No. 19-755

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

BRIEF AMICUS CURIAE FOR THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a tax scheme that discriminates against foreign income earned by subjecting it to double taxation, when income earned from domestic sources is not subject to the same scheme, discriminates against foreign commerce in violation of the dormant Commerce Clause.

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IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, the American Legislative Exchange Council (ALEC) respectfully submits this brief *amicus curiae* in support of Petitioners Robert C. Steiner and Wendy Steiner-Reed.[1]

ALEC is a nonprofit, tax exempt corporation headquartered in the Commonwealth of Virginia for the purpose educating state legislators and operating as a forum for the exchange of ideas, developing real, state-based solutions to encourage growth, preserve economic security and protect hardworking taxpayers. Roughly 25 percent of all state legislators are members.

ALEC has been a force discussing tax policy and the implications thereof for decades, especially in the context of educating state legislators on what pro-free market and enterprise tax policy looks like. The power to tax is a necessary incident of state sovereignty. While necessary, the power to tax is limited and, if overused, may damage a state's economic outlook or

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief.

Pursuant to Rule 37.6, A*micus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

even, if applied improperly, negatively impact the United State's economy.

ALEC's seminal, annual publication, *Rich States, Poor States*[2] compares the economic position and outlook of all 50 states based, in part, on tax policy. This publication demonstrates that billions of dollars and millions of Americans have fled higher tax states for states with more tax-friendly climates. While a state cannot vote for warmer weather, more oil reserves, or a nice coastline, policymakers can make sure that there is more capital in the hands of taxpayers and businesses, making it easier for them to save, earn, invest, and hire.

When a state's international tax policy is at issue, a principled approach is needed that affirms a state's sovereignty while reconciling weighty issues such as foreign commerce and policy. Such a principled approach should reconcile conflicts between state taxing authority and preventing undue burdens on foreign commerce.

ALEC legislative members have seen and understood that states following certain fundamentals of tax policy will produce economic growth. Among other principles, a state should have "[a]n effective tax system [which is] broad-based, utilize[s] a low overall tax rate with few loopholes, and avoid[s] multiple layers of taxation through tax

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[2] Jonathan Williams, Stephen Moore, & Arthur B. Laffer, *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index,12th ed.* (American Legislative Exchange Council), 2019, https://www.alec.org/app/uploads/2019/04/2019-RSPS-State-Pages_FINAL_WEB_R1.pdf

pyramiding."[3] Any state tax scheme should be based on equity and fairness, which means that it should not be used to "engage in discriminatory or multiple taxation."[4]

A state's tax scheme should be guided by the principle of competitiveness. The means that "[a] low tax burden can be a tool for a state's private sector economic development by retaining and attracting competition from other states… Effective competitiveness is best achieved through economically neutral tax policies."[5]

ALEC members believe that a state should offer credits or equitable adjustments for taxes paid on a foreign subsidiary's income, regardless of whether the subsidiary is owned by a subchapter C corporation (or C-corp), a subchapter S corporation (S-corp), or an individual. Applying the foreign dormant Commerce Clause to state tax schemes will not eliminate a state's ability to tax, nor will it reduce taxing authority in the states through the federal government. Ultimately, the purpose of applying the foreign dormant Commerce Clause is to avoid multiple, or double taxation and to reconcile the authority of states with respect to international tax policy.

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[3] American Legislative Exchange Council, *ALEC Principles of Taxation* (2010, renewed 2019), https://www.alec.org/model-policy/statement-alec-principles-of-taxation/.

[4] *Id.*

[5] *Id.*

SUMMARY OF ARGUMENT

The Commerce Clause does not distinguish between individuals or entities and the dormant foreign Commerce Clause. *See generally Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. ___, 135 S.Ct. 1787 (2015) and *Japan Line, Ltd. v. Los Angeles County*, 411 U.S. 434 (1979). While the Utah Supreme Court may have, in a hyper-technical sense, accurately stated that this Court has not considered a case involving individual (or S-corp) income tax and foreign income, the state court was wrong to break new ground arguing that the Commerce Clause places no restrictions on the state's ability to double tax foreign income.

The Utah's refusal to grant the petitioners either a credit or equitable adjustment violates the principles of *Wynne*, *Kraft General Foods, Inc. v. Iowa Department of Revenue and Finance*, 505 U.S. 71 (1992), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Starting with *Complete Auto*, this case requires that taxes challenged under the Commerce Clause pass a four-pronged test. Among the prongs, the third is that "the tax must be does not discriminate against interstate commerce." 430 U.S. at 279.

