No. 20-1159

In The
Supreme Court of the United States

VERMONT NATIONAL TELEPHONE COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF TAXES,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 2003, Vermont National Telephone Company bought two FCC licenses that gave the company a right to broadcast in designated parts of New York State. The company acquired the licenses solely for investment purposes and never made any attempt to provide service in New York or acquire the real property or infrastructure necessary to do so. In 2013, the company sold the licenses for a nearly $24 million gain that was not reported as taxable income to any State. In the decision below, the Vermont Supreme Court determined the gain was subject to taxation in Vermont under Vermont Tax Regulation § 1.5833-1(e), which allocates income from a nonbusiness asset with no "situs" to the taxpayer's commercial domicile. The question presented is:

In applying Vermont Tax Regulation § 1.5833-1(e), did the Vermont Supreme Court correctly conclude that the FCC licenses lacked a New York situs?

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INTRODUCTION

In 2003, petitioner Vermont National Telephone Company (Vermont National) bought two licenses from the Federal Communications Commission (FCC) that gave the company a right to broadcast in designated parts of New York State. Vermont National acquired the licenses solely for investment purposes and never made any attempt to provide service in New York or acquire the real property or infrastructure necessary to do so. In 2013, Vermont National sold the licenses for a nearly $24 million gain that was not reported as taxable income to any State. In the decision below, the Vermont Supreme Court determined the gain was subject to taxation in Vermont under Vermont Tax Regulation § 1.5833-1(e), which requires allocating income from a nonbusiness asset with no "situs" to the taxpayer's commercial domicile.

In applying § 1.5833-1(e), the Vermont Supreme Court held that Vermont National's licenses had no situs in New York. The petition for certiorari argues that holding conflicts with this Court's decision in *New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937). The petition should be denied for at least four reasons.

First, the petition fails to present a substantial federal question. The Vermont Supreme Court applied a Vermont tax regulation to a Vermont company's nonbusiness income. Although the court drew on federal due process principles to define the regulatory term "situs," Vermont National does not argue that its rights under the Fourteenth Amendment's Due Process

Clause—or any other federal "title, right, privilege, or immunity"—have actually been violated. *See* 28 U.S.C. § 1257(a). They have not been. "The Due Process Clause allows a State to tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1798 (2015) (quotation omitted). The question in this case is and has always been whether Vermont law permits taxation of the income in question.

Second, the decision below does not contribute to a split in authority among lower courts. The only other reported decision to have addressed a remotely similar factual situation reached the same conclusion.

Third, the decision below will have limited impact, even in Vermont. It will not interfere with the laws of any other States or create a significant risk of double taxation. Allocating nonbusiness income from an intangible asset to a company's commercial domicile, as Vermont did here, is entirely consistent with both the Uniform Division of Income for Tax Purposes Act (UDITPA) and New York law. As Vermont National concedes, its arguments to the contrary rely entirely on inapposite provisions governing the *apportionment* of *business* income. *See* Pet. 26 n.7. There is no dispute that this case concerns the *allocation* of *nonbusiness* income. In any event, the unique factual circumstances that allowed Vermont National to cheaply acquire two FCC licenses in 2003 without having to provide service in the covered areas are unlikely to recur.

And *finally*, the decision below is correct. To the extent the decision below is informed by federal due process principles, it does not conflict with any of this Court's relevant decisions.

Vermont undisputedly has the constitutional authority to tax Vermont National's income. Vermont National does not suggest otherwise. Rather, it argues that, in applying a Vermont tax regulation, the Vermont Supreme Court misconstrued *Whitney* by holding that Vermont National's FCC licenses lacked a New York situs.

The decision below correctly distinguished *Whitney*. In that case, the Court was "dealing with an intangible right of a peculiar nature"—a membership interest in the New York Stock Exchange. 299 U.S. at 372. The Court explained that right was "exercisable only in transactions conducted at the Exchange building in the city of New York." *Id.* at 370-71. Because the rights of membership were "fixed exclusively or dominantly" at the Exchange building, the Court held the membership interest's "very nature localizes it at the Exchange." *Id.* at 373. Accordingly, the Court held the membership interest had acquired a "business situs" at the Exchange building and thus could constitutionally be taxed by New York. *Id.* at 372, 374.

Here, by contrast, Vermont National never acquired the real property or infrastructure necessary to provide mobile telecommunications service or otherwise transact any business in New York. Unlike the membership interest in *Whitney*, Vermont National's

licenses never became "localized" at an actual physical location in New York and the company's ownership of those licenses thus never implicated the "protection and benefits" of New York law. Pet. App. 19a.

