No. 23-171

IN THE

Supreme Court of the United States

CHRIS QUINN, ET AL.,

Petitioners,

v.

WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

BRIEF OF WASHINGTON POLICY CENTER, OPPORTUNITY FOR ALL COALITION, AMERICANS FOR TAX REFORM, CALIFORNIA POLICY CENTER, GRASSROOT INSTITUTE OF HAWAII, ILLINOIS POLICY INSTITUTE, INDEPENDENCE INSTITUTE, NATIONAL TAXPAYERS UNION FOUNDATION, MANHATTAN INSTITUTE, MOUNTAIN STATES POLICY CENTER, OKLAHOMA STATE CHAMBER RESEARCH FOUNDATION, REASON FOUNDATION, AND TAX FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are 13 organizations based in multiple states across the country with long-standing expertise in taxation.

Washington Policy Center (WPC) is an independent, nonprofit think tank that promotes sound public policy based on free market solutions. WPC's Center for Government Reform has actively researched the topic of capital gains income taxes.

Opportunity for All Coalition is a nonprofit 501(c)(4) organization dedicated to preserving the competitive advantages of Washington's existing tax structure, which include attracting employers to Washington, increasing capital investment and hiring, and generating abundant state revenue.

Americans for Tax Reform (ATR) is a taxpayer advocacy group founded by Grover Norquist in 1985. ATR works to limit the size and cost of government; opposes higher taxes at the federal, state, and local

[1] The parties were timely notified of the intention to file this brief under Rule 37.2. Undersigned counsel represented the following plaintiffs-respondents in the proceedings below: April Clayton, Kevin Bouchey, Renee Bouchey, Joanna Cable, Rosella Mosby, Burr Mosby, Christopher Senske, Catherine Senske, Matthew Sonderen, John McKenna, Washington Farm Bureau, Washington State Tree Fruit Association, and Washington State Dairy Federation. No counsel for any other party authored this brief in whole or in part. No entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

levels; and supports tax reform that moves towards taxing consumed income one time at one rate.

California Policy Center is an educational nonprofit working for the prosperity of all Californians by eliminating public-sector barriers to freedom. The Center's research and advocacy focuses especially on tax policy, business regulation, public debt, education reform, cost of living, and water policy.

Grassroot Institute of Hawaii is an independent, nonprofit think tank that promotes public policy solutions based on economic freedom, individual liberty and limited, accountable government. The Grassroot Institute has been active in analyzing the economic impact of state tax policy and has offered legislative testimony on multiple bills related to the state capital gains tax and state income tax.

Illinois Policy Institute is a nonpartisan, nonprofit public policy research and education organization that promotes personal and economic freedom through free markets and limited government. Headquartered in Illinois, the Institute's focus includes budget and tax, good government, jobs and economic growth, and labor policy.

Independence Institute is a nonprofit Colorado-based organization founded in 1985 on the eternal truths of the Declaration of Independence. The Institute has participated in many Supreme Court cases, and its amicus briefs have been cited in several decisions of this Court.

National Taxpayers Union Foundation (NTUF) is a nonpartisan research and educational organization founded in 1973 dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, engages in litigation upholding taxpayers' rights, and challenges administrative overreach by tax authorities.

Manhattan Institute for Policy Research is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship regarding tax policies that allow free enterprise to flourish. The Manhattan Institute's constitutional studies program aims to preserve the Constitution's original public meaning.

Mountain States Policy Center (MSPC) is based in Idaho. It is an independent think tank that believes in providing research and fact-based recommendations to lawmakers, the media, and the public. MSPC's staff collectively have decades of experience working on tax and federalism policies and on the interstate commerce impacts of policy decisions whose effects cross state lines.

Oklahoma State Chamber Research Foundation (SCRF) is the Oklahoma business community's think tank. As a nonprofit, nonpartisan

research and education organization, SCRF is dedicated to advancing free markets, increasing opportunity, and growing prosperity. Sound tax policy is at the core of SCRF's mission as a critical component of a thriving free enterprise economy.