If a tax discriminates against out-of-state income by double taxing the foreign income, it violates the Commerce Clause. *Wynne*, 135 S.Ct. at 1801-1802 and *Kraft*, 505 U.S. at 82. It ought to make no difference whether that income is taxed first in another state or country.

The Founders, when debating and ratifying the Constitution had a somewhat universal understanding that the foreign Commerce Clause deprived the states of any authority to set foreign policy, especially tax policy. *See* THE FEDERALIST NO. 12 (Alexander Hamilton) (Discussing the benefits of a federal union with respect to encouraging foreign commerce and standardizing revenue regulations and collection).

Aware of Founders' views of foreign versus interstate commerce, this Court added two considerations to the four prongs of *Complete Auto* in *Japan Line* to cases involving taxes on foreign commerce. These two additional considerations are whether the tax "creates a substantial risk of international multiple taxation and… 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 citations omitted).

Not only does this Court's Commerce Clause jurisprudence provide a solid footing for granting review, tax policy also does so. Double taxation of an individual's foreign income is a powerful disincentive, raising the effective tax rate paid, especially when compared with taxes paid on domestic income. Over half of the states protect taxpayers from double taxation on foreign income. Mary Beth Lougen, *Alleviating Double Taxation on Foreign Income at the State Level*, Tax Management Multistate Tax Report (Bloomberg BNA), 2014 WSTR 42, Oct. 17, 2014, at 10.

The United States also has multiple tax treaties with foreign nations. Internal Revenue Service, UNITED STATES INCOME TAX TREATIES – A TO Z, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited January 8, 2020). These treaties ensure that taxpayers are not subject to double taxation on the federal, or national, level. A state, under proper application of the Commerce Clause, should not be able to risk national foreign policy by subjecting its taxpayers to double taxation.

Utah's tax policies, discriminating against foreign income in favor of domestic income, clearly violate the third prong of the *Complete Auto* test and fail to satisfy either of the considerations in *Japan Line*. On top of this, the Utah Supreme Court clearly erred by refusing to recognize that the Commerce Clause protects corporations and individuals. Because of these errors, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT

The Utah Supreme Court's decision is clearly wrong. Utah's policy of not providing credits or equitable adjustments for foreign taxes results in double taxation and operates as a powerful incentive for its residents to engage domestic rather than foreign commerce. Further, the state court's decision argues that the Commerce Clause does not apply to individuals in contrast to this Court's decision in *Wynne*. The Founders intended the Commerce Clause to empower the federal government, not the states, to regulate commerce with foreign nations.

The Commerce Clause of the United States Constitution provides that "Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art. I, § 8, Cl. 3.

Utah, like many states, taxes the income its residents earn from within and without the state, including income earned from foreign subsidiaries. Consistent with the principles in *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. ___, 135 S.Ct. 1787 (2015), Utah offers credits or equitable adjustments for taxes its residents pay to other states. But unlike a number of other states, Utah does not extend this same credit to income earned from foreign subsidiaries. The net result is that residents with foreign income are subject to double taxation on the same income—once by the foreign government and then again by Utah.

While the state follows the principles of *Wynne*, the state supreme court's decision threatens the

precedent by dismissing, offhand, the applicability of the Commerce Clause, and specifically the dormant foreign Commerce Clause, to individual taxpayers. In doing so, the Utah Supreme Court essentially determined that an individual's choice to participate in an S-corp results in a distinction without a difference. *See Steiner v. Utah State Tax Commission*, 449 P.3d 189 (Utah 2019) at 198. The argument is essentially that this Court has opined, numerous times, on states' tax schemes relating to C corporations and foreign tax policy, but never on a state's tax scheme relating to individuals.

In the opinion of ALEC, the Utah Supreme Court is correct on one factor: this Court has never addressed whether the foreign Commerce Clause, dormant or otherwise, applies to individuals to protect them, and their economic activities, from overzealous state tax policies impacting income from foreign countries. This case presents a unique opportunity to weigh the limits of state tax policy on individuals within the taxing authority's jurisdiction and to correct the Utah Supreme Court's failure to apply this Court's precedents—not just *Wynne*, but also *Complete Auto*, and *Japan Line, Ltd*. and their progeny.

