IN THE UTAH SUPREME COURT

ROBERT C. STEINER & WENDY STEINER-REED, Appellants/Cross-Appellees, v. UTAH STATE TAX COMMISSION, Appellee/Cross-Appellant.	Case No. 20180223-SC

BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISION
ON BEHALF OF
APPELLEE/CROSS-APPELLANT UTAH STATE TAX COMMISSION

On appeal from the Third Judicial District Court, Tax Court Division
Honorable Noel S. Hyde, No. 170901774

Peter W. Billings
William H. Adams
Nora K. Brunelle
David P. Billings
FABIAN VANCOTT
215 S. State Street, Suite 1200
Salt Lake City, Utah 84111-2323
Counsel for Appellants/Cross-Appellees

Erin T. Middleton
Assistant Solicitor General
Stanford E. Purser
Deputy Solicitor General
John C. McCarrey
Mark E. Wainwright
Assistant Attorneys General
P.O. Box 140858
Salt Lake City, Utah 84114-0858
Counsel for Appellee/Cross-Appellant

Gregory S. Matson #5312
Executive Director
Counsel of Record
Helen Hecht
General Counsel
Brian Hamer
Counsel
Multistate Tax Commission
444 N. Capitol Street. NW, Suite 425
Washington, DC 20001-1538
Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Treatises

Regulations

The Multistate Tax Commission (the "MTC") submits this brief as *amicus curiae* in support of the appellee/cross-appellant, Utah Tax Commission (the "Commission").

INTEREST OF THE AMICUS CURIAE

The Multistate Tax Commission was created in 1967 by the Multistate Tax Compact (the "Compact").[1] The goal of the MTC is to preserve state tax sovereignty and to promote uniformity, fairness, and efficiency in state taxation of multistate businesses. The purposes of the Compact are: (1) facilitation of proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes; (2) promotion of uniformity or compatibility in significant components of tax systems; (3) facilitation of taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. See Compact, Art. I.[2]

In this case, the appellants/cross-appellees (the "Taxpayers") ask the court to recognize a limitation on state taxation within the dormant commerce clause that neither

---

[1] *See United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978), (upholding the Compact).

[2] The Commission is made up of the tax agency heads of states that have adopted the Compact by statute. In addition to these sixteen compact members, thirty-four states are sovereignty or associate members. Compact members are: Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington. Sovereignty members are: Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey, Rhode Island, and West Virginia. Associate members are: Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. Information on the Commission and its programs is available on its website, http://www.mtc.gov/Home.aspx.

the U.S. Supreme Court nor any state appellate court has ever recognized. To do so would call into question the constitutionality of state individual income taxes across the country. Therefore, the MTC and its members have a substantial interest in this case.

SUMMARY OF ARGUMENT

The Taxpayers, residents of Utah, make two main arguments under the dormant commerce clause. First, with respect to their U.S.-sourced business income from S corporations, they argue that the dormant commerce clause prohibits Utah from taxing 100% of that income and providing a credit for taxes paid to other states where the income may be sourced. Instead, they argue, Utah may tax only the portion of the income that would be sourced to Utah (as if the Taxpayers were nonresidents, or C corporations). Second, with respect to their foreign-sourced income, they argue that Utah must either exclude that income or grant a tax credit for foreign taxes paid.

We write to emphasize the following points with respect to the dormant commerce clause arguments: As to the first issue, whether the tax credit that Utah and other states provide is sufficient to satisfy the dormant commerce clause with respect to the of taxing 100% of a resident's domestic business income, *Wynne v. Comptroller of the Treasury of Maryland*, 135 S.Ct. 1787 (2015), is conclusive. As to the second issue, whether a state must exclude foreign-sourced income or grant a foreign tax credit, Utah, like most states, properly relies on the foreign tax credit long provided by the federal government to address the risk of discriminatory double taxation of foreign commerce. This credit is comprehensive and generous. If the states granted a duplicative foreign tax credit, or excluded foreign income, foreign commerce would receive an unintended and unfair tax advantage. The states' reliance on the federal government to address discriminatory double taxation of foreign income, rather than somehow separately addressing this issue themselves, reduces the risk that states might interfere with federal tax policies or prevent the federal government from "speaking with one voice." Finally, this approach reflects proper respect for the role of the federal government in this area.

ARGUMENT

I. *Wynne* conclusively established that a state does not subject interstate commerce to the risk of double-taxation, in violation of the dormant commerce clause, when it taxes 100% of the income of residents and also taxes state-sourced income of nonresidents, so long as it provides a credit to residents for taxes paid to other states on their income properly sourced to those states.

As the Commission explains in its brief, Utah is like virtually every other state that imposes an income tax on the business income of individuals. Utah taxes residents on 100% of their income, including business income. Utah Code § 59-10-103(w)(i) (referencing 26 U.S.C. § 61 which includes income from whatever source earned). It also taxes nonresidents on their state-sourced business income. Utah Code § 59-10-103(w)(ii); § 59-10-117(2)(d). But, Utah, like other states, also gives its residents a credit for taxes paid to another state on business income properly sourced to that state. Utah Code § 59-10-1003(3).[3] Just three years ago, in *Wynne v. Comptroller of the Treasury of Maryland*, 135

[3] All but four of the states that impose a broad-based income tax have adopted this tax structure. The four exceptions are Nebraska, New Mexico, Oklahoma, and Michigan, which have elected to tax resident shareholders of a subchapter S corporation only on that portion of the corporation's income that is apportioned to the resident's state. See Neb. Rev. Stat. §77-2734.01; N.M. Stat. §7-2-11(A), Instructions for 2017 Form PIT-B; Okla. Stat. §68-2358, 2017 Okla. Form 511 (Part One) Instructions; *Chocola v. Michigan Dep't of Treasury*, 369 N.W.2d 843 (1985) (construing MCL 206.103 and related statutory provisions).

