No. 19-755

In the Supreme Court of the United States

ROBERT C. STEINER, ET UX.,

Petitioners,

v.

UTAH STATE TAX COMMISSION,

Respondent.

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

BRIEF OF PROFESSORS MICHAEL S. KNOLL AND DONALD T. WILLIAMSON, AND THE KOGOD TAX POLICY CENTER AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Michael S. Knoll is Theodore Warner Professor, University of Pennsylvania Law School; Professor of Real Estate, The Wharton School; Co-director, Center for Tax Law and Policy, University of Pennsylvania. Much of Professor Knoll's recent research focuses on the connections between taxation and competitiveness.

[1] Counsel for all parties received notice of amicus curiae's intent to file this brief 10 days before its due date, and both Petitioners and Respondent have consented to its filing. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief 's preparation or submission.

Donald T. Williamson is the Eminent Professor of Taxation and the Howard S. Dvorkin Faculty Fellow at the Kogod School of Business at American University, where he serves as Chair of the Department of Accounting and Taxation and as Director of the University's Graduate Tax Program. Professor Williamson's research and teaching interests include issues of federal income taxation, with a special focus on the tax implications of cross-border commerce.

The Kogod Tax Policy Center, housed in the Kogod School of Business at American University, is a nonpartisan research institute that promotes independent investigation of tax policy, tax planning, and tax compliance for small businesses, entrepreneurs and middle-income taxpayers. The Center seeks to increase public understanding of our nation's tax laws and to encourage a balanced, productive dialogue on the challenges average Americans confront in complying with these laws. The Center also offers suggestions to policymakers on the changes that must be made to tax laws to facilitate the growth of small business and the interests of middle-class entrepreneurs.

Amici share extensive experience with the Nation's tax laws, a devotion to the sound development of tax policy, and a concern for the thousands of Utah taxpayers who earn income from sources outside the United States. Amici write to share their considerable expertise on the "'practical effect'" of Utah's laws concerning taxation of this income. *Comptroller of the Treasury of Maryland* v. *Wynne*. 135 S. Ct. 1787, 1795 (2015) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)). We show how these effects constitute discrimination against international commerce under any fair application of *Wynne*'s principles.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the obligation of lower courts and state supreme courts to follow U.S. Supreme Court precedent, particularly this Court's 2015 decision in *Wynne*. *Wynne* demonstrated the Court's renewed attention to state tax laws that discriminate against cross-border commerce relative to purely domestic commerce. *Wynne* announced a clear rule, grounded in economics, for identifying such discrimination: States unconstitutionally discriminate in violation of the dormant Commerce Clause when they enact internally inconsistent tax regimes. A tax regime is internally inconsistent when, if applied, by all the states, cross-border commerce suffers higher taxation than purely in-state commerce. *Wynne* provides an unambiguous mandate to state legislatures: States must reckon with the cross-border effects of all their tax laws to ensure they avoid discrimination.

Wynne also made clear that the internal consistency test would be an essential tool, grounded in sound economics, for uncovering such discrimination, and that it would have wide applicability. *Wynne* thus ensures in the "quagmire" of dormant Commerce Clause jurisprudence, *Northwest States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959), there would be at least one spot of firm ground. And *Wynne* provides clarity where it is especially needed: in state taxation, where state law's potential to incentivize private behavior, and disrupt cross-border commerce, is at its maximum. And *Wynne's* clarity made it the most important advance in dormant Commerce Clause tax discrimination analysis in more than forty years. See Michael S. Knoll & Ruth Mason, *Why the Supreme Court Should Grant Cert in* Steiner *v.* Utah 3 (Feb.

2020) (forthcoming in Tax Notes) (Knoll & Mason—*Steiner*), <https://bit.ly/2tbUB1w>.