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing Reason magazine, as well as commentary on its websites, and by issuing policy research reports. Reason participates as amicus curiae in cases raising significant constitutional or legal issues.

Tax Foundation is a nonprofit, nonpartisan research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Tax Foundation seeks to make information about government finance more accessible to the general public and inform smarter tax policy at the federal, state, and global levels.

Amici have a strong interest in the outcome of this case because it addresses the fundamental territorial limits on a state's tax jurisdiction. Representing diverse perspectives from multiple states and reflecting broad nationwide expertise, amici are concerned that the Washington Supreme Court's decision opens the door for states to institute extraterritorial excise taxes and lay claim to revenues from transactions beyond their borders, which will have damaging effects

on the interstate economy and our system of federalism.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2021, Washington's legislature enacted Engrossed Senate Substitute Bill (ESSB) 5096, imposing a novel capital gains tax on residents' sale of capital assets. Among other provisions, ESSB 5096 empowers the State of Washington to impose excise taxes on out-of-state transactions anywhere in the country. That remarkable assertion of extraterritorial authority to impose excise taxes contravenes foundational federalism principles and calls for this Court's review.

Seeking to avoid state constitutional restrictions on income taxes, Washington expressly fashioned the tax as an excise levied on its residents' sales and exchanges of long-term capital assets (wherever that sale or exchange may occur), not as a tax on the in-state income residents receive when they realize capital gains. But state law notwithstanding, the federal implications of allowing an extraterritorial excise tax on out-of-state transactions involving out-of-state property are profound.

As explained in the Petition, the Washington Supreme Court's decision "lays the first stone on a path toward a regulatory regime under which borders are trivialized" and grants states unprecedented "power to intrude on the sovereign prerogatives of their sister states." Pet. 14. Representing a broad coalition of state and nationwide organizations with expertise in

taxation, amici submit this brief to highlight that allowing states to impose extraterritorial excise taxes not only threatens to wreak havoc on taxpayers and businesses around the country, but also damages interstate relations and undermines elementary principles of federalism underlying the Court's dormant Commerce Clause jurisprudence and the Constitution as a whole.

The Washington Supreme Court's decision threatens to unsettle numerous limitations on the scope of states' taxing power and thereby prompt other states to follow Washington's lead, when it suits their own purposes. If Washington can lay an excise on out-of-state sales of capital assets involving only out-of-state property, may California impose a gas tax on gasoline purchases in Arizona? May Texas impose an excise tax on stock sales in New York? May Pennsylvania impose a sales tax on grocery store checkouts in Ohio? Straightforward and long-standing principles of federalism dictate that the answer to all these questions should be no. But if this Court does not review Washington's claimed authority to impose an excise tax with extraterritorial effect, other states will surely follow Washington's lead and enact novel excise taxes of their own.

Allowing the decision to stand, thereby leaving open the door to extraterritorial excise taxes, will fray the ties that bind the federal system. Permitting such taxes will encourage further predatory behavior by states seeking to take advantage of their neighbors. It will compromise core values of state autonomy and democracy by permitting states to extract remuneration from transactions taking place entirely in other

states and involving solely out-of-state property. And it will distort the incentives of state lawmakers everywhere, tempting them to impose taxes on out-of-state transactions instead of more politically costly taxes on in-state income and transactions. All these consequences will damage the system of interstate economic competition that has served the nation well.

States have wide latitude to design their own tax regimes as they see fit as they compete in the interstate economy for business, talent, and prosperity. But they must do so within the territorial parameters the Constitution imposes. Review is urgently needed here to enforce basic principles of federalism and protect the long-standing ground rules for interstate interaction.

This Court should grant certiorari and reverse.

ARGUMENT

I. The Constitution Imposes Territorial Limits On State Taxes To Ensure A Dynamic And Competitive Interstate Economy.

"The principle that states are territorially bound … permeates the Constitution." Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468, 1520 (2007). "The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist." Allan Erbsen, *Horizontal Federalism*, 93 Minn.

L. Rev. 493, 494 (2008). In doing so, the Constitution embodies a "special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335-36 (1989).