S.Ct. 1787 (2015), the Supreme Court expressly endorsed this same credit mechanism as sufficient to meet the requirements of the dormant commerce clause.

In *Wynne*, Maryland residents with S corporation income who paid taxes to other states on that income, argued they were entitled to a credit for those taxes against the entire amount of the Maryland tax imposed on that same income. *Id.* (Maryland law limited the application of the credit to just a portion of the tax.) The Supreme Court, in ruling for the Maryland residents, made clear that in assessing whether a particular state's tax system imposes the risk of discriminatory double taxation upon interstate commerce, it is the *inherent* attributes of *that* tax system that are at issue—not simply the interaction of differing tax systems to which the taxpayer might be subject. *Id.* at 1804 (noting that the failure to give a full credit made Maryland's tax inherently discriminatory).

For our purposes, what is most important is that the Court explicitly recognized that a state could avoid the risk of imposing double taxation on interstate commerce through other means, including apportionment. *Wynne* at 1793-94. The respondents in *Wynne* recognized this as well, noting in their brief on the merits that: "Another way of curing the discrimination would be for States to divide their residents' tax base, to avoid taxing all their income in the first place." *Brief for Respondents*, filed in *Wynne*,[4] at 26. The Court was also aware that the credit mechanism might not render the same result as apportionment in some cases, since this was discussed in an amicus brief filed by

---

[4] The brief is posted at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-485_resp.pdf (last visited Nov. 18, 2018).

economists in *Wynne*, and cited by the Court multiple times. *See, e.g., Wynne* at 1806. Indeed, the economists' brief made clear that, unlike apportionment of resident income, the credit mechanism is not entirely "neutral" because when other states tax income at lower rates, or not at all, it will affect the extent to which the credit will offset the state's own tax. *See Brief of Tax Economists as Amicus Curiae in Support of Respondents*, filed in *Wynne*,[5] at 19. Furthermore, other amici of the respondents argued that only apportionment could satisfy the "external consistency" test, which they claimed should apply to the taxation of residents. *See, e.g. Brief of the American Legislative Exchange Council as Amicus Curiae in Support of Respondent*, filed in *Wynne,*[6] at 5; *Brief of Amicus Curiae The National Association of Publicly Traded Partnerships in Support of Respondents,* filed in *Wynne*,[7] at 9; *Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Respondents,* filed in *Wynne*,[8] at 17.

It is simply not possible, therefore, to argue that the Supreme Court somehow lacked the ability in *Wynne* to reach the question of whether the dormant commerce clause requires the apportionment of the income of residents. Nor is it possible to argue that the Court did

---

[5] The brief is posted at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-485_resp_amcu_te.pdf (last visited Nov. 18, 2018).
[6] The brief is posted at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-485_resp_amcu_alec.pdf (last visited Nov. 18, 2018).
[7] The brief is posted at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-485_resp_amcu_naptp.pdf (last visited Nov. 18, 2018).
[8] The brief is posted at https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-485_resp_amcu_cocus.pdf (last visited Nov. 18, 2018).

not really endorse Maryland's credit mechanism when it said that Maryland "could cure the problem with its current system by granting a [full] credit for taxes paid to other States. . . . ." *Wynne* at 1806. And no one disputes that Utah grants a full credit for taxes paid to other states.

Further, we agree with the Commission that there is no other dormant commerce clause doctrine that requires a state to provide some sort of tax relief to residents who earn income in another state where the income is not taxed or is taxed at a lower rate. In such situations, there simply is no risk that interstate commerce will be subjected to multiple taxation. *See also D. H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988) (holding that a state's taxing scheme was "fairly apportioned for it provide[d] a credit against its use tax for sales taxes that have been paid in other States").

Moreover, the Supreme Court has repeatedly acknowledged the broad power of states to tax their residents in any manner they deem appropriate to fund government services, subject of course to the limits imposed by the U.S. Constitution. In *Lawrence v. State Tax Commission of Mississippi*, 286 U.S. 276, 279 (1932), for example, the Court opined that ". . . domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." *Accord*, *Shaffer v. Carter*, 252 U.S. 37, 52 (1920) ("Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction."). *See also Goggin v. State Tax Assessor*, 2018 ME 111 (8/2/2018) at 7 (noting that the Supreme

Court's jurisprudence that limits state taxation to only that portion of a taxpayer's income that reasonably relates to in-state activity has never been applied to individual income taxes, "likely because of the established legal principle that residence in a state and the consequent enjoyment of the protection of its laws provide a basis for the taxation of individuals' income").