STATEMENT

A. Apportionment and Allocation of Corporate Income Under Vermont Law

Vermont, like most states, takes a binary approach to taxing corporate income. Under this approach, *business income*—that is, revenue derived from the company's regular business activities—is *apportioned* or divided proportionally among the states in which the company does business. All other sources of revenue are considered *nonbusiness income* and are *allocated* in whole to a single state, typically the taxpayer's commercial domicile. *See generally ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 310-11 (1982) (discussing apportionment and allocation). There is no dispute that this case concerns the *allocation* of *nonbusiness* income.

Apportionment and allocation of corporate income in Vermont are governed by Vermont Tax Regulation § 1.5833-1, Pet. App. 126a-36a. The dispute in this case turns on the meaning of the words "location" and "situs" in section (e) of that regulation, which provides:

> Nonbusiness income will be allocated to the state in which the income producing assets are located. If the income producing asset has

> no situs, the income will be allocated to the state of commercial domicile, the princip[al] place from which the business is directed or managed.

Vt. Tax. Reg. § 1.5833-1(e); Pet. App. 135a-36a.

In the decision below, the Vermont Supreme Court interpreted the term "location" to mean where tangible property is physically located and the term "situs" to be a "term of art referring to where intangible property is constitutionally subject to taxation." Pet. App. 13a. Thus, when computing a company's nonbusiness income to determine its tax liability under Vermont law, income and losses from tangible property will be allocated to the State where the property is physically located. Income and losses from intangible property—*i.e.*, property that lacks a physical location—will be allocated to the State of the company's commercial domicile, unless the intangible property has acquired a "situs" elsewhere.

B. Factual Background

This case involves a dispute between Vermont National and respondent Vermont Department of Taxes over the proper allocation of a capital gain Vermont National realized in 2013 from the sale of two FCC licenses.

1. Vermont National was founded by Michel Guité, who is currently the president and chief executive officer of the company and its subsidiaries. P.C.

185-86.[1] Vermont National's core business is providing telecommunications services in southern Vermont. P.C. 186. Mr. Guité, a former Wall Street equities analyst, has also used Vermont National as a vehicle to explore various investment opportunities, including real estate throughout the eastern United States and Canada, a technology start-up in Israel, and a venture fund affiliated with the Massachusetts Institute of Technology. P.C. 185, 188-89.

In 2003, Vermont National purchased the two federal licenses at issue here through an FCC auction. P.C. 190-91. Each license permitted the owner to send and receive wireless data and voice signals within a narrow section of bandwidth in the lower 700 megahertz (MHz) portion of the electromagnetic spectrum. *Id.* Both licenses covered designated geographic areas in New York State. P.C. 191. Vermont National acquired the licenses "solely for investment purposes with the hope, if not the expectation, that [they] could later be sold for more than [their] initial purchase price." P.C. 195-96.

The 2003 licenses were particularly attractive as passive investments because they lacked the stringent "performance requirements" that typically accompany FCC licenses, such as "construction benchmarks" that require licensees to build out a communications infrastructure or otherwise provide service to a specified

[1] Vermont National and its subsidiaries are referred to collectively as "Vermont National." References to "P.C." are to the "Printed Case" that Vermont National filed below. *See* Vt. R. App. P. 30.

percentage of the population within the licensed area. *See generally* Jennifer Prime, *Finding Substance in the FCC's Policy of "Substantial Service*," 56 Fed. Commc'ns L.J. 397, 399-400 (2002); 47 U.S.C. § 309(j)(4)(B) (requiring FCC to promulgate performance requirements in order "to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services").

At the time of the 2003 auction, the transition from broadcast to digital television had begun, and the lower 700 MHz band of spectrum was in the process of being transitioned from television to cellular telecommunications. P.C. 193-94. But "[t]here was considerable uncertainty about how long this process would take," and "no significant manufacturer of cellular broadcasting equipment was making equipment that would allow" this portion of the spectrum to be used for cellular telecommunications. P.C. 193-94. Accordingly, the FCC extended the term of the 2003 licenses and did not require licensees to satisfy any build-out requirements until the licenses were up for renewal in 2019. P.C. 71, 106; FCC, *In re Reallocation and Service Rules for 698-746 MHz Spectrum Band (Television Channels 52-59)*, 177 FCC Rcd. 1022, 1078 (2002). "In effect, this meant the Licenses had no build-out requirements." Pet. App. 54a. Vermont National saw this as "a rare opportunity to acquire potentially superb FCC spectrum in a Top 50 market, at a bargain-basement price,

without a specified technology build-out schedule until the end of the license term." P.C. 198-99.