A. The Founders' Original Understanding of the Foreign Commerce Clause Would Prevent States from Discriminating Against Foreign Commerce

The Commerce Clause may be broken into three constituent parts, the regulation of commerce: international, interstate, and with Indian Tribes.

While the construction of the Clause is "in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be greater [than the scope of interstate commerce]." *Japan Line*, 441 U.S. at 448; *see also Kraft*, 505 U.S. at 79 ("[T]he constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce"). Because the Founders intended the scope of the Commerce Clause to provide greater protection with respect to foreign commerce, "a more extensive constitutional inquiry is required" when states seek to levy taxes against foreign, international income. *See id.* at 446.

Many of the early discussions regarding the Commerce Clause involved both foreign commerce and tax policy. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101-147 (2001). For example, in Federalist No. 12, Hamilton linked the need for the federal government to oversee foreign commerce to standardized tax policy and the ability to collect revenue.

> As far as [a general union] could be conducive to the interests of commerce, so far it must tend to the extension of the revenue to be drawn from that source. As far as it would contribute to render regulations for the collection of the duties more simple and efficacious, so far it must serve to answer the purpose of making the same rate of duties more productive, and of putting it into the power of the government to increase the rate, without prejudice to trade.

THE FEDERALIST NO. 12 at 123-124 (Alexander Hamilton) (John C. Hamilton, ed., 1998).

In Federalist No. 42, James Madison discussed the need for the federal government to regulate foreign commerce, placing it on the same plane as making treaties, sending and receiving ambassadors, and so on. THE FEDERALIST NO. 42 at 329 (James Madison) (John C. Hamilton, ed., 1998).

The Founders also understood the dormant foreign Commerce Clause to limit the taxing and regulatory authorities of a state. Citing *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419 (1827), James Kent noted that

> [u]nder the power to regulate commerce, it has been further decided that a state law, requiring every importer of goods by wholesale, bale, or package, to take out a license, and pay for it, under certain penalties or forfeitures for neglect or refusal was repugnant to the Constitution of the United States, and void; inasmuch as it belonged to Congress to regulate foreign commerce…
>
> 1 COMMENTARIES ON AMERICAN LAW *439 (12th ed., O. W. Holmes, Jr., 1873).[6]

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[6] In *Brown*, Chief Justice Marshall noted that states have the authority to tax their "own citizens, or [the citizens'] property within [the state's] territory" but that "the taxing power of the state must have some limits. [A state's authority to tax] cannot reach and restrain the action of the national government within its proper sphere… it cannot interfere with the regulation of

From these discussions, those in the Constitutional Convention, and those in the Ratifying Conventions, it is clear the Founders intended for the federal government to supplant the states with respect to foreign commerce. The federal government's supplanting of state authority thus justifies a "more extensive constitutional inquiry" when a state's policies, and particularly its tax policies, discriminate against foreign policy or may otherwise intrude upon authorities the Constitution reserves for the federal government.

B. The Utah Supreme Court Failed to Conduct the "more extensive constitutional inquiry" required by Complete Auto and Japan Line, Ltd.

The idea that some state tax policies may be limited received something of a renewed life since this Court's decision in *South Dakota v. Wayfair*, 585 U.S. ___, 138 S.Ct. 2080 (2018). According to the Court in *Wayfair*, "Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *Id.* at 2090-2091. This Court continued, stating "[t]hese principles also animate the Court's Commerce Clause precedents addressing the validity of state laws." *Id.*

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commerce." The Chief Justice seemed to suggest that a state's authority to tax ends where such a policy would "derange the measures of Congress to regulate commerce." 25 U.S. (12 Wheat.) at 449.

A court will, thus, "sustain a tax against a Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279.

This Court acknowledged in *Japan Line* that the four-pronged test applies to taxies discriminating against both interstate and foreign commerce. Despite the applicability of the *Complete Auto* test, it is insufficient for taxes discriminating against foreign income. Because of this insufficiency, the Court

> believe[d] that an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answer the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, 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." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

441 U.S. at 451 (internal citations omitted).[7]

The Court has applied the *Complete Auto* and *Japan Line* tests separately. *See*, for example, *Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8-9 (1986). ("In the present case, appellant concedes that Florida's tax satisfies the four-part test set out in *Complete Auto*… Appellant and the United States as *amicus curiae* thus rely entirely on the final factor identified in *Japan Line.*") Thus, a case could theoretically satisfy the four-prongs necessary to sustain an interstate tax, but fail either, or both, of the inquiries demanded by *Japan Line*.

