No. 21-279

In the
Supreme Court of the United States

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
Petitioner,

v.

MARK BOUGHTON, COMMISSIONER,
CONNECTICUT DEPARTMENT OF REVENUE SERVICES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Connecticut Department of Revenue Services ("DRS") fails to confront the central issue raised in the Petition: the improper projection of state regulatory power beyond state borders and beyond constitutional limits. DRS instead begins its Brief in Opposition by defending the goals sought to be achieved by the state law, instead of addressing the *practical effect* of the state law, which is the lodestar of the constitutional issues presented in this Petition. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Good or bad, the state law at issue cannot be applied to collect private business data from out-of-state companies that DRS concedes do not conduct business in Connecticut. DRS's desire to collect nationwide commercial data from transactions that have nothing to do with Connecticut, no matter how well intentioned, cannot survive application of this Court's precedent rejecting the power of the State to do so.

I. THE SECOND CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH DECISIONS OF THIS COURT AND UNITED STATES COURTS OF APPEALS.

The Brief in Opposition argues that no case is on "all fours" with this one, restates the holdings in the Second Circuit opinion at issue, and then presents DRS's own broad brush and general criticisms of the Petition. Yet what is most notable about the Brief in Opposition is that which DRS does not contest. Critically, DRS does not deny that the Reconciliation

Requirement reaches commerce occurring entirely out of the state – to the contrary, it prides itself in the national implications of its state law:

> The overarching purpose of this legislation is to grant state certification only to those NPMs that can effectively track the sales of their cigarettes *throughout the United States*, and can demonstrate, through diligent recordkeeping, that few, if any, of their cigarettes may have been diverted into an illicit market.

Br. in Opp'n at 6 (emphasis added).

As described in the Petition, the "diligent recordkeeping" at issue is not Petitioner Grand River Enterprises Six Nations, Ltd.'s ("GRE's") recordkeeping, but, rather, the recordkeeping undertaken and possessed by out-of-state companies having no nexus to Connecticut. And DRS does not deny that it put in writing its demand that GRE simply stop doing business with these out-of-state importers who do not agree to give Connecticut the product of their "diligent record keeping" even if those importers are not located in Connecticut, do no business in Connecticut, and have no nexus with Connecticut. JA54. Finally, DRS does not deny that the Court of Appeals itself recognized that the Reconciliation Requirement requires reporting of transactions that occur entirely outside of Connecticut, with no nexus to the State. *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 125 (2d Cir. 2021) (App. A, 29). Each of these concessions underscores the importance of granting the Petition, as Connecticut is jurisdictionally without authority to regulate commerce

of any kind occurring completely outside of its boundaries. *E.g., BMW of N. Am. v. Gore*, 517 U.S. 559, 572-73 (1996) ("Alabama does not have the power, however, to punish [defendant] for conduct that was lawful where it occurred").

Because DRS is unable to dispute the nationwide reach of the state law at issue, it instead argues that this projection of state regulatory authority onto out-of-state transactions is permissible because the records it demands are "public" and not "private." But as demonstrated in the Petition, that is inaccurate. For example, the Brief in Opposition does not dispute (and in some cases admits) the following facts, all of which establish the private and confidential nature of the records at issue:

- Connecticut has enacted a statute that "tasks GRE with gathering sales or shipping information from out-of-state importers and distributors of its cigarettes so that GRE in turn may . . . submit the required data [to] . . . the Connecticut [Department of Revenue]." *Grand River Enterprises Six Nations, Ltd. v. Biello*, No. 3:16-CV-01087 (JAM), 2020 WL 1027803, at *3 (D. Conn. Mar. 3, 2020) (App. D, 53); Conn. Gen. Stat. § 4-28m(a)(3)(C).

- Much of the data that GRE is tasked with gathering is not otherwise collected by federal or state authorities. 2020 WL 1027803, at *6 (App. D, 58) ("Connecticut seeks certain sales and shipping information that goes beyond what the PACT Act otherwise requires to be reported"); 988 F.3d at 123 (App. A, 21) ("the number of

cigarettes reported on federal excise tax forms may conflict with the number of cigarettes reported pursuant to the PACT Act because PACT Act filings exclude intrastate sales, cigarette inventory, and – as Grand River argues – sales within 'Indian Country'").

- As a Canadian manufacturer, GRE does not file federal excise tax reports or make excise payments of its own, and its transactions with importers are not subject to state filing requirements. JA43-44.

