No. 20-1159

In the Supreme Court of the United States

VERMONT NATIONAL TELEPHONE COMPANY,
Petitioner,

v.

VERMONT DEPARTMENT OF TAXES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

REPLY BRIEF FOR THE PETITIONER

HENRY P. BUBEL
TIFFANY N. TAM
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

WM. ROGER PRESCOTT
TIMOTHY C. DOHERTY, JR.
DOWNS RACHLIN MARTIN PLLC
199 Main Street
Burlington, VT 05401

ROMAN MARTINEZ
Counsel of Record
ERIC J. KONOPKA
CHRISTINE C. SMITH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

OTHER AUTHORITIES

ARGUMENT

The Department's response is remarkable for what it concedes without saying outright: The Vermont Supreme Court invented a new—and erroneous—legal test that is wholly divorced from *People of the State of New York ex rel. Whitney v. Graves*, 299 U.S. 366 (1937), the binding precedent it purported to apply. This Court's review is plainly justified under Rule 10(c).

Vermont National's primary argument for granting certiorari could not have been clearer: "The Vermont Supreme Court blatantly misconstrued this Court's controlling precedent"—*Whitney*—"in an effort to allow Vermont to tax income that should have been taxable only in New York." Pet. 2. Yet the Department all but ignores *Whitney* and the reasoning of the decision below. And when it finally gets around to addressing those points at the very end of its brief, it entirely avoids defending the test the Vermont Supreme Court actually applied in favor of a totally different test that is equally inconsistent with *Whitney* and other case law from this Court. The Department's desire to gloss over the merits is understandable, because the decision below is plainly incorrect.

To distract from that glaring deficiency, the Department raises a litany of puzzling objections to review. Most prominently, it argues that this Court lacks jurisdiction. But that assertion is borderline frivolous. The decision below "fairly appears to rest primarily on federal law"—the federal due-process situs principle and *Whitney*'s interpretation of it—not on an adequate and independent state-law ground. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). And

the Department's efforts to downplay the potential significance of the Vermont Supreme Court's erroneous decision fare no better.

The Vermont Supreme Court's decision is wrong, inconsistent with *Whitney*, and important. This Court should summarily reverse or grant plenary review.

A. The Vermont Supreme Court Blatantly Departed From *Whitney*

As Vermont National has explained, this Court should grant certiorari primarily because the Vermont Supreme Court blatantly departed from *Whitney*. The Department's half-hearted response fails to offer any credible defense of the decision below. No such defense is possible.

1. The Vermont Supreme Court's decision is simply irreconcilable with *Whitney*. *Whitney* held that an intangible asset has a situs in a state for due-process purposes if it grants rights that are "fixed exclusively or dominantly" in that state. 299 U.S. at 372. By its terms, that test turns on the "nature of the right" granted by the intangible asset—not on who created the right, or whether or how it has actually been exercised by the owner. *Id.* at 370.

Instead of applying this straightforward rule, the Vermont Supreme Court carved out a brand-new exception to it. That court held that an intangible asset has no situs unless it is "created or protected by a state's laws." Pet. App. 19a. That exception is not based on anything in *Whitney*, which focused on the "nature of the right," 299 U.S. at 370, not the asset's relationship to state law.

Applying the test dictated by *Whitney*, there is no meaningful difference between that case and this one.

Both the partial stock-exchange membership at issue in *Whitney* and the FCC licenses at issue here granted rights whose exercise was "fixed exclusively or dominantly" in New York and "nowhere else." *Id.* at 372-73. Since both assets could be used only in New York, their value was highly dependent on New York factors. *See* Pet. 17, 19-20.[1] And although Vermont National did not use the licenses to provide mobile-telecommunications services in New York, Whitney and his partners did not use their membership to trade stock either. *Whitney*, 299 U.S. at 372. The Vermont Supreme Court therefore had no principled basis on which to depart from *Whitney*.

2. The Department implicitly concedes as much, making no effort to defend the "created or protected by state law" test adopted by the Vermont Supreme Court. In fact, over the course of its entire brief, the Department makes only a single fleeting reference to that test. *See* BIO 28. The Department's desire to run away from that test is understandable—because it is indefensible.