But even the clearest rules need enforcement. Lower courts have proven unreliable partners in advancing *Wynne*'s worthy objectives to provide a principled and predictable method for identifying state tax discrimination. As Professor and Amicus Donald Williamson has written elsewhere, see Br. of Prof. Donald T. Williamson *et al.*, *Edelman* v. *New York Department of Taxation and Finance*, No. 18-1570, certain state courts have undertaken efforts to sap *Wynne* of any force. For example, in *Edelman*, New York's highest court distinguished *Wynne* on dubious grounds—that *Wynne* involved multi-state *income*, while New York's scheme involved multi-state *residents*. See *Edelman* v. *New York State Department of Taxation and Finance*, 162 A.d.3d 574, 575 (N.Y. App. Div. 2018).[2] Notwithstanding New York's refusal to apply *Wynne*, the Supreme Court declined to grant certiorari in that case, 140 S. Ct. 134 (2019), allowing that quiet disobedience to stand.

Now, perhaps emboldened by New York's refusal to acquiesce to *Wynne*, the Utah Supreme Court in *Steiner* has engaged in outright defiance. Utah's tax treatment of international income presents a blatant violation of the dormant Commerce Clause and the Court's internal consistency test, in nearly the exact same manner as the tax regime struck down in *Wynne*. Because Utah income-taxation law refuses to grant taxpayers any credits for taxes

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[2] See also Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 State Tax Notes 707 (2017); Jennifer Cass, *New York Can't Ignore* Wynne *Forever*, 91 State Tax Notes 571 (2019).

paid to the other country, it imposes a heavier burden on international commerce than on domestic commerce. Utah thereby discriminates against international commerce—simultaneously punishing Utah residents for seeking economic opportunities abroad as well as foreigners seeking economic opportunities in Utah.

The Utah court offered no sound reason that this blatant discrimination should be immunized from dormant Commerce Clause scrutiny, and it offered no sound reason how *Wynne*'s relevance could be dismissed. Instead, the Utah court relied on a narrow conception of *stare decisis* that it applies only to dormant Commerce Clause cases—one resulting from explicit hostility not only to *Wynne*, but the entire line of dormant Commerce Clause jurisprudence, which it characterized as lacking any "textual or originalist mooring." Pet. App. 3a. Under this narrow and hostile view, virtually *any* difference between the facts of the instant case and the facts of the applicable precedent justifies refusing to apply the dormant Commerce Clause *at all*. In applying that principle, it refused to apply *Wynne* because it involved *interstate* income, whereas *Steiner* involved *international* income. But the dormant Commerce Clause applies to prevent discrimination against both interstate and international income, and nothing in *Wynne* suggests that the decision is as cabined as Utah contends. Utah cannot pretend otherwise simply because it does not like *Wynne*.

If accepted, the Utah court's reasoning would mean that the dormant Commerce Clause simply no longer constrains Utah's ability to tax a large swath of its residents' foreign commerce. And if the Utah court's denouncements of *Wynne* and the entire line of the Supreme Court's

dormant Commerce Clause jurisprudence go unchallenged, the applicability of other dormant Commerce Clause principles is also in serious jeopardy.

In this case, the Utah court has thus refused the rope that *Wynne* offered to pull dormant Commerce Clause jurisprudence out of its current quagmire. By excessively limiting the scope of the dormant Commerce Clause, the Utah court also threatens the free flow of international commerce. This Court should therefore take this case to protect the valuable project it began in *Wynne*, which is only the latest chapter in a story that traces back to the Framers' design of the Commerce Clause itself—one that stands for the economic integration of the Union and against the "economic Balkanization that had plagued relations among the Colonies and later among the States" since "the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979).

ARGUMENT

I. The decision under review conflicts with this Court's decision in *Comptroller of Treasury of Maryland* v. *Wynne*.

The reasoning of *Wynne* applies to prohibit Utah's regime for the taxation of income from foreign sources—as do the well-settled background principles of dormant Commerce Clause jurisprudence upon which *Wynne* stands. These principles prohibit discrimination against foreign commerce on exactly the same terms as they prohibit discrimination against interstate commerce.