Vermont National's bet paid off. In 2013, the company sold the licenses to AT&T for a gain of $23,970,730 without having spent a penny to build out a cellular communications network or provide service in New York. Pet. App. 46a; P.C. 15.[2]

2. Vermont National then made a riskier bet. The company chose not to report its gain as taxable income to *any* state. The company reported its gain from the FCC licenses in its 2013 Vermont tax return as "everywhere" nonbusiness income, allocated entirely to a non-Vermont source. Pet. App. 46a.[3]

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[2] Although not relevant here, the company carved out and retained a small area of one of the 2003 licenses along the New York-Vermont border. Pet. App. 44a.

[3] Vermont National argues that it acted "diligently" based on "the (accurate) advice of its tax accountant" in taking this aggressive position. Pet. 8, 30. But the only tax advice in the record is a conclusory memorandum from a Maine accounting firm, which remarkably fails to even mention —much less discuss—the critical language in Vermont's regulation concerning where the assets were "located" or whether they had a "situs." *See* Vt. Tax. Reg. § 1.5833-1(e); Pet. App. 135a-36a. Instead, the memorandum exclusively addresses whether the gain from the sale of the licenses should be treated as nonbusiness income, an issue on which the parties here have never disagreed. *See* P.C. 94-95. Despite this omission and Vermont National's stated belief that "the factual and legal issues" involved were "complex," Pet. App. 104a, the company did not request a formal ruling on its liability from the Department, *see* Vt. Dep't of Taxes, Organization and Rules of Procedure, Rule 7(b) ("Upon request of a taxpayer, the Department will issue a declaratory ruling as to the applicability of any statutory provision or of any rule or practice of the Department.").

Vermont National also did not report the gain as taxable income to New York. *See* Pet. App. 47a; Oral Argument at 31:24-31:41, *Vt. Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83 (No. 2019-280) ("[T]he State of New York's tax rules are set up so that our client did not owe taxes in the State of New York. . . . The State of New York's tax regulations did not tax this gain.").[4]

The Department audited Vermont National in 2015. Pet. App. 45a. The Department concluded that the gain from the sale of the FCC licenses was non-business income that should have been allocated to Vermont and assessed Vermont National a tax of $1,947,437, an underpayment penalty of $445,222.52, and interest. Pet. App. 4a-5a & n.2.[5]

C. Procedural History

1. Vermont National appealed the assessment and penalty to the Tax Commissioner and argued, among other things, that (i) the licenses were located in New York and thus should not be allocated to the company's commercial domicile, (ii) Vermont National's commercial domicile was in any event in Connecticut, and (iii) that the Department exceeded its statutory authority by imposing a penalty without having found that Vermont National acted unreasonably. Pet. App. 61a, 84a, 104a. The Tax Commissioner rejected each

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[4] *Available at* https://soundcloud.com/user-970290540/2019-280a?in=user-970290540/sets/2020vtjud.

[5] The assessment included a relatively small amount of other unpaid taxes not at issue here. Pet. App. 4a-5a n.2.

argument in a comprehensive opinion. Pet. App. 60a-101a, 104a-07a.

2. Vermont National then appealed to the Civil Division of the Vermont Superior Court for Washington County, raising similar arguments concerning the Department's application of Vermont law. Vermont National did "not challeng[e] the constitutionality of Regulation § 1.5833-1(e) generally or the constitutionality of the Department's interpretation of it specifically." Pet. App. 111a. Vermont National did argue for the first time that the Department's penalty was unconstitutionally excessive. Pet. App. 121a-23a. The Superior Court affirmed the Commissioner's decision and rejected all of Vermont National's arguments. Pet. App. 109a-23a.

3. Vermont National then appealed to the Vermont Supreme Court, again raising arguments concerning the location of the FCC licenses, the company's commercial domicile, and the propriety of the penalty. The Vermont Supreme Court affirmed. Pet. App. 1a-39a. The court interpreted the term "situs" in § 1.5833-1(e) to be a "term of art referring to where intangible property is constitutionally subject to taxation." Pet. App. 13a.

Applying state-law principles of administrative deference, the court then held that Vermont National had failed to show any compelling indications of error in the Tax Commissioner's conclusions that the FCC licenses were intangible assets that had not acquired a situs in New York, and that accordingly the income

from their sale must be allocated to Vermont National's commercial domicile in Vermont. Pet. App. 12a, 17a-26a. The court also held the penalty was within the Department's statutory authority and was not an "excessive fine" under the Eighth Amendment. Pet App. 26a-39a. Vermont National unsuccessfully moved for reargument. Pet. App. 124a-25a.