As to the first of the two inquiries, the Utah Supreme Court's decision admits that Petitioners are subject to double taxation. "It's true that the Steiners have suffered a 'double tax detriment' by being taxed by both Utah and a foreign country." The court, though, justified the double taxation by determining "Utah has not taxed the foreign income twice—it has only taxed it once. The second tax detriment was at the hands of a foreign sovereign." *Steiner*, 449 P.3d at 201.

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[7] The Utah Supreme Court, as discussed in the Petition for Writ of Certiorari, discussed *Barclays Bank PLC v. Franchise Tax Bd. Of California*, 512 U.S. 298 (1994) to avoid *Wynne*. See Petition at 19-20. The "one voice" argument is not as broad as the Utah court suggests as it appears to apply not to the *Complete Auto* tests, but to the second of *Japan Line*'s two prongs. "An important premise underlying both decisions is this: Congress may more passively indicate certain state practices *do not* 'impair federal uniformity in an area where federal uniformity is essential.'" 512 U.S. at 323 (emphasis original).

This is backwards. The Petitioners' foreign income is taxed before it is patriated into the United States and Utah. See Petition for Writ of Certiorari at 7-8. Utah's income tax is the second time Petitioners' foreign income is subject to taxation. This Court's review is warranted to remedy this clear misstatement of tax policy and failure to apply either of the inquires demanded by *Japan Line*.

C. The Commerce Clause Does Not Distinguish Between Individuals and Corporations

While the Utah Supreme Court failed to apply the two considerations in *Japan Line*, its primary failure is the misapplication of both *Wynne* and *Kraft*. The logical combination of the cases should have established the premise that the foreign Commerce Clause bars state policies discriminating against foreign investments. And the focus should be not on the form of the person or entity paying the taxes, but on the practical effect of the policies.

The Utah Supreme Court sought to avoid this Court's holding in *Wynne* by focusing on the nature of the taxpayer than the impact of the tax, arguing that

> [n]o Supreme Court case considering the Dormant Foreign Commerce Clause has involved an individual taxpayer (or S corporation shareholder). They have all involved C corporations. The Supreme Court has never indicated that a state taxing an *individual* based on his residency in that state—could run afoul of the Constitution by failing to grant a tax credit against taxes levied by foreign countries.

Steiner, 449 P.3d at 198 (emphasis added).

Nothing in the text of the Commerce Clause suggests that the Founders intended to distinguish between individuals and corporations. The Commerce Clause empowers Congress, rather than the states, to "regulate commerce with foreign nations."

Maryland, in *Wynne* had a unique tax scheme that resulted in residents paying taxes earned on out-of-state income to both the original taxing state and Maryland without credit or adjustment. The Wynnes, much like Petitioners, owned shares in an S corporation. They elected to pass the income through to their personal taxes. *Wynne*, 135 S.Ct. at 1793. In the decision invalidating the Maryland scheme and protecting individual taxpayers from double taxation, this Court relied on cases "involving the taxation of the income of domestic corporations." *Id*. at 1795.

Unlike the Utah Supreme Court, this Court made no distinction between individuals, S corporations, and C corporations. Instead, the Court focused on the impact of the tax policy: did the policy discriminate against interstate commerce by treating out-of-state income differently than intrastate income? This focus on the impact of tax policy is consistent throughout the Supreme Court's taxation Commerce Clause jurisprudence, with the tests in both *Complete Auto* and *Japan Line* designed to suss out the effect, if any, of a state tax on interstate or foreign commerce.

In *Kraft*, this Court set aside a state tax scheme that discriminated against foreign commerce by taxing income from a company's foreign subsidiaries while providing allowances, or deductions, for

dividends received from domestic subsidiaries. *Kraft*, 505 U.S. at 74. In the decision, this Court noted that

> 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. So here, we think that a State's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause even if the State's own economy is not a direct beneficiary of the discrimination.
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> *Id*. at 2370.

The Founders intended for the foreign Commerce Clause to more robustly protect against state action than the interstate Commerce Clause and the Court in *Wynne* determined that the interstate Commerce Clause protects individuals from state double taxation. Similarly, in *Kraft*, this Court concluded that disparate treatment of dividends from foreign and domestic subsidies violates the foreign Commerce Clause. Between the two cases, it should not have been too difficult for the Utah Supreme Court to rule that the Commerce Clause projects individuals (or S corporations) from inequities between state and foreign income tax policy and that there is really no difference whether an individual or corporation is seeking to enforce its rights.