- GRE's products are sold worldwide. With respect to the United States, and at the time the Complaint was filed in this case, GRE sold its products to five independent and unaffiliated U.S. importers, none of which were (nor are) located in Connecticut. JA103-04, ¶¶ 38-39; JA47-52. And only one of these importers sold GRE products to cigarette wholesalers in Connecticut. JA104, ¶ 39; JA44, JA47 (Tobaccoville USA, Inc., a company located in South Carolina).

- The first data point required by the Reconciliation Requirement are the federal excise tax returns filed by all five importers. *See* 26 U.S.C. § 5701(b); U.S. Dep't of Treas. Alcohol and Tobacco Tax and Trade Bureau, Form 5220.6 (Feb. 28, 2013) https://www.ttb.gov/images/pdfs/forms/f52206.pdf. Form 5220.6 reports are *confidential federal tax returns* of the importers. *See* 26 U.S.C. § 6103.

- The second data point required by the Reconciliation Requirement are the PACT Act reports of the importers which record their interstate shipment of products throughout the United States. PACT Act reports are *confidential under federal law* and may only be used for purposes of determining compliance with the PACT Act's reporting requirements. *See* 15 U.S.C. § 376(c).

Tellingly, DRS never claims that Connecticut otherwise has any right to access these private records. Its only arguments are that: (1) the "Reconciliation Statute simply requires [GRE] to transmit to CT DRS the same data that [GRE] already collects and uses for other regulatory compliance purposes" (Br. in Opp'n at 8) (an untrue statement); and (2) if Connecticut's improper demand to access these out-of-state propriety business records succeeds, it will "protect" them from additional public disclosure. Br. in Opp'n at 17.

The issue this Court should review is whether a state can demand access to these confidential, proprietary out of state business records in the first instance. The issue is not whether an after the fact promise of protection resolves the state law's constitutional infirmities. As to the actual issue identified in the Petition, this Court and the Courts of Appeals repeatedly have held that a state law that has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question violates the dormant Commerce Clause. *Healy*, 491 U.S. at 336; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S.

573, 579 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982); *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003). Whether the dormant Commerce Clause prohibits a state from using its regulatory powers to gain access to private data belonging to out-of-state businesses with no nexus to the state, by withholding permission for an unrelated business to have its products sold in the state, is an important question of federal law that the Second Circuit Court of Appeals has decided in a way that conflicts with opinions cited in the Petition from this Court and other Courts of Appeals.

DRS attempts to address this conflict by trying to distinguish conflicting precedent, claiming that the cases cited in the Petition involve laws "entirely unlike Connecticut's Reconciliation Statute, [and] were neither cited nor relied upon by GRE below." Br. in Opp'n at 11-12. Yet there is no rule of Court limiting case citations to those cited in earlier briefs. And more importantly, DRS's attempts to distinguish these cases based solely on an argument that they deal with other laws and other facts is simplistic and irrelevant. Although the cited cases involved different forms of extraterritorial control of interstate business, that alone is insufficient. This Court has made clear that the analysis under the dormant Commerce Clause is not bound by formalism and focuses on the *practical effect* of the state law. *Healy*, 491 U.S. at 336. If a case existed that dealt with these exact same facts and law, the parties would not be before the Court.

The state law at issue also violates the fundamental concept of due process that a state only has jurisdiction

over non-residents to the extent of their activities within that state. Pet. 22-25. DRS entirely ignores the fact that there are no activities within Connecticut to form a basis for jurisdiction to demand that out of state businesses disgorge their private records in order to do business *entirely outside Connecticut* with a manufacturer whose products are sold in Connecticut and distributed there by a separate, Connecticut wholesaler. Br. in Opp'n at 19-21.

The state law at issue requires GRE to provide Connecticut proprietary tax and shipping records from third-party out-of-state importers and downstream sellers with no nexus to Connecticut. The law has a direct, significant and unconstitutional impact on out of state commerce. Because the Second Circuit Court of Appeal's opinion to the contrary conflicts with opinions of this Court and the Courts of Appeals, it should be reviewed by this Court.

II. WHETHER A STATE MAY, AS A CONDITION OF DOING BUSINESS IN THE STATE, REQUIRE THIRD-PARTY OUT OF STATE BUSINESSES WITH NO NEXUS TO THE STATE TO DISGORGE PRIVATE BUSINESS DATA IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

DRS concedes that:

> [N]o ruling of this Court or any circuit court interpreting any of those provisions is factually or analytically "on all fours" with the Second Circuit's opinion. Connecticut's Reconciliation

> Statute is one of only four such state statutes. This case is the only challenge that has been brought against any of the four statutes to date.