In sum, when a state taxes both 100% of the income of residents and the state-sourced income of non-residents, the risk of double-taxation may be avoided, consistent with the dormant commerce clause, by providing residents with a credit for taxes paid on income sourced to other states.

II. With respect to foreign commerce, Utah, like most states, properly relies on the foreign tax credit long provided by the federal government to address the risk of double taxation of foreign commerce.

In this section, we address the additional dormant commerce clause requirements with respect to taxing foreign commerce: that states avoid imposing taxes that subject foreign commerce to a substantial risk of discriminatory double taxation; and that state tax policies do not interfere with the federal government's ability to speak with one voice. We discuss the generous credit mechanism developed by the federal government to address the risk of double taxation of foreign commerce. Because such a credit mechanism satisfies the dormant commerce clause, this federal credit effectively removes the risk of double-taxation of foreign commerce, and the states need not grant a duplicative credit. If the states were to grant a duplicative credit, this would simply give foreign commerce a tax advantage over domestic commerce. And because the federal foreign tax credit satisfies the dormant commerce clause, states cannot be required to apportion a resident's worldwide income instead, as the Taxpayers here appear to contend. Moreover, it is not clear that such a worldwide apportionment system would be fairly implemented unless it is applied not only to Utah residents but also to residents of other states and to foreign residents. For reasons we will discuss, it would likely come as a surprise to the states and the federal government to discover that the dormant commerce clause requires states to tax income using worldwide apportionment. Finally, if the states were to "get into the business" of granting foreign tax credits, it would inevitably interfere with the federal government's ability to speak with one voice.

At the outset, we also wish to make clear that we agree with the Commission that the U.S. Supreme Court has never applied the internal consistency test to a state tax imposed on foreign commerce. It is noteworthy that in no case in which the Supreme Court has considered the constitutionality of a state tax on foreign commerce has it actually applied the internal consistency test. *See, e.g.*, *Japan Line Ltd, v. County of Los Angeles*, 441 U.S. 434 (1979); *Container Corp. of America v. Franchise Tax Board*, 463 U.S.159 (1983); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994). But as we will discuss, even if the test were to apply, it is satisfied by the ability of states to rely on the federal foreign tax credit.

A. The federal government has long had a comprehensive system for granting U.S. residents a credit for foreign taxes paid on their foreign-sourced income, and the states are entitled to rely on this credit to address the risk of double taxation of foreign commerce.

As discussed in Section I, the U.S. Supreme Court has recognized that a credit mechanism, like the one used by Utah and other states, is an acceptable means to address the risk of discriminatory double taxation of interstate commerce. Nor is there any reason to believe that a credit mechanism would fail to satisfy the dormant commerce clause when it comes to alleviating the risk of double taxation of *foreign* commerce. See *Itel* (holding that a tax credit allowed for foreign transaction taxes prevented a state sales tax from violating the foreign dormant commerce clause). While the Supreme Court has held states to a higher standard when it comes to addressing the risk of double taxation of foreign commerce, that standard is met when the tax in question is consistent with the custom of nations. *See id.* at 72. Here, that standard is easily met through use of a credit mechanism, since the U.S. and its treaty partners also recognize tax credits as appropriate for addressing double taxation. *See, e.g.,* United States-Canada Income Tax Convention, signed September 26, 1980 (ARTICLE XXIV Elimination of Double Taxation), posted at https://www.irs.gov/pub/irs-trty/canada.pdf.

Just like the tax system adopted by the states, the federal government has generally adopted a system in which residents are taxed on all of their income "from whatever source derived," 26 U.S.C. § 61, and nonresidents are taxed on their U.S.-sourced income. 26 U.S.C. § 872(a)(1).The federal government also provides residents with a credit for foreign taxes paid on their foreign-sourced income. 26 U.S.C. §§ 901-908. As will be discussed further below, this system has developed alongside of, and to carry out, the federal government's international tax treaties.

Like Utah's credit for taxes paid to other states, the federal foreign tax credit is for taxes actually paid and is capped at the U.S. effective tax rate imposed on the income. BNA Portfolio 949-1st A.(1). To implement and administer this credit, the federal government must have rules in place for determining who is to be treated as a U.S. resident, how the credit is calculated and applied to particular types of income, and how those types of income are "sourced" for taxation to the United States or a foreign jurisdiction. The federal system must also address, among other things, when a foreign tax may not qualify for the credit, either because the foreign jurisdiction offers no reciprocal credit, 26 U.S.C. § 901(c), or because the foreign jurisdiction does not impose an "income tax," as defined. 26 U.S.C. § 901(b) and 26 C.F.R. § 1.901-2(a). Nor will the federal government credit taxes paid that may be rebated or refunded by the foreign government. 26 C.F.R. § 1.901-2(e). The federal government, of course, reserves the right not to credit certain taxes, including taxes paid to a country: (1) whose government the United States does not recognize; (2) with which the United States has severed or never established diplomatic ties; or (3) that the U.S. Secretary of State designates as supporting international terrorism. BNA Portfolio 949-1st F.(4)(b). The federal rules also address potential abuse, for example, shifting income earned in a low-tax jurisdiction to a higher tax jurisdiction to take advantage the greater tax credit against U.S. tax. *See* 26 U.S.C. § 960(c). In short, the rules for implementing the credit are many and detailed.

