is, it taxes income earned by residents[5] or by non-residents conducting business in the jurisdiction[6] at a flat rate of 5%, and grants a

[5] *See* Utah Code § 59-10-103(1)(w)(i).

[6] *See* Utah Code §§ 59-10-116, 59-10-103(1)(w)(ii), 59-10-117(1)(b).

dollar-for-dollar credit for taxes paid to any political subdivision of the *same* country but *not* for taxes paid to foreign countries or any subdivision of a foreign country.[7] Imagine further that three taxpayers, Charlie, April, and Bob, are Utah residents who each have income of $100,000 in a given tax year passed through by S corporations in which they are shareholders. *Cf. Wynne*, 135 S. Ct. at 1803-04 (conducting a similar internal-consistency analysis with April and Bob). Charlie only derives income from Utah business activities; April only has income from non-Utah domestic commerce; and Bob's sole income is from foreign commerce. As in *Wynne*, Bob has the short end of the stick: He pays an effective tax rate of 10%—5% to Utah and 5% to Country B as a non-resident earning income from business in Country B—whereas Charlie and April pay an effective tax rate of only 5%—Charlie directly to Utah, and April because she gets a credit in Utah for the 5% she paid to other States.

Once again, Bob must "pay more income tax than [Charlie and] April solely because" of *where* his income is earned. *Id.* And the internal-consistency analysis, like in *Wynne*, demonstrates that Utah's "tax scheme is inherently discriminatory and operates as a tariff," a result that is "patently unconstitutional." *Id.* at 1804 (internal quotation marks omitted).

Although *Kraft* involved a challenge by a nonresident corporation, 505 U.S. at 72, rather than an individual resident, *Wynne* holds this distinction

[7] *See* Utah Code § 59-10-1003(1).

makes no difference. *Wynne* explained that there is no reason "why the dormant Commerce Clause should treat individuals less favorably than corporations," 135 S. Ct. at 1797, and that residency alone "says nothing about whether [a] tax violates the Commerce Clause," *id.* at 1799. That reasoning applies with equal force to taxation of S-corporation income, which was also at issue in *Wynne*. As this Court explained, "[i]t would be particularly incongruous" to disregard this Court's "decisions regarding the taxation of corporate income because the income at issue here is a type of corporate income, namely, the income of a Subchapter S corporation." *Id.* at 1798. Because "[o]nly small businesses may incorporate under Subchapter S," accepting the Utah Supreme Court's reasoning below "would provide greater protection for income earned by large Subchapter C corporations than small businesses incorporated under Subchapter S." *Id.*

And although *Wynne* involved discrimination against interstate rather than foreign commerce, nothing in the Court's reasoning regarding the Commerce Clause's applicability to individual and S-corporation income turned on any difference between interstate and foreign commerce. *See id.* at 1797, 1799. Indeed, *Wynne* made clear that States may not treat income earned outside the State less favorably than income earned inside the State, and income earned in foreign commerce is, by definition, earned outside the state. And, to the extent there is any distinction, the dormant Commerce Clause protects foreign commerce even *more* jealously than interstate commerce. *Kraft*, 505 U.S. at 79.

Under *Kraft* and *Wynne*, then, Utah's disparate treatment of foreign income is unconstitutionally

discriminatory. The Utah Supreme Court's decision to the contrary clearly contravenes this Court's precedent. *See* Sup. Ct. R. 10(c) (certiorari is warranted where "a state court * * * has decided an important question of federal law * * * in a way that conflicts with relevant decisions of this Court").

3. In a half-hearted attempt to defend its decision under existing doctrine, the Utah Supreme Court sustained the State's tax scheme by concluding that any discrimination was either (1) remedied by a separate *federal* tax credit for income earned abroad; or (2) passively sanctioned by Congress's silence on this issue. Pet. App. 25a-28a. Both justifications are foreclosed by this Court's precedent.

As for the federal tax credit, *Kraft* rejected an analogous argument that any burden resulting from Iowa's discriminatory treatment of dividends might be remedied by the combined effect of "taxation by the Federal Government and by [an]other State." 505 U.S. at 80. The Court found "no authority * * * for the principle that discrimination against foreign commerce can be justified if the benefit to domestic subsidiaries might happen to be offset by other taxes imposed not by Iowa, but by other States and by the Federal Government." *Id.* at 80-81. That same logic prevents the Utah Supreme Court from relying on federal tax law to remedy Utah's discriminatory allocation of tax credits.