Br. in Opp'n at 10. That is precisely why this Court should grant this Petition and issue a writ of certiorari: the issues identified in the Petition are important questions of federal law that have not been, but should be, decided by this Court. The unique state law at issue presents two such important questions of federal law: whether a state may gain access to private data belonging to out of state businesses with no nexus to the state by using state regulatory power over unrelated businesses whose products are sold in the state; and whether a state can prohibit a business from selling its products to out of state Native American Tribes.

As to Connecticut's demand for private, proprietary out of state business records, the Brief in Opposition side steps the issue of the ownership protections that apply to those records. Instead, DRS argues that these records somehow are not private. But that is not true, as shown on pages 3-5, *supra*. DRS then argues that even if they are private records kept by businesses with no nexus to the State, Connecticut may still demand their transfer to DRS if they are kept for "other purposes," because (according to DRS) a state law may supersede the rights of out of state businesses to refuse to produce them. Br. in Opp'n at 17 (arguing that "there is no legal justification" for an out of state business with no nexus to Connecticut to withhold "tax records from a state tax administrator, like CT DRS, when their disclosure is statutorily mandated" under

Connecticut's state law). That is also incorrect, as demonstrated by Connecticut's inability to itself obtain these tax records from other states or the federal government. 26 U.S.C. § 6103; 15 U.S.C. § 376(c).

As to the state law's impact on out-of-state Native American Tribes, DRS does not dispute that it cannot prohibit a business from selling its products to Tribes. *Accord Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014) ("a tribe's immunity, *like its other governmental powers and attributes*, [are] in Congress's hands" and these are "not subject to diminution by the States" (emphasis added)). Instead, DRS argues that the petition "asserts arguments about Tribal Rights that were neither made nor ruled on below." Br. in Opp'n at 16-17. This Court's precedent confirms that new arguments regarding existing claims is permitted and appropriate:

> Our traditional rule is that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 1532, 118 L.Ed.2d 153 (1992); see also *Dewey v. Des Moines,* 173 U.S. 193, 198, 19 S.Ct. 379, 380, 43 L.Ed. 665 (1899).

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995).

DRS's second argument regarding its state law regulation of GRE's commerce with out of state Native American Tribes is equally without merit. Contrary to its assertion in the Brief in Opposition that it has not

and will not demand access to proprietary tribal records (Br. in Opp'n at 13-16), DRS initially told GRE that it could stop doing business with Tribal and other importers which do not file PACT Act reports or otherwise force the importers to prepare and submit the documentary equivalent of PACT Act reports to DRS. JA54 ("Grand River Enterprises could utilize other importers or could require its importers to submit to DRS the documentary equivalent of PACT Act reports.").[1] It wasn't until later that "CT DRS determined, in the summer of 2016, that sales on tribal reservations should be excluded from NPMs' compliance analyses. CT DRS made that decision after learning about two federal district court rulings in the State of New York involving the PACT Act, the federal statute incorporated by reference in the Reconciliation Statute." Br. in Opp'n at 16. But as noted in the Brief in Opposition, "CT DRS continues to exempt GRE from having to document tribal shipments, *pending further clarification of the law*." Br. in Opp'n at 15-16 (emphasis added).

Accordingly, DRS does not dispute that it originally demanded that GRE obtain tribal records, that it reversed its original demand for tribal records based on federal case law, and that it only exempts tribal records at present "*pending further clarification of the law*." Because DRS's position on the production of records of tribal shipments is, by its own admission, a

[1] This is consistent with DRS's interpretation of the law as not "distinguish[ing] between sales in Indian Country and nontribal sales." Br. in Opp'n at 14.

discretionary determination that it could reverse in the future, it should not preclude review by this Court.

CONCLUSION

This Court should grant the petition for a writ of certiorari. The state law at issue has required GRE to provide Connecticut confidential proprietary tax and shipping records from third-party out-of-state importers and downstream sellers with no nexus to Connecticut, including federally recognized Native American Tribes. The law's direct, significant and unconstitutional impact on out-of-state commerce raises important questions of federal law that have not been, but should be, decided by this Court on writ of Certiorari.

Respectfully Submitted,

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