But most importantly, federal law determines when items of income, or portions of those items, will be treated as U.S. or foreign sourced and this determination is controlling for purposes of the credit. There are detailed rules for sourcing various types of income. *See* 26 U.S.C. §§ 861-865 as well as the regulations implementing these sections. This sourcing of income also involves the allocation of expense items incurred by a multinational business that might be related to that income, such as interest, to the U.S. and foreign jurisdictions where the income is sourced. *See* 26 U.S.C. § 864(e). Foreign taxes levied on an item of net income or gain that federal law classifies as U.S. sourced, rather than foreign sourced, are not eligible for the foreign tax credit, even if some foreign tax might actually be paid on that income. BNA Portfolio 949-1st C.(1). We will return to the controlling nature of these sourcing rules below.

The federal credit is also generous in that foreign taxes may be "cross-credited," effectively averaging foreign tax rates, so that the taxpayer may receive a greater tax benefit than if relatively high foreign taxes and relatively low foreign taxes were treated separately. *See* 26 U.S.C. § 904 and T.D. 9521, 76 Fed. Reg. 19,268 (Apr. 7, 2011). Furthermore, the credit may be carried back one year and carried forward 10 years, so that if it cannot be completely taken in the year the taxes are paid, it is available to offset federal taxes in other years. This feature, in particular, is more generous than the typical tax credits generally offered by the states for taxes paid to other states which are not subject to carry-over.

In reliance on this federal foreign tax credit, Utah, the District of Columbia, and 37 other states generally tax 100% of their residents' foreign-sourced income and provide either no state credit for foreign taxes paid or only a partial credit on that income.[9] Specifically, 27 states including Utah and the District of Columbia grant no credit at all, two states grant a credit only for foreign subnational taxes, five states grant a credit only for Canadian subnational taxes, and two states grant a credit on only certain types of

[9] Only four states grant a full tax credit for both national and subnational taxes to all taxpayers, whether or not the federal tax credit is fully used. The Appendix to this brief summarizes the law regarding foreign tax credits in each state.

income. Of the states that grant some credit, six grant a credit only to the extent that the federal foreign tax credit cannot be used by a taxpayer. As we have noted, despite the fact that most states provide no credit for foreign taxes, neither the U.S. Supreme Court nor any state appellate court has ever ruled that this violates the dormant foreign commerce clause.

B. Because of the federal credit for foreign taxes paid, not only is there no substantial risk of multiple taxation, but if Utah were to provide a duplicate credit or otherwise exclude foreign income, it would grant foreign commerce an advantage over domestic commerce.

The federal foreign tax credit addresses the risk of double-taxation of foreign commerce. If the states were to give a duplicative credit, or exclude foreign income, it would actually give an advantage to foreign commerce over domestic commerce that no federal policy appears to intend. To illustrate this point, take the hypothetical example of David and Mary, both residents of Utah. David earns $100,000, $70,000 of which is sourced to and taxed by State A. Mary also earns $100,000, $70,000 of which is sourced to and taxed by a foreign country. Assume Utah and State A impose a 5% tax rate, and the rate of tax imposed by the U.S. and the foreign country is 15%.

David's total tax liability would be $20,000, calculated as follows:

Federal Tax (on $100,000)	$15,000
State A Tax (on $70,000)	$ 3,500
Utah Tax (on $100,000)	$ 5,000
Credit for State A Tax	($ 3,500)
Total Tax Liability	$ 20,000

Mary's total tax liability would also be $20,000, calculated as follows:

Foreign Taxes (on $70,000)	$ 10,500
Federal Tax (on $100,000)	$ 15,000
Credit for Foreign Taxes	($10,500)
Utah Tax (on $100,000)	$ 5,000
Total Tax Liability	$ 20,000

Due to the federal tax credit, domestic and foreign commerce are treated the same, and there is no discriminatory double-tax on Mary's foreign income, nor is Mary in any way disadvantaged by conducting business abroad.

Now assume that Mary could also claim the same $13,500 foreign tax credit against her $5,000 of Utah tax liability, or alternatively, could exclude her foreign income from Utah tax. Now Mary would be subject to only $16,500 of total tax:

	State Credit	Exclusion of Foreign Income
Foreign Taxes	$ 10,500	$ 10,500
Federal Tax	$ 15,000	$ 15,000
Credit for Foreign Taxes	$(10,500)	$(10,500)
Utah Tax	$ 5,000	$ 1,500
Credit for Foreign Taxes	$ (3,500)*	
Total Tax Liability	$ 16,500	$ 16,500

* Assuming Utah would cap the credit at the amount of Utah's tax on the foreign-sourced income.

As we discussed in Section I, the elements of another jurisdiction's tax, including tax rates, are not relevant in determining whether a state tax imposes discriminatory double taxation on commerce. *See Wynne* at 1804 ("discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States."). Nevertheless, one might wonder whether changing the rates of tax here would affect the outcome. Assuming that Utah must give a duplicative credit for foreign taxes paid, would the tax paid by Mary and David be the same ($20,000) if the foreign tax rate imposed on Mary's foreign income were 20% (the sum of the federal and state tax rates)? No. The foreign tax rate would have to exceed 28.55%, 8.55% more than the combined federal and state rates, before there is no longer a discrepancy between the taxes paid by David and the taxes paid by Mary (now – all to the foreign government and none to either the Utah or the federal government).