Kraft's rule makes good sense. How the federal government chooses to treat foreign income is entirely outside of Utah's control. The Constitution does not leave Utah residents at the mercy of external actors to ensure that they are not subjected to unlawful, discriminatory state taxation. That is why

the key question in the internal consistency test is whether the State's system "inherently discriminate[s] * * * without regard to the tax policies of other" jurisdictions." *Wynne*, 135 S. Ct. at 1802. Just as an internally consistent system cannot be condemned based on how it interacts with another system, *id.* at 1804, an internally *inconsistent* system cannot be salvaged by how it interacts with another system, *Kraft*, 505 U.S. at 81.

Worse still, the Utah Supreme Court *recognized* that its approach was inconsistent with *Kraft*. Pet. App. 26a-27a n.18. Seeking some way around that obstacle, the court reached for *Barclays*' "principle of passive congressional approval." *Id.* The Utah court admitted that this Court has only applied that principle in the context of the "one voice" test, but nevertheless insisted that "it has broader applicability" and that "there is no reason" why the concept of "passive approval should not be attributed to" the *other* dormant Commerce Clause requirements. *Id.* at 27a n.19.

The reason is *Barclays* itself. *Barclays* held that the passive-approval principle comes into play "*only after* determining that the challenged state action was otherwise constitutional"—that is, after finding that a tax complied with the rest of the dormant Commerce Clause's requirements. 512 U.S. at 323 (emphasis added). And, leaving nothing to the imagination, the Court in the *very same paragraph* reiterated that Congress must speak "with * * * unmistakable clarity" when it wants to "permit state regulation that discriminates against interstate commerce or otherwise falls short under *Complete Auto* inspection." *Id.*; *see also Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (courts must identify an "unam-

biguous indication of congressional intent" to sanction a tax that fails a *Complete Auto* requirement). There is no way the Utah Supreme Court could think that the passive-approval principle can excuse a tax code, like Utah's, that flunks *Complete Auto*'s internal-consistency test and thereby discriminates. And the Utah court did not identify an "unmistakably clear" statement from Congress sanctioning Utah's tax scheme.

The federal-tax-credit argument therefore misses the essential point. Regardless of the federal policy, the foreign jurisdiction imposes a tax on the taxpayer's income earned in foreign commerce, and Utah imposes a second tax on the same income. That the federal government may or may not tax the income is irrelevant.

But even if, contrary to *Kraft*, a court were legally permitted to look to the federal tax credit for taxes paid to foreign governments, that does not necessarily cure discrimination in Utah's system. The Utah Supreme Court believed that layering a state credit on top of a federal credit would result in "the windfall of a double tax credit" for foreign commerce. Pet. App. 26a. That argument rests on a flawed premise: that the federal credit will *always* be great enough to offset Utah's disparate burden on foreign commerce. But that is not always so, as the amount of the federal tax credit for foreign taxes paid is capped based on the total amount of federal tax liability. *See* 26 U.S.C. § 904(a); *Foreign Tax Credit – How to Figure the Credit*, Internal Revenue Serv. (last updated Mar. 18, 2019).[8] Thus, the federal tax credit

[8] *Available at* https://tinyurl.com/gocmnsa.

will not always eliminate the discriminatory double tax. Even if there are some cases in which the federal credit does result in more favorable treatment for foreign commerce, that result flows from a *federal* policy expressly sanctioned by Congress. In the context of foreign commerce, that makes all the difference: Congress has the power to set national economic policy; States do not. *Japan Line*, 441 U.S. at 448, 456-457.

4. Given its incompatibility with this Court's precedent, it is no surprise that the Utah Supreme Court's interpretation of *Barclays* is highly anomalous. The decision below approved Utah's tax regime based on the "lack of an explicit Congressional directive" prohibiting it. Pet. App. 28a. But other courts applying *Barclays* recognize that "any state statute or regulation that impacts * * * foreign commerce is subject to judicial scrutiny under the commerce clause unless the statute or regulation has been * * * expressly *authorized*[] by an act of Congress." *Pacific Merch. Shipping Ass'n* v. *Voss*, 907 P.2d 430, 435-436 (Cal. 1995) (emphasis added); *see also County Sanitation Dist. No. 2* v. *County of Kern*, 27 Cal. Rptr. 3d 28, 74-75 (Ct. App. 2005) (dormant commerce analysis applies "where Congress has not spoken," and does not apply "where Congress has spoken and specifically authorized the state or local government action" (internal quotation marks omitted)). And since *Barclays*, several state high courts have concluded that discriminatory state taxes violate the foreign dormant Commerce Clause even where Congress has not spoken on the tax. *See Emerson Elec. Co.* v. *Tracy*, 735 N.E.2d 445, 448 (Ohio 2000); *Conoco, Inc.* v. *Taxation & Revenue Dep't of State of N.M.*, 931 P.2d 730, 733-734, 735-

736 (N.M. 1997); *Dart Indus. Inc.* v. *Clark*, 657 A.2d 1062, 1066 (R.I. 1995).