Indeed, Whitney's stock-exchange membership would have flunked that test. The rights and privileges associated with that membership were not "created or protected by a state's law," Pet. App. 19a; they were created by an unincorporated private

---

[1] Respondent's argument that an intangible asset "does not acquire situs in a State simply because the State's laws or resources contribute to the asset's value" is a red herring. BIO 28 n.11. That has never been Vermont National's position. The FCC licenses had a situs in New York because they granted rights exercisable "exclusively or dominantly" in New York. The fact that their value depends on local factors helps to demonstrate why states may, and often do, choose to tax such assets. *See* Pet. 28 n.9.

association, and their use was governed and protected by that association's bylaws. Pet. 19. Therefore, under the Vermont Supreme Court's test, the intangible asset at issue in *Whitney* would not have been taxable by New York. The Department says nothing about this fatal flaw in the decision below.

3. Rather than defend the Vermont Supreme Court's analysis, the Department advances an entirely different rationale. It argues that the FCC licenses lacked a New York situs because "Vermont National never acquired the real property or infrastructure necessary to provide mobile telecommunications service or otherwise transact any business in New York." BIO 27.

The Department's test is plainly inconsistent with the test embraced by the Vermont Supreme Court. Whereas that court's test turns on whether the licenses were created by state law, the Department's test turns on whether Vermont National acquired infrastructure in New York. Indeed, Vermont National would have lost under the Vermont Supreme Court's test even if it *had* acquired New York infrastructure, because the licenses still would have been created by federal (not state) law. The Department has completely abandoned the basis for its victory below.

In any event, the Department's alternative test is wrong—on its own terms—for three reasons. *First*, it conflicts with *Whitney*. *Whitney* expressly rejected the argument that an intangible asset "cannot be said to have a business situs in New York because . . . [the taxpayer] transact[ed] all [its] business [elsewhere]." 299 U.S. at 372. The Department would require Vermont National to do business in New York—either by providing mobile-telecommunications services or

by purchasing property in preparation for providing such services. This Court has never limited a state's ability to tax intangible assets to those actually used in business in the state, and any such test would dramatically restrict state taxing powers.

Second, the Department's test effectively seeks to resurrect the physical-presence requirement that this Court has long since discarded. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2092 (2018) (Commerce Clause); *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992) (Due Process Clause), *overruled on other grounds by Wayfair*, 138 S. Ct. 2080. The relevant due-process question is whether there is some "definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 306 (citation omitted). As *Whitney* made clear, such a connection exists when an intangible asset grants rights whose "exercise . . . is fixed exclusively or dominantly" in that state. 299 U.S. at 372. Such a connection does not require a physical presence, property, or infrastructure in the state—and the Department is wrong to suggest otherwise.

Third, the Department's test misunderstands how broadcasting works. Broadcasters can—and do—use cell towers in nearby states to broadcast across state lines. *See* P.C. 262; *see also, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 180-81 (1999). Accordingly, Vermont National could have used the licenses to broadcast in New York without ever establishing a physical presence there.

Vermont National should have won this case under a straightforward application of *Whitney*. Instead, the Vermont Supreme Court invented a new test directly at odds with *Whitney*, and the

Department now defends that court's bottom-line holding by pivoting to another (equally erroneous) legal theory for denying New York situs. This Court should grant certiorari to clarify the legal standard and overturn the Vermont Supreme Court's blatant departure from *Whitney*.

B. The Department's Arguments Against Review Are Unavailing

Instead of seriously engaging with the egregious errors in the decision below, the Department falls back on a series of misplaced jurisdictional and prudential objections. None has merit.

1. This Court Has Jurisdiction

To start, this Court clearly has jurisdiction under 28 U.S.C. § 1257(a). The Court may review a "state-court judgment that rests, as a threshold matter, on a determination of federal law," *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam), including any "federal issue in a state cause of action," *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 816 (1986). Indeed, this Court may review federal issues "interwoven" with state law, so long as "the adequacy and independence of any possible state law ground is not clear from the face of the [state court's] opinion." *Long*, 463 U.S. at 1040-41. Under these principles, this Court has jurisdiction.