Assuming that Utah residents were entitled to this type of duplicative state-level credit for foreign taxes paid, could the disparity between otherwise similarly situated taxpayers engaging in foreign commerce and domestic commerce, like Mary and David, be remedied somehow? The answer is telling. The only way to fully remedy this difference is either by the federal government giving a credit against federal taxes for some amount of state taxes paid (here, $3,500), or by the states giving a credit against state taxes for some amount of federal taxes paid. In effect, the claim that Utah must give a duplicative foreign tax credit (or exclude foreign income) leads to a disadvantage for domestic commerce that can only be remedied by the federal or state government foregoing the right to tax what the other is taxing. This extraordinary contention flies in the face of longstanding jurisprudence that recognizes that, in our federal system, states and the federal government have *concurrent* power to tax. For example, in *Frick v. Pennsylvania*, 268 U.S. 473, 499 (1925), the Supreme Court observed that "[t]he power of Congress, in laying taxes, is not necessarily or naturally inconsistent with that of the States. Each may lay a tax on the same property, without interfering with the action of the other." *See also Mobil Oil Corp. v. Commissioner*, 445 U.S. 425, 448 (1980) ("Concurrent federal and state taxation of treatment of foreign income, of course, is a well-established norm.").

In short, the duplicative credit that the Taxpayers here seek is an unjustified tax windfall and would only serve to incentivize U.S. residents to engage in foreign versus domestic commerce.

C. States are entitled to rely on the federal foreign tax credit to address the risk of double taxation of foreign commerce unless and until Congress indicates otherwise.

In *Barclays Bank,* the U.S. Supreme Court reviewed its prior decisions concerning the dormant commerce clause as applied to foreign commerce and said this about the role of federal foreign policy in evaluating state taxes, and the need for the federal government to "speak with one voice":

> In both *Wardair* and *Container Corp*., the Court considered the 'one voice' argument only after determining that the challenged state action was otherwise constitutional. An important premise underlying both decisions is this: Congress may more passively indicate that certain state practices do not impair federal uniformity in an area where federal uniformity is essential; it need not convey its intent with the unmistakable clarity required to permit state regulation that discriminates against interstate commerce or otherwise falls short under *Complete Auto* inspection.

Barclays Bank at 324 (internal citations omitted). As discussed above, because of the comprehensive federal foreign tax credit, the states are not imposing a discriminatory risk of double taxation on foreign commerce simply because they do not grant a duplicative credit. So the only question is whether Congress has, at least, "passively indicated" that this reliance on the federal credit does not impair some essential federal uniformity. This standard is clearly met.

The federal tax credit provided for foreign taxes paid includes both national and subnational taxes. Two experts in the state tax field have pointed out that this makes sense, compared to having national governments give credits for national taxes, and subnational governments give credits for subnational taxes. As they write: "Subnational governments generally are not in a position to resolve double tax issues by treaty, and many subnational governments do not have the technical expertise necessary to deal effectively with the complexities of international taxation."[10] These experts go on to note that subnational governments would face "serious technical problems in fashioning the proper relief" at their level for duplicative foreign and domestic taxes, particularly if they do not use the same approach to determining the tax base as the federal government does.[11]

We believe that Congress would certainly recognize the "serious technical problems in fashioning the proper relief" to which the experts referred. If states were to attempt to provide a credit for some or all of foreign taxes paid, how should they address the fact that, because of the generosity of the federal credit, a duplicative state credit might simply

[10] Richard D. Pomp and Michael J. McIntyre, GATT, Barclays, and Double Taxation, 8 State Tax Notes 977 (1995) at para. 13, posted at https://www.taxnotes.com/state-tax-today/state-and-local-taxation/full-text-gatt-barclays-and-double-taxation/1996/07/03/6ys7?highlight=pomp%20mcintyre%20gatt (last visited Nov. 18, 2018).
[11] *Id*. at para. 25.

disadvantage domestic commerce? If states should provide only a credit for the portion of the federal credit that might not be "used up" at the federal level, how should that be calculated, given that the federal credit may be carried over for 10 years. Should states ever be required to give credit for national taxes?

Given these technical difficulties, it should not be a surprise that while the federal government has negotiated and entered into numerous bilateral tax treaties and has regularly agreed to grant a federal tax credit to U.S. residents for foreign taxes paid at both the national and subnational level, it has never committed the states to providing such a credit against state taxes.

One of many examples is the tax treaty between the United States and Canada, our second largest trading partner. In that treaty, each national government agreed, in order to avoid "double taxation," to allow its residents a credit against its national income tax for both the tax imposed by the national government and taxes paid or accrued to a political subdivision or local authority. However, neither country agreed to require states or provinces, as the case may be, to provide their residents a similar credit. *See* United States-Canada Income Tax Convention, signed September 26, 1980 (ARTICLE XXIV Elimination of Double Taxation), posted at https://www.irs.gov/pub/irs-trty/canada.pdf. *See also* United States Model Income Tax Convention of November 15, 2006, Article 23 (Relief From Double Taxation), posted at https://www.irs.gov/pub/irs-trty/model006.pdf.