A. In *Wynne*, this Court reinvigorated a clear rule, grounded in economics, for identifying discrimination that violates the dormant Commerce Clause: the "internal consistency test." 135 S. Ct. at 1802. Determining whether tax

laws are "internally inconsistent" requires "look[ing] to the structure of the tax at issue to see whether its identical application in every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Ibid.* (quoting *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)). A tax regime is internally inconsistent when, if the regime were applied by all the states, cross-border commerce would suffer higher taxation than purely domestic commerce.

The internal consistency test may not be the most intuitive way of discovering discrimination that violates the dormant Commerce Clause, but the Court has acknowledged that it is an economically correct way of uncovering tax schemes that operate similarly to tariffs, the "'paradigmatic'" evil the dormant Commerce Clause prohibits. *Id.* at 1804 (quoting *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 193 (1994)). For one thing, by analyzing and universalizing only the challenged State's law, the test eliminates the potential for the results to be polluted by features of other States' laws that would introduce, or disguise, discrimination. *Ibid.* And the test is especially useful in discerning discrimination "obscured in a facially neutral regime," Knoll & Mason—*Steiner* 11. Such was the case in *Wynne* itself, in which Maryland's tax *seemed* neutral: It taxed residents' in-state and out-of-state income at the same rate. It also taxed nonresidents' Maryland income at a lower rate. But it was nevertheless discriminatory because Maryland offered no credits for taxes imposed by other states—which meant a taxpayer who had income from another state might be taxed both in that state and Maryland. *Wynne*, 135 S. Ct. at 1803-1804. To evaluate whether this facially neutral regime resulted in

discriminatory taxation, the Court required some principled way of evaluating the impact of Maryland's regime on interstate, as compared to in-state, commerce. The internal consistency test did so.

B. Utah's discrimination against the Steiners results from the state's tax treatment of foreign commerce, while *Wynne* involved interstate commerce. Yet there is no legitimate question that *Wynne*'s teachings, and the internal consistency test it describes, are equally applicable in determining whether state taxes discriminate against international or foreign commerce.

1. There is support for this in *Wynne* itself. *Wynne* cited numerous cases involving discrimination against foreign commerce, indicating an intent to fit them all together as a seamless body of dormant Commerce Clause jurisprudence. *See, e.g.,* 135 S. Ct. at 1799, 1803 (citing *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983)); *id.* at 1799 (citing *Barclays Bank PLC* v. *Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994)).

Wynne couched its decision in broad terms that do not suggest that the Court intended to limit its reach exclusively to cases implicating interstate commerce. *Wynne* expressly stated that its dormant Commerce Clause teachings apply to any kind of taxpayer, individual or corporation. *Id.* at 1796-1797. It also stated that the dormant Commerce Clause applies to any kind of state tax. *Ibid.* ("'A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce'") (quoting *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, Me., 520 U.S. 564, 574 (1997)).

2. The interstate and foreign strains of the dormant Commerce Clause also emerged out of a common set of

rules and consonant purposes indicating that the two should be interpreted in lockstep. The foreign strain shows the interstate strain's concern with protecting Congress's plenary authority to regulate both interstate and foreign commerce, U.S. Const. art. 1, § 8, cl.3, and the same concern for state interference with that authority, see *Barclays Bank*, 512 U.S. at 310 (quoting *Southern Pac. Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)) (the foreign aspect of the dormant Commerce Clause "has long been understood * * * to provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted'"). Moreover, the Supreme Court applies the same basic framework from *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) when it analyzes both interstate and foreign commerce cases. 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).