4. Vermont National then filed a petition for writ of certiorari to this Court. The only question presented is whether the Vermont Supreme Court misapplied this Court's precedent by concluding the FCC licenses lacked a New York situs and that income from their sale was properly allocated to Vermont under Vermont Tax Regulation § 1.5833-1(e).

REASONS FOR DENYING THE PETITION

I. The petition fails to present a substantial federal question.

In the decision below, the Vermont Supreme Court applied a Vermont tax regulation to a Vermont company's nonbusiness income. Although the court drew on federal due process principles to define the state regulatory term "situs," the question in this case is and has always been whether Vermont law permits taxation of the income in question. Vermont National does not argue that any of its federal rights have been violated. They have not been. The petition fails to present a substantial federal question, and accordingly, this Court lacks jurisdiction under 28 U.S.C. § 1257(a).

1. As relevant here, this Court's jurisdiction to review a state supreme court decision is limited to "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution" or other federal law.[6] 28 U.S.C. § 1257(a). The Court may not disturb a state supreme court's construction of state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."). This Court's appellate jurisdiction over state court decisions is limited to "correct[ing] them *to the extent* that they incorrectly adjudge *federal rights*." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945) (emphasis added).

2. The Vermont Supreme Court did not decide Vermont National's federal rights. The company says this case is about the Due Process Clause of the Fourteenth Amendment. Pet. 1. But it nowhere argues that its due process rights—or any other federal "title, right, privilege, or immunity"—are actually violated by having its income taxed by the State where it is commercially domiciled. *See* 28 U.S.C. § 1257(a). They are not. "The Due Process Clause allows a State to tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Wynne*, 135 S. Ct. at 1798 (quotation omitted); *see also Curry v. McCanless*, 307 U.S. 357, 366 (1939) ("From the beginning of

[6] Vermont National does not argue that the validity of any state or federal law has been "drawn in question" by the decision below. *See* 28 U.S.C. § 1257(a).

our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value.").

The only due process question Vermont National identifies is whether the gain from the sale of its federal licenses is "constitutionally subject to taxation in New York." Pet. 13. But that question is meaningless outside the context of Vermont's tax regulations. The decision below will not affect the taxing authority of New York (or any other State), which is not a party here and is not bound by the decision below. And Vermont National has adamantly maintained it does not owe and will not pay New York taxes on its gain. Oral Argument at 31:24-31:40, *Vt. Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83 (No. 2019-280). Indeed, New York law would seem to unambiguously require allocating the gain to Vermont. *See Burton v. N.Y.S. Dep't of Taxation & Fin.*, 37 N.E.3d 718, 722 (N.Y. 2015) (reciting that "intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation" (quoting N.Y. Const., art. 16, § 3)). Vermont National's petition completely fails to explain what federal "title, right, privilege, or immunity" the company seeks to vindicate by having this Court make a hypothetical ruling about whether a State that is not party to this action may

constitutionally impose a tax that its own laws prohibit and thus will never have to be paid. *See* 28 U.S.C. § 1257(a).

3. What Vermont National is actually aggrieved by, of course, is taxation of its gain by Vermont. But that is a function of state law, as Vermont National has recognized throughout these proceedings. *See, e.g.*, Pet. App. 119a (Vermont National "never raised" a "constitutional objection" to the Department's application of § 1.5833-1(e)); Brief of Appellant at 24, *Vt. Tel. Co.*, 2020 VT 83 (No. 2019-280) (arguing that federal due process analysis was "irrelevant to the question of where nonbusiness income is allocated" under Regulation § 1.5833-1(e)). The only difference now is that Vermont National's state law arguments have been definitively rejected. *See Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) ("The highest state court is the final authority on state law. . . .").

Although the Vermont Supreme Court drew on federal precedent to define the term "situs" in Vermont Tax Regulation § 1.5833-1(e), this did not convert the application of that state regulation into a federal question that triggers jurisdiction under § 1257(a). This is not a situation where state and federal questions are identical and interwoven. *Cf. Michigan v. Long*, 463 U.S. 1032, 1037 n.3 (1983) (exercising jurisdiction where Michigan Supreme Court held police search "was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution"). Rather, the Vermont Supreme Court concluded—under a deferential standard

of review required by state law—that the Vermont Tax Commissioner reasonably applied a Vermont tax regulation. Pet. App. 20a ("Given the deferential standard of review and the Commissioner's thorough reasoning as to why the FCC licenses did not have a situs in New York, [Vermont National] has failed to demonstrate any compelling indications of error." (quotation omitted)). Countless state laws are modeled on federal authorities (for example, rules of evidence and civil procedure), and state courts routinely consult federal precedent when interpreting and applying these laws. To hold that § 1257(a) reaches these situations would dramatically expand this Court's oversight of the state court system.