This division warrants review, particularly in light of the weighty federal issues involved. This Court has explained that "the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated." *Kraft*, 505 U.S. at 79. A State's "discriminatory treatment of foreign commerce may create problems, such as the potential for international retaliation, that concern the Nation as a whole." *Id.*; *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 266 (10th ed. 2013) (collecting cases and explaining that certiorari is often granted "in cases involving a constitutional challenge to federal or state statutes or actions with a significant impact on American foreign policy").

The Utah court's refusal to apply this Court's holdings jeopardizes the ability of the Nation to fulfill the "special need for federal uniformity" in the "unique context of foreign commerce." *Barclays*, 512 U.S. at 311 (internal quotation marks omitted). And the risk would only grow if additional State courts follow Utah's approach of resisting Commerce Clause commands—at least one has implied it might. *See Kansler* v. *Mississippi Dep't of Revenue*, 263 So. 3d 641, 654 (Miss. 2018) (citing the Utah Supreme Court's decision in *DIRECTV* and "echo[ing] the Utah Supreme Court's caution against novel Commerce Clause arguments" in rejecting challenge to Mississippi's statute of limitations for amending tax returns), *reh'g denied* (Feb. 28, 2019), *cert. denied*, No. 18-1485, 2019 WL 4921402 (U.S. Oct. 7, 2019).

II. THE UTAH SUPREME COURT'S UNWILLINGNESS TO APPLY THE DORMANT COMMERCE CLAUSE WARRANTS THIS COURT'S REVIEW.

At its core, the Utah Supreme Court's decision is not a good-faith attempt to interpret this Court's dormant Commerce Clause case law; rather, it is grounded in the court's "reluctan[ce] to extend" this Court's dormant Commerce Clause precedent—"even in ways that might seem logical in other jurisprudential realms." Pet. App. 8a-9a (internal quotation marks omitted). That is not how our federal system—or *stare decisis*—works.

1. The "Constitution, and the Laws of the United States" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. "State courts, as much as federal courts, have a solemn obligation to follow federal law." *Arizona* v. *San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983); *accord Employees of Dep't of Pub. Health & Welfare* v. *Dep't of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973) (state courts "are obliged to enforce" federal law, "even if it conflicts with state policy"). "[T]his Court is the final arbiter of" federal law, and through certiorari review "correct[s] * * * state-court decisions giving the Constitution too little shrift." *New York* v. *Ferber*, 458 U.S. 747, 767 (1982).

That is exactly what the Utah Supreme Court has done here—and exactly what it has indicated it will do in future Commerce Clause cases. The Utah court decided that, because "[t]here is no Supreme Court case in which that Court has struck down a state tax

on the foreign income of an individual or an S corporation," it was free to conclude that the dormant Commerce Clause offers *no* protection whatsoever in such circumstances. Pet. App. 21a. That conclusion rests on the court's rule, grounded purely in state decisional law, that it will not apply the principles articulated in this Court's dormant Commerce Clause cases to new factual scenarios. *See DIRECTV*, 364 P.3d at 1049. While the court below is to be commended for its honesty, what this doctrine really means—stripped of legalese—is that a State is free to violate the dormant Commerce Clause, so long as it does so in a way that differs even slightly from the violations this Court has confronted in the past. Such a state-law instruction cannot be reconciled with the mandate of the Supremacy Clause or the supremacy of this Court, and court below identified *no* basis for a similar rule grounded in federal law.

2. The Utah Supreme Court rests its refusal to give full effect to this Court's precedent on two pillars: outright hostility to the dormant Commerce Clause and professed confusion about this Court's doctrine. Neither objection is well founded.