Both the interstate and international variants of the dormant Commerce Clause are also devoted to the basic "nondiscrimination question[] posed in *Complete Auto*," prohibiting a "preference for domestic commerce over foreign commerce," *Kraft General Foods, Inc.* v. *Iowa Department of Revenue and Finance*, 505 U.S. 71, 79 (1992). And the international variant likewise shares the same concern for such discrimination when it manifests as "multiple taxation." *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 451 (1978). Indeed, the contours of the international and interstate versions of the dormant Commerce Clause follow each other exactly—with one exception: The "protection afforded foreign commerce is broader than the protection afforded interstate commerce," *Kraft*, 505 U.S. at 79, and even less amenable to

interference from the states than is interstate commerce. This is because although state interference with interstate commerce might risk economic inefficiency and sibling-State tension, State interference in foreign commerce injects the states into foreign affairs and might provoke foreign "retaliation" against the "nation as a whole." *Ibid.* Accordingly, the foreign dormant Commerce Clause prohibits more than "favoritism;" it also prohibits anything that "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd.*, 441 U.S. at 451 (internal quotation marks omitted). All this means that if a state tax on interstate commerce would be prohibited under the *interstate* strain of the dormant Commerce Clause, then an identically formulated state tax on international commerce ought to be prohibited under the even more stringent restrictions imposed by the *foreign* strain of the doctrine. *Wynne* and its internal consistency test therefore map perfectly onto this case.

Indeed, there is only one tweak necessary to make the internal consistency test work for the international context: instead of universalizing the tax to "every state in the Union," the reviewing court must universalize it to every country in the world---assuming that all other countries' tax regimes exhibit the same structure as Utah's. 135 S. Ct. at 1812 (quoting *Jefferson Lines*, 514 U.S. at 185). And that means identifying a political subdivision within the country by which the comparison can be made. This means that instead of assuming that all other *U.S. states* adopt Utah's rules, the reviewing court would assume that the relevant *subdivisions of all other countries* did so. Knoll & Mason—*Steiner* 25. To put it in more concrete terms: instead of mapping Utah's rules onto New York (as a court

would in the interstate context), the court would map Utah's tax rules onto Ontario's. Beyond this, the test operates exactly the same way.

C. Application of these principles to this case can lead to only one conclusion: Utah's treatment of income from foreign sources is an obvious violation of the dormant Commerce Clause that disregards the Court's teachings in *Wynne*. The problem with Utah's tax regime could be understood as violating the "discrimination" prong of *Complete Auto's* four-prong test. Or it could be understood, as the Utah court described it, as an "apportionment" problem—whether Utah "taxes a disproportionate share of * * * income earned outside of Utah." Pet. App. 10a. The choice between the two hardly matters. As relevant here, the analysis proceeds the same either way. See Michael S. Knoll & Ruth Mason, *How the Massachusetts Supreme Judicial Court Should Decide* First Marblehead, 78 State Tax Notes 921 (2015). Either way, Utah's law must fall.

This is clear from applying *Wynne's* internal consistency test. Professor and Amicus Michael S. Knoll and Professor Ruth Mason have done a detailed analysis of the test's applicability in this case in a forthcoming article, see Michael S. Knoll & Ruth Mason, *Why the Supreme Court Should Grant Cert in* Steiner v. Utah 25-28 (Feb. 2020) (forthcoming in Tax Notes). But the essence of the analysis is this: If Utah, Ontario, and every similar subnational taxing entity imposed the same flat income tax on inbound, outbound, and in-state commerce (as Utah does), and each gave credit for taxes paid to any political subdivision within the same country (as Utah does), but denied credits for taxes paid to foreign countries (as Utah does), then taxpayers who earn international income would always

pay twice the tax as those who earn only in-state income. Because the Utah tax regime burdens international income more than in-state income, it is internally inconsistent and unconstitutional.

Moreover, Utah's scheme is essentially identical to the Maryland scheme that was invalidated in *Wynne*. Both cases involved states that taxed the in-state incomes of both residents and non-residents, and residents' income worldwide. And in both cases, the challenged state failed to credit taxes paid on cross-border income. The only relevant difference is the nature is the relevant border. In *Wynne*, Maryland denied credit for income earned in other States. In *Steiner*, Utah fails to credit taxes paid on income earned in other countries. But both scenarios were internally inconsistent, and both regimes favored in-state commerce over cross-border commerce.