Because Vermont National has not "set up or claimed" a violation of any federal "title, right, privilege, or immunity," this Court lacks jurisdiction under 28 U.S.C. § 1257(a). At the very least, the sole federal question identified in the petition—whether a State that is not a party can constitutionally impose a tax its own laws prohibit—is not "important" or "substantial" enough to warrant this Court's review. Sup. Ct. R. 10(c) (in deciding whether to grant writ of certiorari, Court considers whether "state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *Zucht v. King*, 260 U.S. 174, 176 (1922) ("[I]t is our duty to decline jurisdiction whenever it appears

that the constitutional question presented is not . . . substantial in character.").[7]

II. There is no split in authority warranting this Court's review.

No split of authority exists between federal courts of appeals, state supreme courts, or any other courts on the legal questions involved in this case. Vermont National does not argue otherwise.

The only decision cited by any party throughout these proceedings that involves remotely similar facts is consistent with the decision below. In that case, Crystal Communications held an FCC license to operate wireless telecommunications services in Oregon. *Crystal Commc'ns v. Dep't of Revenue*, 297 P.3d 1256, 1259 (Or. 2013) (en banc). For nearly a decade, the company built and operated cellular telecommunications infrastructure throughout the service area. *Id.* After selling its assets, the company treated the gain from

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[7] Vermont National argues near the end of its petition that the penalty the Department imposed "is highly questionable under the Excessive Fines Clause." Pet. 30. The petition neither includes a question presented based on the Excessive Fines Clause nor even cites that provision as a relevant authority. Pet. i, viii, 1-2. The Court should not consider this argument. *See* Sup. Ct. R. 14(1)(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). In any event, the Vermont Supreme Court thoroughly addressed and correctly rejected the argument below—despite Vermont National's failure to preserve it—in an analysis Vermont National has not meaningfully challenged here. *Compare* Pet. App. 31a-39a *with* Pet. 30-31.

the sale of the FCC license as nonbusiness income allocable to its commercial domicile in Florida. *Id.* at 1257. The Oregon Tax Court rejected that position, and held the gain was apportionable business income taxable in Oregon because "[t]he activities" in which Crystal engaged "went far beyond mere holding of an asset and collection of income." *Crystal Commc'ns v. Dep't of Revenue*, 19 Or. Tax. 524, 541 (2008), *as amended* (Mar. 2, 2009), *aff'd*, 297 P.3d 1256.

The court also explained in dicta that, with respect to intangible assets like an FCC license:

> [I]t is possible for a nonresident individual to simply hold the intangible and not "employ" it in a trade or business or any other activity other than passive ownership. Where employment of such an intangible in this state has not occurred, neither income nor gain in respect of the intangible is sourced to this state. Rather, the principle of *mobilia sequuntur personam* is applied to locate and tax the intangible, or income from it, at the situs of its owner.

Id. at 538. The decision below here is entirely in accord. Pet. App. 17a-20a (affirming Commissioner's determination that gain from Vermont National's "passive investment" in FCC licenses must be treated as nonbusiness income allocated to company's commercial domicile).

III. The decision below will have limited impact, even in Vermont.

This case also does not merit this Court's review because the decision below will not have a significant impact outside this case, even in Vermont. Vermont National argues the decision below must not be "allowed to proliferate" and that unless this Court acts now to "nip any spillover consequences . . . in the bud," the decision below will interfere with numerous state laws and create a significant risk of double taxation for multi-state corporations. Pet. 22-29. In addition to being conjecture, these arguments are meritless. Moreover, the facts giving rise to this case are novel and unlikely to recur. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("special and important" reasons are required to grant writ of certiorari; the problem to be addressed must be "beyond the academic or episodic").

1. The decision below will not limit States' ability to tax intangible assets. *See* Pet. 23. Most obviously, the Vermont Supreme Court upheld state taxation of the assets here. It was Vermont National that took the position that its $24 million gain was beyond any State's power to tax.