The territorial constraint on state power is foundational to the interstate economy, as it establishes the basic parameters within which states compete for business, talent, investment, and other determinants of growth and well-being. Federalism requires that "each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders," and also that each State respect the prerogatives of other states to do the same within their borders. Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. at 1521.

As Justice Brandeis put it nearly a century ago, our federal system empowers states to "serve as … laborator[ies]" and "try novel social and economic experiments"—but only when those experiments are "without risk to the rest of the country" or sister states. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. 1353, 1355 (2006) ("While Justice Brandeis's aphorism about the states as laboratories of democracy is oft repeated, the tail end of his claim tends to get lost."). "[W]hen one state's experimentation … adversely affects citizens of other states, … not only may the benefits of heterogeneity fail, but

also the citizens of other states are deprived of the political means of compelling democratic accountability on economic actors shielded by other states' claims of sovereignty." Issacharoff & Sharkey, *Backdoor Federalization*, 53 U.C.L.A. L. Rev. at 1353.

A healthy system of interstate competition cannot function if states overstep their boundaries. Without question, states have wide latitude to craft economic regulations, pursue differing market policies, and establish varying tax structures that, in their view, best attract business and talent from the rest of the country to their state. But in exercising their prerogative to structure their tax system as they see fit, states must respect the territorial limits on their power and not encroach on the sovereign domain of other states. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.) ("[E]ach State has a sovereignty that is not subject to unlawful intrusion by other States.").

When states experiment and compete with their tax systems within territorial bounds, the nation benefits. Citizens and businesses everywhere enjoy broader latitude to seek a state tax system and economic environment that best suit their interests. While some states may think it best to create a higher tax environment with more extensive social services, others may prefer to attract business, investment, and in-migration by offering a system of lower taxes. While some states may prefer to raise funds through taxes on income, others may deem it preferable to rely primarily on use or excise taxes. While some states prefer a highly graduated tax structure, others may select a flat tax. The list goes on—to everyone's gain.

But in all events, a state's authority "is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (internal citation omitted).

Implementing these territorial principles, this Court has long held that "[n]o State can legislate except with reference to its own jurisdiction," since "[e]ach State is independent of all the others in this particular." *Bonaparte v. Appeal Tax Ct.*, 104 U.S. 592, 594 (1881). And no state has the authority to enact "policy for the entire Nation" or "impose its own policy choice on neighboring States." *Gore*, 517 U.S. at 571. For that reason, state "[l]aws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States." *Huntington v. Attrill*, 146 U.S. 657, 669 (1892).

These principles flow directly from the text and structure of the federal Constitution. This Court's Commerce Clause jurisprudence has long "preclude[d] the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982). "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Id.* at 643 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977)). Thus, permitting state regulations or tax schemes "to operate beyond the jurisdiction of that State" would "throw[] down the

constitutional barriers by which all the States are restricted within the orbits of their lawful authority." *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

This territorial constraint is no less critical with respect to taxation than it is with respect to other vectors of state authority. *See* Pet. 5, 18. After all, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). The Court has long recognized that a state "tax on an [out-of-state] sale … involves an assumption of power by a State which the [Constitution] was meant to end." *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330 (1944). And the Court "ha[s] not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc. v. Dir., Div. of Tax'n*, 504 U.S. 768, 778 (1992).

Similarly, the Court has held that states may not "impose a tax on a transfer of ownership … where the transfer was made beyond the state limits." *McLeod*, 332 U.S. at 331. And a "state may not tax real property or tangible personal property lying outside her borders." *Great Atl. & Pac. Tea Co. v. Grosjean*, 301 U.S. 412, 424 (1937); *see also Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 325 (1968). Unlike when a state imposes in-state rules that merely have extraterritorial effects, *e.g.*, *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 371 (2023), it is simply "beyond the power of the state" to impose a tax when "the taxable event is outside its boundaries." *Memphis Nat. Gas Co. v. Stone*, 335 U.S. 80, 95 (1948).