Indeed, Utah's scheme at issue here is arguably worse than the Maryland scheme in *Wynne*. This is because, unlike the Maryland law that created trouble in *Wynne*, Utah takes care to avoid discrimination against *interstate* commerce by giving residents a credit for taxes paid to other states. Utah Code § 59-10-1003(1). That credit makes Utah tax system internally consistent for *interstate* commerce. But it refuses to grant that credit for foreign income, making it internally inconsistent only for *foreign commerce*. That Utah singles out foreign income—and only foreign income—for differential treatment makes the discrimination all the more obvious and invidious.

There is also no doubt that Utah's scheme creates the perverse "incentive" that the Constitution prohibits: driving "taxpayers to opt for interstate rather than [cross-border] economic activity." *Wynne*, 135 S. Ct. at 1792 (substituting "cross-border" for "interstate"). The law operates

no differently than a "tariff" on all foreign commerce with connection to Utah. But this is not a tariff imposed by Congress. It is a tariff imposed by a single state. There is no doubt that the dormant Commerce Clause prohibits this discrimination.

D. There is also no reason why Utah's blatant discrimination ought to be immunized from *Wynne*'s broad rules, or from dormant Commerce Clause scrutiny. The Utah court did so only by applying a special *stare decisis* rule it applies exclusively to questions under the dormant Commerce Clause—and nothing else. Pet. App. at 8a-9a (citing *DIRECTV* v. *Utah State Tax Comm'n*, 364 P.3d 1036, 1049 (Utah 2015)). Applying this doctrine, and perceiving a lack of "clear direction" from this Court for translating *Wynne* into the foreign commerce context, the Utah court declined to apply *Wynne* at all, else it risk "extend[ing]" dormant Commerce Clause jurisprudence "into new territory." *Id.* at 8a-9a (citing *DIRECTV*, 364 P.3d at 1049). But each of the Utah court's conclusions in applying this *stare decisis* "rule" is incorrect, and the rule itself is unfaithful to this Court's precedent and the state courts' limited role within our federal system.

1. Applying *Wynne* to international income cannot properly be called an "expansion" of dormant Commerce Clause jurisprudence. There is no doubt that the dormant Commerce Clause applies to both interstate and international commerce equally. And there is no reason to think that *Wynne* only applies to interstate income, especially when Wynne went out of its way to draw support for its holding from foreign Commerce Clause cases, suggesting that the Court conducts the same discrimination analysis under both the interstate and foreign Commerce Clauses.

Indeed, the Utah court's application of its dormant Commerce Clause *stare decisis* rule, whereby a small difference between the case before the court and previously decided Supreme court cases can be the basis for refusing to apply them altogether, works a dramatic *retraction* in dormant Commerce Clause jurisprudence. The Utah court's supposed inability to discern the applicable test for uncovering prohibited discrimination in foreign commerce leads it to refuse to apply *Wynne* or the dormant Commerce Clause at all. Pet. App. 21a. That does more than neglect *Wynne*'s clear teachings, it also pulls up stakes from territory that the dormant Commerce Clause has occupied for decades. And this frees the Utah Legislature to enter the field of foreign regulation by enacting as many blatantly discriminatory taxes as it likes. This, indeed, is what Utah's unique *stare decisis* rule actually was designed to do: to free Utah from *Wynne* with its supposedly "little analysis" (at least with regard to its conclusion that the dormant Commerce Clause's protections extend to individuals), Pet. App. at 14a, and, eventually, to facilitate Utah's escape from the supposed "'quagmire'" of dormant Commerce Clause jurisprudence altogether. Pet. 31a (quoting *Nw. States Portland Cement Co.*, 358 U.S. at 458).