The decision below is also consistent with UDITPA and state laws modeled thereunder. Under UDITPA, nonbusiness income from an intangible asset is always allocated to the owner's commercial domicile. UDITPA § 6(c) ("Capital gains and losses from sales of intangible personal property are allocable to this state if the

taxpayer's commercial domicile is in this state."). There is no situs analysis. *See id.* New York law is in accord. *See Burton*, 37 N.E.3d at 722. Thus, if Vermont had adopted and applied UDITPA's provisions word-for-word, the result here would be exactly the same. Vermont National repeatedly acknowledged this below. Oral Argument at 10:51-11:00, *Vt. Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83 (No. 2019-280) ("Many jurisdictions adopted UDITPA section 6 in whole cloth. And if the Department had done that, we wouldn't be having this dispute."); Brief of Appellant at 20, *Vt. Nat'l Tel. Co. v. Dep't of Taxes*, 2020 VT 83 (No. 2019-280) ("[I]n states that have adopted UDITPA § 6(C), intangible assets are always allocated to the taxpayer's commercial domicile.").

Vermont National misleadingly portrays the decision below as "in serious tension" with UDITPA by citing to provisions concerning *apportionment* of *business* income. Pet. 24; *see also* Pet. 24-26. But those provisions are inapposite, as the company eventually concedes in a footnote. Pet. 26 n.7. There is no dispute the issue here exclusively concerns *allocation* of *nonbusiness* income. Accordingly, Vermont National is simply wrong that, under UDITPA, a State may tax income from any government license that "authorizes" business activity in the State. Pet. 25. For nonbusiness income subject to allocation—like the FCC licenses here—UDITPA says no such thing. Vermont National has not cited any cases or state rules to the contrary. All the state laws cited in the petition either follow

UDITPA or, like Vermont, require an analysis of situs. *See* Pet. 25-28 nn. 6, 8, 9.

Moreover, Vermont National's attempt to shoehorn apportionment principles into a case about allocation is inconsistent with this Court's precedent and, if accepted, would impact state taxation far more dramatically than the decision below, left undisturbed, ever could.

Rules governing apportionment and allocation have developed against the constitutional backdrop that a State may only impose taxes if it "has given anything for which it can ask return." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1944). Accordingly, apportionment rules only apply to business income and attempt to fairly distribute, among the various States where a company does business, the portion of "income that can be fairly attributed to in-state activities." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 31 (1988). "In that situation, the income bears relation to benefits and privileges conferred by several States." *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 446 (1980).

But income unrelated to a company's regular operations often lacks the necessary "minimal connection" to be subject to apportionment in all the States where the company operates. *Exxon Corp. v. Dep't of Revenue*, 447 U.S. 207, 219, 223-24 (1980). With respect to such nonbusiness income, this Court has made clear that a State may tax income from (i) real or tangible property located within its borders, and (ii) intangible

property—like the FCC licenses here—if the property owner is domiciled in the State. *See, e.g.*, *Curry*, 307 U.S. at 364-66; *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-13 (1937). "State legislatures have relied upon [these] precedents by enacting tax codes which allocate intangible nonbusiness income to the domiciliary State." *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (citation omitted).

Vermont National's attempt to blur the lines between apportionment and allocation ignores the constitutional concerns that led to the development of separate rules for business and nonbusiness income. If mere "authorization" to do business in a State created sufficient contacts to permit allocating nonbusiness income to that State (even where the company actually does no business in the State), it would significantly broaden the passive income a State could permissibly tax, raising both Due Process and Commerce Clause concerns. *See Mobil Oil Corp.*, 445 U.S. at 437 (a State's taxation of income satisfies due process nexus requirement if the taxpayer "avails itself of the substantial privilege of carrying on business within the State" (quotation omitted)); *Cent. Greyhound Lines, Inc., of N.Y. v. Mealey*, 334 U.S. 653, 662-63 (1948) (State unfairly burdens interstate commerce if it taxes, without apportionment, income that other States might also fairly tax).

If this Court were to bless that approach, the States would no doubt embrace the opportunity to raise more revenue. After *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), relaxed the "physical presence"

requirement for imposing sales tax several terms ago, nearly every State in the country with a sales tax "rushed with extraordinary speed" to extend their taxing authority "as far as the decision allows," 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 19.04(1)(b) (3d ed.). That history belies Vermont National's suggestion that this Court's intervention is needed here to maintain the national status quo.