The Utah Supreme Court has made no secret of its distaste for the dormant Commerce Clause. It has repeatedly expressed its view that there is no "textual or originalist mooring for the doctrine that has built up around the concept of dormant commerce." Pet. App. 3a (citing *DIRECTV*, 364 P.3d at 1049); *see also id.* at 28a (referring to the doctrine as a "judicially jury-rigged multipart test[]"). But the doctrine has "deep roots." *Wynne*, 135 S. Ct. at 1794. "The 'negative' aspect of the Commerce Clause was considered * * * important by the 'father of the Constitu-

tion,' James Madison." *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 n.9 (1994). Madison understood the clause to impose "a negative and preventative provision against injustice among the States themselves." *Id.* (quoting 3 M. Farrand, Records of the Federal Convention of 1787, at 478 (1911)). In any event, the Court has applied the doctrine for well over a century now, and "it is this Court's prerogative alone"—not the Utah Supreme Court's—"to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997).

Beyond outright hostility, the Utah court claimed to act out of a belief that this Court's "recent decisions" regarding the dormant Commerce Clause "'add more room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation.'" Pet. App. 31a (quoting *DIRECTV*, 364 P.3d at 1049). But although state courts are entitled to some benefit of the doubt when they earnestly attempt to fulfill their "constitutional obligation to * * * uphold federal law," they may not decline to apply federal law based purely on an "unsympathetic attitude to federal constitutional claims," and this Court has identified "oversight" through "certiorari" as the "safeguard" against the latter problem. *Stone* v. *Powell*, 428 U.S. 465, 493 n.35 (1976).

Moreover, there is no relevant "controversy" or "confusion" in this Court's cases. The Utah court's primary purported source of confusion was its belief that, despite this Court's express statement to the contrary, it *did* treat individuals differently than corporations in *Wynne*. Pet. App. 22a-23a. The court perceived *Wynne* as having "adopted the internal consistency test as a freestanding constitutional

requirement" rather than "one part of the broader *Complete Auto* framework." *Id.* at 22a. But that is exactly how this Court treated the internal-consistency test in *Wynne*: It used the test to help "identify tax schemes that discriminate against interstate commerce," 135 S. Ct. at 1802, and non-discrimination is one of the four *Complete Auto* requirements, 430 U.S. at 287.

Nor was it a departure from prior practice to treat the internal-consistency test as a "freestanding constitutional requirement." Pet. App. 22a. Failure to meet any one *Complete Auto* factor has long been fatal. *Barclays*, 512 U.S. at 310-311. So it is no surprise that, having found that Maryland's tax failed the internal-consistency test—and, therefore, impermissibly discriminated, 135 S. Ct. at 1805—*Wynne* did not bother going through the remainder of *Complete Auto*. This Court rarely decides more than it needs to in order to resolve a case. *See, e.g.*, *National Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2370 n.2 (2018) (explaining that the Court "need not reach" the claim that notice requirements "discriminate based on viewpoint" in light of holding that the requirements were "unconstitutional either way"); *Bernal* v. *Fainter*, 467 U.S. 216, 223 (1984) (explaining that the Court "need not decide" first prong of test of alienage classification "because of [its] decision with respect to the second prong").

The Utah court tried to buttress its claim to confusion by contending that, before *Wynne*, "failure of a tax to pass the internal consistency test was not previously fatal." Pet. App. 23a (citing *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and *American Trucking Ass'ns* v. *Michigan Pub. Serv. Comm'n*, 545 U.S. 429

(2005)). *Wynne* rejected just that argument. *See* 135 S. Ct. at 1802 n.7. Indeed, *Wynne* recognized that one of the Utah Supreme Court's two cited cases has long since been abrogated, *id.* at 1796 (discussing *Shaffer*), and dedicated an extensive footnote to explaining why the Utah Supreme Court's other cited case did *not* fail the internal-consistency test as a factual matter, *see id.* at 1802 n.7 (discussing *American Trucking*). The Utah Supreme Court's reliance on these cases only highlights the extent to which it was relitigating *Wynne* instead of following its holdings.