2. Further, the Utah court's claim that lack of "clear guidance" exists to facilitate its application of *Wynne* in the foreign context fundamentally ignores what *Wynne* actually achieved. *Wynne* did not seek to displace *Complete Auto*, as the Utah court suggests. Pet. App. 22a. It instead gave shape to *Complete Auto*'s concept of "discrimination"—by imposing a clear rule that would be easily applicable to any dormant Commerce Clause challenge: States cannot allow the imposition of heavier taxes

on cross-border commerce than purely domestic commerce. *Wynne*'s entire purpose was thus to bring clarity to dormant Commerce Clause jurisprudence in the vital area of state taxation, because that is one of the State's most effective tools for influencing economic behavior, and thus a fertile ground for potential abuses by the States. See Michael Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 Va. L. Rev. 309, 319 (2017). *Wynne* therefore did not contribute to any "quagmire" in dormant Commerce Clause law. It provided the best means for *getting out* of the quagmire, by providing the very "'overarching'" principle the Utah court would demand. Pet. App. 3a (quoting *DIRECTV*, 364 P.3d 1036).

Nor, for that matter, do the "multiple levels of foreign taxation" at issue in some foreign systems—"local, subnational, and national"—make it "impossible" to translate the internal consistency test from its "state-level" origins to "an international setting," as the Utah court suggests, Pet. App. 24a. As described above, that translation is easy: The Steiners are only challenging Utah's income tax, and so a court need only analyze the Utah income tax, and assume it is adopted worldwide, in order to apply the internal consistency test. The internal consistency test ignores foreign jurisdiction's actual tax systems, just as it ignores the other taxes in Utah's fiscal system (such as the sales and use tax) that the Steiners are not challenging. None of them are relevant, and not including them in the analysis makes the internal consistency test easy to apply. That simplicity and accuracy is the beauty of the internal consistency test, and the supposed difficulties the Utah court seems to anticipate in applying the internal consistency

test to international commerce are thus entirely of its own imagining.

Indeed, the lower court in *Steiner* had no trouble applying the internal consistency test. In three short and simple paragraphs, the lower court applied the internal consistency test to the facts of *Steiner* and concluded that the Utah tax was internally inconsistent and hence unconstitutional. Pet. App. at 39a.

In any event, the task of translating the internal consistency test to the international context is largely beside the point. The discrimination from Utah's system is so obvious and blatant as to be visible without applying the test at all—it is discriminatory in the same way as the Maryland scheme in *Wynne*. Accordingly, even if the Utah court was not able to figure out the internal consistency test, and it had to fall back on the unvarnished anti-discrimination principle in *Complete Auto*, it would still have had no choice but to recognize the discrimination here.

3a. The means the Utah court employs to try and explain-away that discrimination are likewise ineffective. For instance, the Court has already rejected the argument raised by the Utah court that the availability of a federal credit for taxes paid to other jurisdictions under 26 U.S.C. §§ 901-909 ought to mitigate the discriminatory effect of its failure to offer a similar credit. "[W]hatever the tax burdens"—or benefits—"imposed by the Federal Government or by other States," the fact remains that Utah is discriminating. *Kraft*, 505 U.S. at 80. Just as features of another jurisdiction's law cannot create a dormant commerce clause violation where none exists, another jurisdiction's efforts to mitigate a state's discrimination cannot make it go away. And in any event, the federal credit is no cure-all. The federal credit is likely to be inadequate, since

it is capped at the amount of the taxpayer's total amount of federal tax liability.26 U.S.C. § 904(a).

b. Nor is there any indication that Congress could—or would—have "passively" approved of Utah's blatant discrimination. Pet. App. 27a. This Court may have shown some willingness to assume such tacit approval to on the margins of the dormant Commerce Clause doctrine's application to foreign commerce, where the particular state's law had some marginal impact on the federal government's ability to speak with one voice in foreign commercial affairs. See *Barclays*, 512 U.S. at 323-324 (citing *Wardair Canada, Inc.* v. *Fla. Dep't of Revenue*, 477 U.S. 1 (1986) and *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159 (1983)). But it has never been willing to assume that Congress would passively condone constitutional violations—or outright discrimination—against foreign commerce. And rightly so. It is beyond unlikely that Congress would ever actively approve of state's efforts to regulate international commerce on their own, given the serious foreign policy consequences for the entire nation that could result. There is certainly no reason to think it would tacitly do so. That is exactly why this Court requires positive action from Congress, spoken with "unmistakable clarity," before it will be found to have "permit[ed] state regulation that discriminates against interstate commerce." *Ibid.* The Utah court was thus incorrect to think that anything could remove the discrimination inherent in Utah's application. And that error must be reversed.