2. The decision below also does not create a significant risk of double taxation that this Court needs to address. Certainly, no double taxation occurred here. Vermont National did not report its gain as taxable income to New York or any other State. Moreover, as discussed above, both New York and UDITPA would have treated the company's nonbusiness gain exactly as the Vermont Supreme Court did here, by allocating it to the company's commercial domicile in Vermont.[8]

Further, it would exceed this Court's proper role to grant review in the interest of mandating uniformity

[8] Vermont National's discussion of its 2018 tax liability in Michigan is irrelevant and misleading. *See* Pet. 28. Nothing about that potential liability is in the record of this case. Further, the Department's records show that Vermont National has not even filed its 2018 return in Vermont, so any actual double taxation is hypothetical. And critically, Vermont National apparently does business in Michigan, and either indicated to Michigan that the gain is business income, or Michigan determined this in its own analysis. *See* Mich. Bureau of Tax Pol'y, Letter Ruling 2018-1 (Nov. 21, 2018), https://www.michigan.gov/documents/treasury/Letter_Ruling_2018-1_641184_7.pdf. Finally, it is worth noting that Vermont National evidently sought an advisory opinion from the Michigan taxing authorities, something the company inexplicably failed to seek from the Department in this case.

among state allocation and apportionment rules, as this Court has previously recognized. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279-80 (1978).

Apportionment and allocation rules are designed to fairly tax a State's portion of a multistate corporation's income to a reasonable degree of precision and within constitutional parameters. But perfection is impossible, and rules inevitably vary from State to State. Any method will occasionally "over-reflect or under-reflect income attributable to the taxing State." *Id*. at 273. "Yet despite this imprecision, the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula." *Id*.

Moorman specifically acknowledged "the risk of multiple taxation . . . created by the diversity among the States in the attribution of 'nonbusiness' income." *Id*. at 279. It made clear, however, that any national solution would need to come from Congress "after due consideration is given to the interest of all affected States":

> The prevention of duplicative taxation . . . would require national uniform rules for the division of income. . . . It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.

Id. at 279-80.

In any event, good policy aside, to the extent the risk of multiple taxation implicates constitutional concerns at all, they arise from the Commerce Clause, not the Due Process Clause. *Wynne*, 135 S. Ct. at 1798 (although the Due Process Clause permits State to "tax *all* the income of its residents," the "threat of double taxation . . . may nonetheless violate the Commerce Clause" (quotation omitted)). Vermont National has never argued that Vermont's taxation rules violate the Commerce Clause, either facially or as applied to the facts of this case.

3. The limited impact of the Vermont Supreme Court's decision is further demonstrated by its unique underlying facts, which are unlikely to recur.

This case involves a company passively investing in FCC licenses, realizing a large gain from their sale, and then treating that gain as nonbusiness income. The Department is not aware of this combination of factors having ever occurred previously in Vermont, and Vermont National has not cited a case from any other jurisdiction involving comparable circumstances.

This is not surprising. Because the FCC was transitioning the lower 700 MHz band of spectrum from television to mobile telephone in 2003, neither the infrastructure to broadcast at that frequency nor the equipment to build the infrastructure yet existed. Vermont National was thus able to purchase its licenses cheaply and without build-out requirements. As the company itself acknowledged, this was "a rare opportunity." P.C. 198. That opportunity has passed. In 2007,

the FCC imposed strict build-out requirements for licenses like those owned by Vermont National. FCC, *700 MHz Second Report and Order*, 22 FCC Rcd. 15289, 15348-50 (2007) (requiring licensees provide service to 35% of geographic area within four years of acquiring license, and 70% within ten years, or face penalties including forfeiture or cancellation of license). A future taxpayer certainly may invest and profit from the sale of an FCC license, but it is unlikely to do so without actively engaging in the business of providing service in the covered area and thereby triggering the requirement that any gains be taxed under apportionment principles, which are not at issue here. *See Crystal Commc'ns*, 19 Or. Tax. at 541 (gain from sale of license was business income because, among other reasons, "the FCC license[] required active development in order for [licensee] to remain the owner").[9]

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[9] Vermont National's comparisons to other situations fall flat. "[A]ir, timber, and mineral rights," Pet. 23, are real property rights—not intangible assets—and thus are taxed at the physical location of the attached property, as the Commissioner explained below, Pet. App. 73a-74a. And it is unclear whether a "federal license to fish in New York waters" even exists. *Compare* Pet. 26 *with Sturgeon v. Frost*, 139 S. Ct. 1066, 1074 (2019) ("[A] State's title to the lands beneath navigable waters brings with it regulatory authority over navigation, fishing, and other public uses of those waters." (quotation omitted)); *Buying a Fishing License*, U.S. Fish & Wildlife Serv. (Feb. 8, 2019), https://www.fws.gov/fishing/FishingLicense.html (directing prospective anglers to visit States' websites to get fishing licenses). But assuming it does, and it is transferable, a fishing license seems unlikely to generate a significant tax dispute, given that a commercial fishing license in New York costs $250. *See Commercial Fishing & Aquaculture*

IV. The decision below is correct.

The decision below does not conflict with this Court's precedent. No federal provision prevents taxation by Vermont in this case. As noted above, this Court's decisions leave no doubt that Vermont has the constitutional authority to tax Vermont National's nonbusiness income. Vermont National does not argue otherwise.