Nothing in this brief or in any of the Court's jurisprudence suggests that a state cannot tax income received from foreign subsidiaries. Instead, precedents argue that just as a state may not double

tax income received in other states, so also it cannot double tax foreign income. If the foreign income is taxed at a rate lower than the state, the state may offer a credit or adjustment and still tax the difference. For example, if a foreign government taxes the income received at 3.95 percent and a state taxes at 4.95 percent, the state may offer a credit or adjustment for the 3.95 percent and still collect one percent through its income tax on the foreign income. This would avoid the problem of double taxation and preserve the state's ability to tax its residents' income.

D. State Double Taxation Is A Powerful Disincentive for Foreign Investments and Risks Establishing National Policy

In addition to the legal reasoning, there are significant policy concerns in this case that require a ruling from the Supreme Court. First, Utah's tax code, as it stands, currently does not offer a foreign tax credit for income earned and taxed abroad but does offer a credit for income taxes paid to other states. *See* UTAH CODE ANN. §§ 59-10-104 (2018), 59-10-104.1, and 59-10-1003.[8] This results in the double taxation of foreign income. Double taxation raises the effective tax rate paid by income earners by applying the foreign income tax rate and the state income tax rate to the same reported adjusted gross income. By increasing the effective tax rate on income earned

[8] The Utah income tax code listed here is for 2008 or 2018. The 2019 tax rate will be 4.66% upon enactment of Senate Bill 2001 in February 2020. See 2019 Utah Senate Bill No. 2001, 63rd Legislature – 2019 Second Special Session. For Petitioners, the effective tax rates are those listed in the 2008 version of the Code.

abroad, Utah subsidizes domestic investment at the expense of foreign commerce. Second, allowing states to double tax foreign income works against tax treaties with foreign governments currently in effect and negatively impacts foreign relations.

Both policy problems can be solved by offering a foreign tax credit or other equitable adjustment. A foreign tax credit allows income earners who report income earned abroad to claim a credit on state taxes up to the value of the foreign taxes paid. For example, if a Utah taxpayer reports $200,000 in income in France, he or she must pay the French top marginal income tax rate of 45 percent plus the Utah income tax rate of 4.95 percent.[9] On $200,000 in income, the Utah taxpayer must pay $9,900 in state taxes in addition to the French taxes levied on the same income.

Over half of the states protect their taxpayers from double taxation on foreign income. Income earners in Arizona, Arkansas, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, New York, North Carolina, South Carolina, Vermont and Virginia can claim some form of a foreign tax credit, while Alaska, Florida, Nevada, New Hampshire, South Dakota, Tennessee, Texas, Washington and Wyoming do not tax earned income at all. Mary Beth Lougen, *Alleviating Double Taxation on Foreign Income at the State Level*, Tax Management Multistate Tax Report (Bloomberg BNA), 2014 WSTR 42, Oct. 17, 2014.

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[9] *See* note 8.

Just as there are many states that recognize the costs of double taxation and offer a foreign tax credit, there are many states insistent on double taxing foreign sourced income. For example, California has a similar policy to Utah where Californians must pay both the foreign tax rate in addition to the state personal income tax, which has the highest top marginal rate of any state at 13.3 percent. *See,* Lougen, *Alleviating Double Taxation on Foreign Income*, above.[10] California has the largest economy of any state and constitutes 14.5% of the total US economy. Todd Siebeneck and Catherine Wang, Bureau of Economic Analysis, U.S. Department of Commerce, BEA 19-19, GROSS DOMESTIC PRODUCT BY STATE, FOURTH QUARTER AND ANNUAL 2018. The economic losses to the United States from state tax policy dissuading American participation in international commerce is stark. California's sheer economic magnitude places the negative effects of double taxation on foreign sourced income on a large scale.