Indeed, before any such requirement was imposed on the states, we would expect the federal government to engage the states and make clear the intention to bind the states to some agreement with a foreign power. Therefore, we would assume that the absence of any mandate on the states is the best expression of the federal government's intention that one not be imposed. Not only does this respect the role of the states in our federal system, but taking action in response to some unexpressed intent is as likely to interfere with, as to conform to, the true purpose of the federal government in dealing with foreign commerce. For example, in the case of the Canadian Tax Convention, it is unlikely Congress would have agreed that the states be bound to the taxing convention when Canadian provinces are not also bound when taxing U.S. residents. Therefore, courts must proceed very cautiously in mandating some action where Congress has had the opportunity, but has failed to express any particular intent. *See* comments of Sen. Frank Church in support of his successful effort to strike that portion of a proposed United States-United Kingdom tax treaty that would have placed restrictions on how states could tax foreign commerce, 124 Cong. Rec. 18417 (1978) ("Mr. President, Congress is the forum in which disputes within the federal system [are] to be resolved."); *Star-Kist Foods, Inc. v. County of Los Angeles*, 719 P.2d 987, 995 (Cal. 1986), *cert. denied*, 480 U.S. 930 (1986) (finding that a tax exemption that applied only to imported and exported goods violated the commerce clause because "[o]nly the federal government can fix the rules of fair competition when such competition is on an international basis"); *Container Corp.* at 196.

The need for states to defer to Congress when dealing with foreign powers has often been expressed by the Supreme Court. Concern for this has caused the Court to strike down state actions that intruded into policy-making areas assigned by the Constitution to the federal government—even when the challenged state action comported with federal policy. In *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), for example, Massachusetts in response to human rights abuses in Burma, enacted a law barring state entities from buying goods or services from companies doing business in that country. Shortly thereafter, Congress enacted sanctions on Burma also in response to those human rights abuses. The Court, in responding to a challenge to the Massachusetts statute, concluded that it was unconstitutional, finding that the state had prevented the federal government from speaking "with one voice" notwithstanding the fact that the state statute was intended to achieve the same goal as the federal statute. *Crosby* at 381. "The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals . . . .," the Court explained. *Crosby* at 380. *Accord*, *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 418 (2003) (". . . state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.").

The holding in *Wardair Canada v. Florida Dep't of Revenue*, 477 U.S. 1 (1986), also supports the decision of states to rely on the federal government to address the risk of double taxation of foreign commerce. In *Wardair*, a taxpayer claimed that Florida violated the dormant foreign commerce clause by imposing a tax on aviation fuel that was used exclusively in foreign commerce. The Supreme Court rejected the claim, relying on the federal government's awareness of state fuel tax regimes and the numerous bilateral aviation agreements that the United States had entered into, none of which had limited state taxing authority. "It would turn dormant Commerce Clause analysis entirely upside down," the Court opined, "to apply it where the Federal Government has acted, and to apply it in such a way as to *reverse* the policy that the Federal Government has elected to follow." *Id*. at 12 (emphasis in original text). Similarly, the federal government's longstanding acquiescence to the choice by most states not to provide a foreign tax credit, particularly in the wake of the multiple tax treaties that preserve state taxing authority, defeats the claim that the tax's structure violates the dormant foreign commerce clause. See also *Container Corp*, 463 U.S. at 194 (". . . if a state tax merely has foreign resonances, but does not implicate foreign affairs, we [*i.e.*, the Supreme Court] cannot infer, absent some explicit directive from Congress . . . that treatment of foreign income at the federal level mandates identical treatment by the States") (internal citations omitted).

In 1983, President Reagan convened the Worldwide Unitary Taxation Working Group (the "Working Group"). The Working Group was concerned with the treatment of the income of C corporations (those taxed under the Internal Revenue Code Subchapter C). We agree with the Commission that there are important differences between the taxation of S corporations, like those from which the Taxpayers derive income, and C corporations—most critically, that the income of C corporations is taxed both when earned and when distributed, whereas an S corporation pays tax only once. Still, a review of the Working Group's deliberations sheds some light in the questions in this case.

Earlier in 1983, the Supreme Court in *Container Corp*. had upheld the use by California of formulary apportionment on a worldwide basis against a constitutional challenge that it would produce the kind of inevitable or inherent risk of double taxation of foreign commerce that the dormant commerce clause prohibits. This worldwide apportionment approach, however, effectively sourced worldwide income for tax purposes differently than the federal sourcing rules (discussed above). Numerous foreign governments and multinational businesses responded by lobbying Congress and the Reagan administration to act to have Congress preempt state authority to impose mandatory worldwide apportionment. In response, the President directed the Treasury Secretary, Donald T. Regan, to convene the Working Group, consisting of Regan, other senior federal officials, business leaders, and representatives of the states (including the then-governor of Utah) to address the matter. For a history of the Working Group, see The Final Report of the Worldwide Unitary Taxation Working Group, August 1984 (known as the "Regan Report") at 1-6, posted at https://archive.org/details/finalreportofwor00unit/page/n0.