Nor does the decision below conflict with *Whitney*. Vermont National argues that, under *Whitney*, its FCC licenses were constitutionally subject to taxation in New York. Thus, the company continues, the Vermont Supreme Court should have held the licenses had a New York "situs," and the gain from their sale could not have been allocated to Vermont under Vermont Tax Regulation § 1.5833-1(e). That argument is mistaken.

With respect to § 1.5833-1(e), the Vermont Supreme Court interpreted the word "situs" to be a "term of art referring to where intangible property is constitutionally subject to taxation." Pet. App. 13a. In applying that regulation, the court correctly held that the FCC licenses had not acquired a situs in New York.

Permits, N.Y. Dep't of Envtl. Conservation, https://www.dec.ny.gov/permits/96310.html (last visited Apr. 2, 2021). Further, in order to be relevant here, Vermont National's hypothetical federal fishing license would have to be passively held as an investment (not, for example, used in a commercial fishing operation), otherwise any gain from its sale would likely be considered business income subject to apportionment.

In *Whitney*, the Court was "dealing with an intangible right of a peculiar nature"—a membership interest in the New York Stock Exchange. 299 U.S. at 372. The Exchange, the Court explained, is an association that "owns the building in which the business of the Exchange is transacted, with the land upon which it stands, situated in the city of New York." *Id.* at 370. Membership in the exchange carries valuable "rights and privileges," which "are exercisable only in transactions conducted at the Exchange building in the city of New York." *Id.* at 370-71. Because the rights of membership were "fixed exclusively or dominantly" at the Exchange building, the Court held the membership interest's "very nature localizes it at the Exchange." *Id.* at 372-73. Accordingly, the Court held the membership interest had acquired a "business situs" at the Exchange building and thus could constitutionally be taxed by New York. *Id*.

Here, by contrast, Vermont National never acquired the real property or infrastructure necessary to provide mobile telecommunications service or otherwise transact any business in New York. It would be as if the New York Stock Exchange in *Whitney* had not yet acquired its building and opened its trading floor. *Cf. id*. at 373 ("The nature of that right is not altered by the failure to exercise it. Wherever the owner may reside he must go to the Exchange to exercise his privilege to trade upon its floor."). In reality, in *Whitney*, the taxpayer's acquisition and sale of the interest were part of his multi-million-dollar securities-trading business—part of which consisted of using his membership in the New York Stock Exchange to trade securities via

correspondent on the floor of the Exchange. *Id*. at 369, 371.[10] Nothing in this record suggests that Vermont National's federal licenses had become "localized" at a specific New York location comparable to the way a membership interest in the New York Stock Exchange is localized at the New York Stock Exchange building.[11]

Accordingly, the Vermont Supreme Court correctly held that the licenses had no New York situs as they were not created or protected by New York law. Pet. App. 20a. That holding is consistent with *Whitney* and this Court's other due process precedents. *See N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2220-21 (2019) (North Carolina could not tax trust administered out-of-state based solely on residence of beneficiary who received no income from trust); *Int'l Harvester Co. v. Wis. Dep't of Taxation*, 322 U.S. 435, 442 (1944) (Wisconsin could tax dividends of companies doing business in State because Wisconsin "afforded protection and benefits to . . . corporate activities and transactions"); *Curry*, 307

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[10] Accordingly, under modern tax rules, the gain in *Whitney*—unlike the gain here—would be business income subject to apportionment.

[11] Nor is there merit to Vermont National's argument that its licenses had become localized in New York because the State's laws made it "a good place to live, work, and do business—the very reasons why the right to broadcast over New York's airwaves was so valuable." Pet. 20. An intangible does not acquire situs in a State simply because the State's laws or resources contribute to the asset's value. *See, e.g.*, *Cohn*, 300 U.S. at 316 (New York taxpayer's income from bonds secured by New Jersey mortgages lacked New Jersey situs); *Beidler v. S.C. Tax Comm'n*, 282 U.S. 1, 9 (1930) (South Carolina lumber company's debt held by Illinois creditor lacked South Carolina situs).

U.S. at 367 (holding intangibles acquire a business situs in a state where "the taxpayer extends his activities with respect to his intangibles, so as to avail himself of the protection and benefit of the laws of another state, in such a way as to bring his person or property within the reach of the tax gatherer there"); *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 210 (1936) (intangible assets "may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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