II. The issues presented in this case are of utmost importance.

The question presented in this case is also important because this case has the potential to shape dormant Commerce Clause jurisprudence for years to come, even if—perhaps *especially* if—the Court declines review.

A. Until recently, the incentives were clearly driving toward harmony. *Wynne*'s rationale and decision seemed clear and universal enough, and, as a result, legislatures had largely been following *Wynne* and amending their codes. Kathleen K. Wright, *The Decision in* Wynne *and the Impact on the States*, 83 State Tax Notes 187 (2017) (detailing state implementation of *Wynne*).

Yet things are starting to go the other way, as courts find increasingly pretextual ways of dismissing *Wynne*'s relevance, as in *Edelman*—and increasingly vocal ways of making their hostility to *Wynne* known, as in this case. That is creating an intolerable two-tiered legal system, in which some legislatures are freer than others to discriminate against cross-border commerce, based solely on the willingness of their state courts to flout Supreme court precedent.

The attitude of these dissenting courts is also undermining *Wynne*. Without the courts behind it, *Wynne* is virtually meaningless, fatally undermining the Court's effort to bring clarity to this area of the law. If this Court allows dissent to flourish, more courts will join the dissenters. After all, what courts like Utah's are saying in text is merely the subtext in many other courthouses around the country. That contagion should not be allowed to spread.

B. Finally, intervention is also necessary to repudiate the Utah court's cramped view of this Court's dormant

Commerce Clause precedents. Its undisguised hostility to those precedents has not only rendered the restrictions against discrimination against foreign commerce a dead letter in Utah, it is disrespectful of the state court's proper role in applying this Court's precedent. There is often room for legitimate debate over the scope of this Court's holdings, and the state courts fulfill an important checking function for this Court—raising problems that have developed in the law's application, and pressuring this Court to reach the right result, all of which helps to assure the legitimacy of this Court's decisions. So even strongly worded criticism of this Court may have a place in lower-court decision-making. But state courts may not simply apply "too narrow view of holdings" to avoid precedents through cramped readings. Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2025 (1994). And cramped readings are no better when they are announced as official judicial policy than when they simply occur quietly, individually, on a case-by-case basis.

Worse still, courts cannot simply throw up their hands and refuse to apply the Court's precedents—and thereby entire swaths of constitutional law—to new circumstances, no matter how difficult the task of application might become. Our system of constitutional adjudication, like the system of common-law judging on which it is built, requires every lower court to "follow its best understanding of governing precedent," *Massachusetts* v. *U.S. Department of Health & Human Services*, 682 F.3d 1, 15-16 (1st Cir. 2012), and "follow [Supreme Court decisions] as closely and carefully and dispassionately as they can." *Priests for Life* v. *U.S. Department of Health & Human Services*, 909 F.3d 1, 14 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc). And the

Utah Court's failure to do so is another error that needs correcting.

C. It is therefore obviously critical for the court to grant review in this case. What form that review takes is another matter. It might be worth granting plenary review to clarify the internal consistency test's application in the international context, or to be even more explicit in saying that *Wynne* is a universal dormant Commerce Clause rule, with universal reach. But it would be just as good for the court to summarily reverse, or grant, vacate, and remand the case for a proper application of *Wynne*'s plain dictates. That worked fine in *First Marblehead Corp.* v. *Massachusetts Commission of Revenue*, 136 S. Ct. 317 (2015), and it would work here to reverse the pernicious trend of ignoring *Wynne* and improperly cabining application of the dormant Commerce Clause currently occurring in the state courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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