Twelve months later, after substantial and complex negotiations among the members, the Working Group issued a final report. In that report, the objections to worldwide apportionment were listed, as well as the states' and others' justifications for the approach. *Id*. at 7-8. Among the objections expressed by foreign and business interests was that worldwide apportionment "departs from the international standard." *Id*. at 7. Ultimately the states agreed to apply apportionment only on a "water's-edge" basis, so that it would not apply to the current income earned by foreign entities. *Id*. at 9. Over the course of subsequent months states amended their tax codes as necessary. *See*, *e.g.,* Cal. SB 85 (Chpt. 660, Stats. 1986) (eff. Jan. 1, 1988).

But, in the end, there were also a number of issues on which the Working Group could reach no agreement. The most important of which was the ability of states to tax foreign dividends when paid to a domestic parent. In response to the concern expressed by business interests that this might result in double taxation, the states asserted that the federal credit for foreign taxes paid was sufficient to address this problem. Moreover, the states refused to make any concessions on this issue. Therefore, the Report simply notes that the states "should seek parity in the taxation of foreign and domestic dividends." *Id*. at 13-14.

No doubt all the members of the Working Group would have been surprised to learn that the states are somehow *required* to apply worldwide apportionment so as to exclude foreign income from their tax base, whether or not that income might be at risk of double taxation. But this is exactly what the Taxpayers contend when they argue that apportionment is *compelled*, in every case, by the external consistency doctrine. As we have discussed above, states are entitled to tax 100% of the business income of residents, provided that they do not subject them to discriminatory double taxation. Therefore, we reject the contention that external consistency applies here. But, more important for our purposes, is that there is also no indication that the Administration's position in the Working Group negotiations, or its expressed policy toward the foreign participants, was predicated on a belief that states ought to limit their taxation of the business income of *residents*, and exclude any foreign income, even if not at risk of double taxation. Had the Administration held this view, it would clearly have been relevant to the states in their negotiations and the states' contention that they were not conceding the right to tax foreign dividends when paid to a domestic parent, including a resident of the state. And it might reasonably have been expected to affect the states' calculation as to whether they would be willing to limit the application of worldwide apportionment to foreign entities generally.

As for the need for a state-level foreign tax credit there was some discussion, as we have noted, of whether states should provide a foreign tax credit if they decided to tax foreign dividends, but again without any resolution. Moreover, the Working Group, under the direction of the Secretary of the Treasury, neither determined that such a credit would be required nor criticized widespread state practices of generally taxing 100% of residents' foreign-sourced business income without providing a tax credit. In short, there is no reason to believe that the federal government did not intend that states could rely on the federal foreign tax credit to address double taxation of foreign commerce—rather than apportionment or a separate state tax credit—given that it failed to express any view to the contrary, despite having the opportunity to do so. The decision by Utah, and other states, that they can properly rely on the federal foreign tax credit to address the risk of double taxation of foreign commerce, and thereby defer to federal policy choices, respects the role of the federal government and its need to speak with one voice. The fact that Congress has not *explicitly* spoken does not change this, especially given the nature of the issue and longstanding practices involved. *See Wardair* and *Barclays Bank*. Indeed, it would be risky for any court to infer from the lack of an explicit statement that Congress expects the states to undertake to change their longstanding tax practices in this area. Even the Supreme Court has admitted that it has "little competence" in matters relating to the "sovereign right of the United States as a whole to let the States tax as they please," referencing the "nuances" of foreign policy which "are much more the province of the Executive Branch and Congress than of this Court." *Container Corp.* at 194-96. *See also Barclays Bank* at 327-28 (1994)(reiterating the Court's analysis in *Container Corp.* and expressing that the view that its reticence to invade the province of the other branches also applies to the entire judiciary).

CONCLUSION

The Taxpayers request this court to rule as follows: Utah and other states' tax systems have long been violating the dormant commerce clause, resulting in the imposition of discriminatory taxes on domestic and foreign commerce. They make this request, even though there is no Supreme Court ruling or other federal policy that so holds, and despite the fact that the relief they seek would only provide a tax advantage to foreign commerce and inevitably lead to actions by states that might well interfere with the federal government's foreign policy in this area. Their request should be denied.

Respectfully submitted,

Gregory S. Matson #5312
Helen Hecht
Brian Hamer
Attorneys for Multistate Tax Commission

CERTIFICATE OF COMPLIANCE WITH RULES 24(f)(l) AND 27(b)

1. This brief complies with the type-volume limitations of Utah R. App. P. 24(f)(l) because this brief contains 6,873 words, excluding the parts of the brief exempted by Rule 24(f)(l)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13 point Times New Roman.