II. The Washington Supreme Court's Decision Contravenes Foundational Principles Of Federalism.

The Washington Supreme Court's decision breaks with these foundational principles by approving the state's self-described "excise tax" on out-of-state transactions. The tax applies to the sale or exchange of tangible personal property located out-of-state if the seller is a Washington resident, and it covers all capital gains above $250,000 resulting from the sale of intangible capital assets if the beneficial owner is domiciled in Washington, regardless of whether the owner confined his activity to the place of his domicile. Pet. 7, 20.

As explained in the Petition, while Washington is free to tax *income* realized by its residents within Washington's borders from out-of-state transactions, it may not tax those out-of-state transactions themselves. Pet. 16. Washington unambiguously characterizes its capital gains tax as an excise. Pet. 1. "[I]f Washington prefers to impose excises instead of income taxes, then it must live with the consequences of that choice. And one of those consequences is that it may not impose excise taxes on transactions that occur entirely outside its borders." Pet. 14.

In reaching this result, the Washington Supreme Court broke with this Court's caselaw recognizing the Constitution's territorial limits on state taxation, *supra* 10-11, as well as numerous lower court decisions properly enforcing those limits. In addition to creating a split with the en banc Ninth Circuit, Pet. 25-27, the Washington Supreme Court's decision conflicts

with state court decisions striking down state taxes that impose excises on out-of-state transactions premised solely on the residence of the taxpayer. *See Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal. App. 4th 841, 864 (2008) (holding that the dormant Commerce Clause prevents California from imposing a levy on a company's income from out-of-state transactions, reasoning that a tax "based on non-California income, not attributable to activities in California, amounts to extraterritorial taxation."); *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, No. 12 CVS 8740, 2015 WL 1880607, at *11 (N.C. Super. Ct. Apr. 23, 2015), *aff'd*, 789 S.E.2d 645 (N.C. Ct. App. 2016) (holding that North Carolina lacked the requisite nexus under the dormant Commerce Clause to tax an out-of-state trust, where the only connection was that the beneficiaries of the trust were North Carolina residents).

The Washington Supreme Court's decision stands in further tension with numerous decisions of state courts enforcing the dormant Commerce Clause in the context of extraterritorial state taxes. *E.g.*, *Somerset Tel. Co. v. State Tax Assessor*, 259 A.3d 97, 101 (Me. 2021); *Noell Indus., Inc. v. Idaho State Tax Comm'n*, 470 P.3d 1176, 1185 (Idaho 2020); *Tesoro Corp. v. State, Dep't of Revenue*, 312 P.3d 830, 838 (Alaska 2013); *Amoco Corp. v. Comm'r*, 658 N.W.2d 859, 865 (Minn. 2003); *Gen. Mills, Inc. v. Comm'r*, 795 N.E.2d 552, 561 (Mass. 2003); *Caterpillar Inc. v. N.H. Dep't of Revenue Admin.*, 741 A.2d 56, 58 (N.H. 1999); *Louis Dreyfus Corp. v. Huddleston*, 933 S.W.2d 460, 465 (Tenn. Ct. App. 1996); *Kewanee Indus., Inc. v. Reese*, 845 P.2d 1238, 1242 (N.M. 1993).

In diverging from the mass of precedent affirming plain jurisdictional limits on states' taxing power, the Washington Supreme Court undermined the "basic ingredients of federalism"—"state autonomy, state equality, and state territoriality," Metzger, *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. at 1513—which promote the level playing field among states competing in the interstate economy.

III. The Washington Supreme Court's Decision Throws Off The Competitive Balance Among States And Will Sow Chaos In Interstate Relations.

If the Washington Supreme Court's decision is allowed to stand, it will invite other states to impose excise taxes with extraterritorial effect. This will unsettle the interstate system as multiple states lay excise taxes on transactions outside their jurisdiction. If Washington "may impose such [a tax], so may other States." *Edgar*, 457 U.S. at 642; *see also Healy*, 491 U.S. at 336 (A state law "must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."). Permitting all fifty states to enact extraterritorial excise taxes like the one approved here would not only create chaos for many individual taxpayers and businesses; it would also result in a grossly distorted interstate commercial regime that compromises core values of federalism.