The Vermont Supreme Court construed the term "situs" in the relevant state regulation to "refer[] to where an intangible asset is *constitutionally* subject to taxation" under the U.S. Constitution. Pet. App. 13a (emphasis added). It then drew exclusively on this Court's due-process case law—not on any adequate and independent state-law ground—to

define "situs," and held that Vermont could tax the $24 million gain at issue here based on an erroneous interpretation of *Whitney*. *Id.* at 13a-20a; *see* Pet. 14-21. This Court may review—and correct—that error.

The Department's counterargument rests on a deeply flawed premise. The Department suggests that this Court has jurisdiction only when there is a claimed "violation of any *federal* 'title, right, privilege, or immunity.'" BIO 15 (emphasis added) (quoting 28 U.S.C. § 1257(a)). Since the Vermont Supreme Court did not "decide Vermont National's federal rights," the Department says, this Court lacks jurisdiction. *Id.* at 12. But the word "federal" does not appear in § 1257(a). And, as the statutory text and this Court's case law make plain, this Court has jurisdiction to review federal questions that affect "*any* title, right, privilege, or immunity," whether arising from state or federal law. 28 U.S.C. § 1257(a) (emphasis added); *see Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984) ("[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law.").

The Department also asserts that there is no "substantial federal question" in this case. BIO 1. That assertion holds no water. "The jurisdictional inquiry in cases involving a mix of state and federal questions focuses not upon the substantiality of the federal question but upon the independence and adequacy of the state-law ground." Steven M. Shapiro et al., *Supreme Court Practice* § 3.22 (11th ed. 2019). As discussed above, the Vermont Supreme Court did not rely on an adequate and independent state-law ground, and the Department does not seriously

contend that it did.[2] But even if the Department were right to focus on the substantiality of the federal question presented, its argument would still fail. Vermont National has raised a "real, and not a fictitious federal question"—the meaning of the federal due-process situs principle—that was the dispositive feature of the decision below. *Hamblin v. Western Land Co.*, 147 U.S. 531, 532 (1893). The Court plainly has jurisdiction.

2. The Proper Interpretation Of The Situs Principle Is Important

The Department's attempts to minimize the significance of the decision below also fail.

a. The Department does not dispute that the Vermont Supreme Court's decision creates a significant risk of double taxation. Instead, it primarily argues that "perfection is impossible" and so double taxation is inevitable. BIO 23. But that is no answer, especially when statutes and regulations like Vermont's are expressly designed to avoid the risk of double taxation. *See* Pet. 27 & n.8. And that risk is far from "conjectur[al]." BIO 18. In 2018, Vermont National sold another FCC license, and the resulting gain was subject to tax in *both* Michigan *and* Vermont. Pet. 28.[3]

---

[2] The Department claims that the Vermont Supreme Court employed "a deferential standard of review required by state law," but does not argue that such deference is an adequate and independent state-law ground. BIO 14-15. And it concedes that the Vermont Supreme Court decided, without deference, the federal-law question presented. *See id.* at 26-28.

[3] The Department attempts to dodge this reality, arguing that this "potential liability is [not] in the record of this case," and that the gain was not reported on a 2018 state tax

b. As Vermont National has explained, the decision below is at odds with UDITPA—and at least 11 other state laws modeled on it—which allows a state to tax business income from a government license authorizing activity in that state, regardless of whether the license is ever used there. Pet. 24-26.

Unable to square the decision below with UDITPA's business-income rule, the Department instead engages in misdirection. Specifically, the Department notes that the gain at issue here was nonbusiness income and asserts that the Vermont Supreme Court would have reached the same result under UDITPA. BIO 18-20; *see* Pet. App. 20a. But that is so only because UDITPA's nonbusiness-income rule admittedly contains "no situs analysis." BIO 19. That feature makes it irrelevant to this case, for situs was critical to the Vermont Supreme Court's reasoning.[4]

UDITPA's business-income rule, by contrast, is highly relevant. It considers the geographical scope of a license, which is at least analogous to situs in this

---

return. BIO 22 n.8. Both points are manifestly incorrect: Vermont National raised the Michigan ruling in its briefing below, *see* Vermont Nat'l Vt. Sup. Ct. Reply Br. 10 (Dec. 27, 2019), and the gain was reported on the tax return for a wholly owned subsidiary of Vermont National, VTel Wireless Inc., which owned the Michigan FCC license.