Finally, the Utah Supreme Court thought it would be "completely at sea" in applying the foreign dormant Commerce Clause to individual taxpayers. Pet. App. 23a. But this Court has already fixed the North Star to guide lower courts evaluating whether a tax impermissibly discriminates: the internal-consistency test. *Wynne*, 135 S. Ct. at 1802. The Utah court thought it would be "quite impossible to apply" that test "in an international setting" because there are "multiple levels of foreign taxation—local, subnational, and national." Pet. App. 24a. But the beauty of the internal-consistency test is its simplicity—there is no need to understand any features of other jurisdictions. *Wynne*, 135 S. Ct. at 1802 ("By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to *isolate* the effect of a defendant's State's tax scheme." (emphasis added)). A court instead assumes that any other jurisdiction shares all relevant features of the defendant jurisdiction. *See Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (internal consistency "looks to the structure of the tax at issue to see whether its

identical application" in other jurisdictions would result in discrimination (emphasis added)). Indeed, although the Utah Supreme Court professed to have "no idea what test to apply or how to apply it," Pet. App. 23a, it needed only to look at the decision on review: The Tax Court had no trouble applying the internal-consistency test to a foreign commerce case, relying on *Wynne*. *Id.* at 40a-41a. And one of the foremost academic authorities on the internal-consistency test explained—in 2008—how it can apply to the European Union. Ruth Mason, *Made in America for European Tax: The Internal Consistency Test*, 49 B.C. L. Rev. 1277 (2008); *see also Wynne*, 135 S. Ct. at 1802 (relying on an *amicus* brief co-authored by Professor Mason).

In any event, where discrimination is sufficiently obvious, a court need not employ the internal-consistency test. *Kraft* is one example—the patently differential treatment of dividends paid by foreign subsidiaries made the discrimination so plain this Court though the point "indisputable" without running through the internal-consistency test. 505 U.S. at 75. The same is true for Utah's policy of granting a credit for income taxes paid to other States but not to foreign countries. Thus, even if there were some difference in how the internal-consistency test applies to foreign commerce, it would provide no basis for the Utah Supreme Court to refuse to apply the dormant Commerce Clause in *this* case.

3. The practical consequences of the decision below illustrate just how wrong the lower court's rule is. Under the law as Utah's highest court articulated it today, the State is free to "tax the entirety of [its residents'] foreign income based on their residency in the state," Pet. App. 25a, no matter how malappor-

tioned or discriminatory the tax, and despite this Court's express instruction that residency alone "says nothing about whether [a] tax violates the Commerce Clause," *Wynne*, 135 S. Ct. at 1799.

Put bluntly, the Utah Supreme Court has relegated the Commerce Clause to second-class status by announcing that it will apply the Clause only after this Court has decided an identical case. Pet. App. 9a. State courts are not entitled to pick and choose which federal constitutional principles they will enforce.

By refusing to logically interpret and, if warranted, extend this Court's Commerce Clause precedent, the decision below betrays the "common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it [is] within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose." *Minneapolis & St. Louis R.R. Co.* v. *Bombolis*, 241 U.S. 211, 222-223 (1916). This Court's review is necessary to ensure the dormant Commerce Clause, and this Court's interpretations of it, are properly enforced. *See* Shapiro et al., *supra*, at 300 (collecting cases and explaining that certiorari is often "granted to determine whether [a] state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation"); *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 362 (1984) ("We are concerned with * * * a contention that a state court disregarded a federal constitutional ruling of this Court.").

The decision below will also have a profound impact on the tax liabilities of individuals and entities in Utah who are engaged in foreign commerce. The Steiners were assessed (and paid) a deficiency of $1.3 million for tax years 2011, 2012, and 2013 alone. *Cf.* Petition for a Writ of Certiorari at 15, *Wynne*, 135 S. Ct. 1787 (No. 13-485), 2013 WL 5652572 (discussing "small" amount of $25,000 at issue for individual taxpayer). The ruling below and the discriminatory tax regime it blessed threaten to distort tax planning and business activity in Utah year after year until it is corrected.

Further, Utah is not alone in imposing discriminatory taxes on foreign commerce. According to the Multistate Tax Commission, which counts nearly every State as a member in some capacity, the Steiners' case implicates "the constitutionality of state individual income taxes across the country." Utah Sup. Ct. *Amicus* Br. of Multistate Tax Comm'n at 2. Its *amicus* brief below identified over two dozen states that tax the entirety of a resident's foreign-sourced income with no credit.[9] *Id.* at 11-12. This Court's intervention is necessary to restore the proper function of the Commerce Clause and the even-handed treatment of foreign commerce it demands.

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[9] It appears that some of these States have elected to tax resident shareholders of a subchapter S corporation only on that portion of the corporation's income that is apportioned to the resident's State. *See, e.g.*, Neb. Rev. Stat. § 77-2734.01(1); N.M. Stat. Ann. § 7-2-11(A); Okla. Stat. tit. 68, § 2358.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 2019