First, a regime in which states are permitted to impose extraterritorial excise taxes will distort competition among states by allowing predatory interstate policies and unproductive, retaliatory behavior. For example, imagine if State A reduces its gas tax in an effort to attract motorists from neighboring State B to travel to State A, thereby promoting follow-on retail sales tax receipts within State A. If the Washington Supreme Court's decision stands, State B could impose its own gas tax or supplemental retail sales tax on its residents' out-of-state gas purchases in State A, thus frustrating State A's efforts and potential gains and deterring interstate travel and commerce.

By the same token, imagine if State A eliminates taxes on capital expenditure, equipment, and job training in its state in an effort to attract business investment and stimulate the state's economy. Under the Washington Supreme Court's decision, State B could institute its own excise tax on its residents' capital expenditures in State A, thwarting State A's policy and deterring State B's residents from deploying their capital for what they see as its most productive use where such investment would benefit a different state.

This extraterritorial taxation directly compromises fair competition among states under the Constitution, with multiple harmful implications. In both examples, the tax damages State A by reducing its ability to compete in the interstate market via a competitive tax policy. It harms the citizens of State B by reducing the benefits they receive from choosing to transact in State A. And such a system would "cause

interstate friction, generate inefficiencies, undermine the national marketplace, violate the autonomy of other states, and threaten democracy by preventing citizens of the affected state from choosing their own destinies." Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 Mich. L. Rev. 57, 62 (2014).

Second, a regime permitting extraterritorial excise taxes compromises the autonomy of states to regulate within their own jurisdiction, with costs to democracy. By endorsing extraterritorial excises, the Washington Supreme Court's decision intrudes on the rights of states to determine the exclusive tax structure inside their borders. For example, imagine that State A imposes a sales tax on its residents' out-of-state transactions in State B. By reaching into State B and laying a tax on a transaction that occurs solely in that jurisdiction, State A interferes with State B's prerogative to determine its own tax policy.

In such a circumstance, State A has impaired State B's sovereign power to determine the exclusive scope of nonfederal taxes that apply to its in-state sales. Sales in State B would be subject to not one but two states' sales tax decisions. And if more states adopted similar policies affecting their own residents, those transactions could be subject to multiple such tax decisions. This undermines State B's autonomy as well as its finances and economy, as State A's extraterritorial tax extracts value from State B's in-state transactions. And it compromises the democratic self-determination of State B's citizens.

Third, permitting extraterritorial excise taxes distorts incentives for state lawmakers by enabling a state to "shift[] costs and … disproportionately affect[] out-of-state interests." Issacharoff & Sharkey, *Back-door Federalization*, 53 U.C.L.A L. Rev. at 1371. Ordinarily, state lawmakers must balance the economic and budgetary implications of changes to a state's tax system with the political implications of those adjustments. And they must equally bear the political and the financial consequences of decisions to raise or lower taxes, to impose new taxes, or to adjust the sources of state revenue. Opening the door to extra-territorial excise taxes distorts this incentive structure and offers state lawmakers a revenue source free from the ordinary political costs.

For example, under the Washington Supreme Court's decision, if State A chose to impose an excise tax on its residents' purchases of goods and services in State B (and every other state), lawmakers could benefit from tax revenues on out-of-state transactions without taking political heat for depressing in-state commerce through higher taxes.

By offering a roadmap for states to shift their costs onto other states, the Washington Supreme Court's decision compromises interstate competition, state autonomy and democracy, and undermines the Constitution's strong interstate territoriality principles that guard against exactly these distorted incentives. And a rule that a state's power to impose excise taxes attaches to out-of-state transactions and out-of-state property solely by virtue of the residency of the taxpayer could soon give rise to states' efforts to reg-

ulate the out-of-state conduct of their residents—further eroding the core territoriality constraints on state authority.

This Court's review is needed to ensure that the Washington Supreme Court's decision does not become a playbook for other states to enact their own extraterritorial excise taxes—thereby taking unfair advantage of their neighbors, compromising the decisional autonomy of sister states, warping incentives for lawmakers, and throwing the Constitution's carefully calibrated system of interstate competition and comity into disarray.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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