[4] *Crystal Communications, Inc. v. Department of Revenue* is irrelevant for the same reason. 19 Or. Tax 524 (2008), *aff'd*, 297 P.3d 1256 (Or. 2013) (en banc); *see* BIO 17. The Oregon Tax Court merely recognized that Oregon law—unlike Vermont law—always allocates nonbusiness gains from the sale of intangible property to the owner's state of domicile. *Id.* at 538; *see* Or. Rev. Stat. § 314.635(3). It neither discussed nor relied on the situs principle.

context. And that rule makes clear that taxation is justified based on where a license *authorizes* activity. Pet. 24-26. For the FCC licenses at issue here, that is New York—and only New York.

The Department separately accuses Vermont National of "ignor[ing] the constitutional concerns that led to the development of separate rules for business and nonbusiness income." BIO 21. But this case implicates no such concerns. In *Whitney*, this Court held that taxation in the circumstances here presents no due-process problem. 299 U.S. at 370, 374. And any Commerce Clause problem arises not from Vermont National's position but from the "risk of double taxation" the decision below creates. *Comptroller of the Treasury of Md. v. Wynne*, 575 U.S. 542, 566 (2015); *see* Pet. 27-29.

c. The Department suggests that the factual circumstances of this case are unique because the licenses held by Vermont National did not have "strict build-out requirements." BIO 25. But as of 2014, 15% of broadband licenses, 17% of 220 megahertz licenses, and 23% of 39 gigahertz licenses did not have build-out requirements either. *See* Gov't Accountability Off., *Spectrum Management: FCC's Use and Enforcement of Buildout Requirements* 57 (Feb. 2014).[5] And as Vermont National explained, the sweep of the decision below is not limited to FCC licenses. It implicates other federal licenses that grant rights that are "fixed exclusively or dominantly" in a state, as well as privately created rights like Whitney's stock-exchange membership.[6] Pet. 23-24.

---

[5] Available at https://www.gao.gov/assets/gao-14-236.pdf.

[6] The Department argues that air, timber, and mineral rights are distinguishable because they are tied to real property.

The potential breadth of the decision reinforces the need for this Court's intervention.

d. Finally, the Department misleadingly declares that, under Vermont National's interpretation, the "$24 million gain [at issue in this case] was beyond any State's power to tax." BIO 18. That is simply wrong. Vermont National's whole point here is that the licenses at issue had a situs in New York—which means that New York *did* have the power to tax the gain from their sale. The Vermont Supreme Court's decision denies New York that power as a matter of federal constitutional law. Federalism considerations thus favor review as well.

C. The Court Should Summarily Reverse Or Grant Plenary Review

Summary reversal is warranted here because the Vermont Supreme Court's decision is "flatly contrary to this Court's controlling precedent"—*Whitney*. *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam). Vermont National, a small company that has invested substantial sums in Vermont infrastructure, P.C. 199-200, should not be punished—to the tune of millions of dollars, and under an erroneous interpretation of federal constitutional law—for its full compliance with Vermont's tax rules. *See* Pet. 29-31. Notably, the Department does not deny that summary reversal is an appropriate remedy in such circumstances.

BIO 25 n.9. But they are still intangible, not real, property, *see, e.g.*, *Ingram v. Ingram*, 521 P.2d 254, 257 (Kan. 1974), subject to the exact same due-process analysis—and just as tied to a particular location—as the broadcast rights granted by FCC licenses.

Alternatively, if this Court thinks the issue is not so clear-cut, it should grant plenary review. This case presents an ideal vehicle to clarify *Whitney*'s situs rule and the due-process principles governing state taxation of intangible property.

Either way, the Vermont Supreme Court's erroneous ruling should be overturned.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY P. BUBEL
TIFFANY N. TAM
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, NY 10036

WM. ROGER PRESCOTT
TIMOTHY C. DOHERTY, JR.
DOWNS RACHLIN MARTIN PLLC
199 Main Street
Burlington, VT 05401

ROMAN MARTINEZ
Counsel of Record
ERIC J. KONOPKA
CHRISTINE C. SMITH
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

Counsel for Petitioner

April 21, 2021