In addition to the economic consequences from double taxation, Utah's tax code is biased against Utah taxpayers engaged in foreign commerce versus Utahns concerned only with domestic business. Utah's tax code creates a foreign Commerce Clause issue, because taxing foreign income doubly has a

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[10] *See also*, Jonathan Williams, Stephen Moore, & Arthur B. Laffer, *Rich States, Poor States: ALEC-Laffer State Economic Competitiveness Index,12th ed.* (American Legislative Exchange Council), 2019, https://www.alec.org/app/uploads/2019/04/2019-RSPS-State-Pages_FINAL_WEB_R1.pdf.

negative impact on American tax treaty negotiations with foreign governments.

Petitioners qualified for the federal foreign tax credit[11] on the same income Utah denied a foreign tax adjustment. Not only does Utah's lack of a foreign tax credit differ greatly from federal foreign tax policy and the foreign tax policy of many states, but it differs greatly from the policy of many other countries.

A total of 38 countries offer their taxpayers a foreign tax credit, and many countries go so far as to recognize the purpose of foreign tax credits by calling their tax treaties with the United States "The Agreement…for the Avoidance of Double Taxation." See, e.g. Internal Revenue Service, UNITED STATES INCOME TAX TREATIES – A TO Z, https://www.irs.gov/businesses/international-businesses/united-states-income-tax-treaties-a-to-z (last visited January 8, 2020), and GUIDE TO GOING GLOBAL: TAX, DLA Piper (2019), https://www.dlapiperintelligence.com/goingglobal/tax/handbook.pdf._In fact, the United States has a tax treaty with every one of its top 10 trading partners. The treaties have the expressed purpose of avoiding double taxation through a foreign tax credit or deduction. Sarah Gray, *These Are the Biggest U.S. Trading Partners*, Fortune (Mar. 7, 2018), https://fortune.com/2018/03/07/biggest-us-trade-partners/, *see also*, IRS UNITED STATES INCOME TAX TREATIES, above. In this case, Utah's tax code lacking a foreign tax credit and double taxing foreign income

[11] 26 U.S.C. § 901

is contrary to US foreign policy and may negatively impact tax treaty negotiations.

Not only may allowing Utah to tax foreign income without credits or equitable adjustments negatively impact foreign tax policy and negotiations, but it may result in retaliatory tax policies enacted by foreign governments against Americans. By not offering a foreign tax credit, Utah is effectively subsidizing income earned domestically at the expense of foreign investment by raising the cost of conducting international business.

Subsidizing domestic economic activity at the expense of international commerce sparked many trade conflicts in the economic history of the United States. For example, recent Canadian dairy subsidies and Chinese industrial subsidies have resulted in retaliatory tariffs. *See*, Evan Haynes, *Trump's Trade Wars Have Mobilized Canada's Dairy Cartel,* Reason (Jul. 24, 2018), https://reason.com/2018/07/24/trumps-trade-wars-have-mobilized-canadas/ and *US-China Trade Deal Will Be Signed on January 15: Trump,* Business Today (Jan. 1, 2020), https://www.businesstoday.in/current/world/us-china-trade-deal-will-be-signed-on-january-15-trump/story/392961.html. Utah's discrimination against international business through double taxation distorts the economy to discourage American capital from foreign countries and is strikingly like the activities practiced by other countries notorious for stoking trade conflicts.

Utah's insistence on double taxing foreign income is certainly bad policy and distorts American

participation in the global economy while potentially working against the United States during tax treaty negotiations. Clear impacts on the broader US economy and American participation in global trade call into question the state double taxation of foreign income and highlight the need to grant the Petition for Writ of Certiorari.

CONCLUSION

Without clarification from this Court on states' powers to tax an individual's income received from international commerce, many states will continue to enforce tax policies that discriminate against foreign income, dampen American trade, and weaken the abilities of Americans to create opportunities for others. Disagreement between state courts on the scope of the foreign dormant Commerce Clause breeds uncertainty in lawmakers and their constituents, while creating a tax code that is unpredictable and unreliable. American business owners and investors require a predictable tax code supported by clear judicial opinions to make informed decisions and craft long term plans for successful ventures.

The American Legislative Exchange Council, as *amicus curiae*, respectfully requests that this Court grant the Petition for Writ of Certiorari because our legislative members require clarity in federal law and policy in order to best represent their constituents. Given the disagreement between the parties regarding *Wynne*, *Kraft*, and *Japan Line,* states need input in order to ensure their state tax policies are aligned with Supreme Court jurisprudence and the

United States Constitution. ALEC members have duties to their constituents and would benefit from a clear legal landscape when crafting state tax policy that relates to foreign trade.

Respectfully submitted,

/s/
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