Lila Disque
Multistate Tax Commission

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, I caused a true and correct copy of the Brief of Amicus Curiae Multistate Tax Commission to be served by e-mail and/or U.S. mail on the following:

Peter W. Billings
William H. Adams
Nora K. Brunelle
David P. Billings
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111-2323
pbillings@fabianvancott.com
wadams@fabianvancott.com
nbrunelle@fabianvancott.com
dbillings@fabianvancott.com
Counsel for Robert C. Steiner & Wendy Steiner-Reed

Erin T. Middleton
Assistant Solicitor General
Stanford E. Purser
Deputy Solicitor General
John C. McCarrey
Mark E. Wainwright
Assistant Attorneys General
P.O. Box 140858
Salt Lake City, Utah 84114-0858
emiddleton@agutah.gov
spurser@agutah.gov
jmccarrey@agutah.gov
mwainwright@agutah.gov
Counsel for Utah State Tax Commission

Lila Disque
Multistate Tax Commission

APPENDIX

State	Description	Citation
Alabama	Credit for 50% of resident's proportionate share of foreign income taxes paid by a resident partner or member of a Subchapter K entity	Ala. Code § 40-18-21(c).
Arizona	Credit for foreign national and subnational taxes paid	Ariz. Rev. Stat. Ann. § 43-1071; Ariz. Admin. Code § R15-2C-501(A)(8).
Arkansas	No credit for foreign taxes paid	Ark. Code Ann. § 26-51-435(f) -504; Ark. Regs. 1.26-51-435(c) -504.
California	No credit for foreign taxes paid	Cal. Rev. & Tax. Code § 18001; Cal. Code Regs. tit. 18, § 18001-1.
Colorado	No credit for foreign taxes paid	39 Colo. Code Regs. § 22-108.
Connecticut	No credit for foreign taxes paid	Conn. Agencies Regs. § 12-704(a)-4.
Delaware	No credit for foreign taxes paid	Del. Code Ann. tit. 30, § 1111(a).
District of Columbia	No credit for foreign taxes paid	D.C. Code Ann. § 47-1806.04(a).
Georgia	No credit for foreign taxes paid	Ga. Code Ann. § 48-7-28.
Hawaii	Credit for foreign national and subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Haw. Rev. Stat. § 235-55(a)-(b).
Idaho	No credit for foreign taxes paid	Idaho Code § 63-3029(1)-(2)(a).
Illinois	No credit for foreign taxes paid	Ill. Admin. Code tit. 86, § 100.2197(a), (b)(2).
Indiana	Credit for foreign national and subnational taxes paid	Ind. Code Ann. § 6-3-3-3(a).

Iowa	Credit for foreign national and subnational taxes paid	Iowa Code §§ 422.8(1),-.4(6).
Kansas	Credit for foreign national and subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Kan. Stat. Ann. §§ 79-32,111(a), -3271(i).
Kentucky	No credit for foreign taxes paid	Ky. Rev. Stat. Ann. §§ 141.070(1), -.010(26).
Louisiana	No credit for foreign taxes paid	La. Rev. Stat. Ann. § 47:33.
Maine	Credit for foreign subnational taxes paid	Me. Rev. Stat. Ann. § 36-5217-A.
Maryland	No credit for foreign taxes paid	Md. Code Ann., Tax-Gen. § 10-703(a)-(c).
Massachusetts	Credit for Canadian subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Mass. Gen. L. ch. 62, § 6(a).
Michigan	Credit for Canadian subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Mich. Comp. Laws Ann. § 206.255.
Minnesota	Credit for Canadian subnational taxes paid	Minn. Stat. §290.06(Subd. 22).
Mississippi	No credit for foreign taxes paid	Miss. Regs. §§ 35.III.01.12.100-101.
Missouri	No credit for foreign taxes paid	Mo. Rev. Stat. § 143.081(1).
Montana	Credit for foreign national and subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Mont. Code Ann. § 15-30-2302(1).
Nebraska	No credit for foreign taxes paid	Neb. Rev. Stat. § 77-2730(1).
New Jersey	No credit for foreign taxes paid	N.J. Rev. Stat. § 54A:4-1(a).
New Mexico	No credit for foreign taxes paid	N.M. Stat. Ann. § 7-2-13; N.M. Stat. Ann. § 7-2-2(U).
New York	Credit for Canadian subnational taxes paid	N.Y. Tax Law § 620(a).
North Carolina	Credit for foreign national and subnational taxes paid	N.C. Gen. Stat. § 105-151(a).
North Dakota	No credit for foreign taxes paid	N.D. Cent. Code § 57-38-30.3(4)(a).

Ohio	No credit for foreign taxes paid	Ohio Rev. Code Ann. § 5747.05(B)(2).
Oklahoma	No credit for foreign taxes paid	Okla. Stat. Ann. tit. 68, § 2357(B)(1); Okla. Stat. Ann. tit. 68, § 2353(14).
Oregon	No credit for foreign taxes paid	Or. Admin. R. 150-316-0080(1), -(4).
Pennsylvania	No credit for foreign taxes paid	72 Pa. Stat. Ann. § 7314(a).
Rhode Island	No credit for foreign taxes paid	R.I. Gen. Laws § 44-30-18(a).
South Carolina	Credit for foreign subnational taxes paid	S.C. Code Ann. § 12-6-3400(A)(1).
Tennessee	No credit for foreign taxes paid	Tenn. Code Ann. § 67-2-122.
Utah	No credit for foreign taxes paid	Utah Code Ann. § 59-10-1003.
Vermont	Credit for Canadian subnational taxes paid to the extent applicable foreign tax exceeds federal foreign tax credit	Vermont Stat. Ann. § 5825(a).
Virginia	Credit for foreign taxes paid on pension or retirement income	Va. Code Ann. § 58.1-332(A).
West Virginia	No credit for foreign taxes paid	W. Va. Code § 11-21-20(a).
Wisconsin	No credit for foreign taxes paid	Wis. Stat. § 71.07(7).