IN THE SUPREME COURT OF THE STATE OF OREGON

MICROSOFT CORPORATION, Plaintiff-Respondent, Cross-Appellant, v. DEPARTMENT OF REVENUE, STATE OF OREGON, Defendant-Appellant, Cross-Respondent.	Tax Court No. TC 5413 Supreme Court No. S072126

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND OREGON BUSINESS AND INDUSTRY ASSOCIATION IN SUPPORT OF PLAINTIFF-RESPONDENT, CROSS-APPELLANT MICROSOFT CORPORATION

Appeal from the Judgment of the Tax Court
Honorable ROBERT T. MANICKE, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTERESTS OF *AMICI CURIAE* 1
SUMMARY OF THE ARGUMENT 3
ARGUMENT 6
I. Businesses Depend on Predictable and Fair Tax Rules That Respect State Borders. 6
A. Predictable and fair tax rules let businesses plan, and the Constitution guarantees them. 6
B. States are increasingly reaching beyond their borders for revenue, leaving businesses exposed to double taxation and uncertainty. 8
II. Oregon's Taxation Scheme Violates the Commerce Clause, Including the Heightened Protections the Clause Affords Foreign Commerce. 12
A. The Department of Revenue's formula is not fairly apportioned. . 13
B. The Department of Revenue's formula discriminates against foreign commerce and creates an enhanced risk of international multiple taxation. 17
III. Oregon's Tax Scheme Penalizes Companies That Compete Abroad and Invites Other States to Follow Suit. 22
CONCLUSION 24
CERTIFICATE OF COMPLIANCE WITH ORAP 5.05 27
NOTICE OF FILING AND PROOF OF SERVICE 28

TABLE OF AUTHORITIES

Page(s)

Cases

Barclays Bank PLC v. Franchise Tax Bd. of California,
512 US 298 (1994).....*passim*

Bonaparte v. Appeal Tax Court of Baltimore,
104 US 592 (1881).....10

Burger King Corp. v. Rudzewicz,
471 US 462 (1985).....7

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,
520 US 564 (1997).....18, 23

Complete Auto Transit, Inc. v. Brady,
430 US 274 (1977).....4, 12

Container Corp. of America v. Franchise Tax Bd.,
463 US 159 (1983).....*passim*

Fulton Corp. v. Faulkner,
516 US 325 (1996).....18

Hans Rees' Sons, Inc. v. State of North Carolina ex rel. Maxwell,
283 US 123 (1931).....5, 13

Japan Line, Ltd. v. County of Los Angeles,
441 US 434 (1979).....*passim*

Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance,
505 US 71 (1992).....*passim*

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600 US 122 (2023).....10

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TC 5413, 2025 WL 1232828 (Or Tax, Apr 29, 2025) .....*passim*

Mobil Oil Corp. v. Commissioner of Taxes of Vermont,
445 US 425 (1980).....16, 17

Moorman Mfg. Co. v. Bair,
437 US 267 (1978).....13

National Pork Producers Council v. Ross,
598 US 356 (2023).....17

Norfolk & Western Railway Co. v. Missouri State Tax Commission,
390 US 317 (1968).....4, 13

North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust,
588 US 262 (2019).....7

Ooma, Inc. v. Department of Revenue,
369 Or 95, 501 P3d 520 (2021).....7

Statutes

Cal Code Regs tit 18, § 25137.....8

ORS 314.650.....14

ORS 314.665.....14

Other Authorities

Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).....6

Brief of Amicus Curiae Chamber of Commerce of the United States in Support of Plaintiffs, *Florida v. California*,
No. 163, Orig. (US Dec 29, 2025).....1, 8

Brief for Amicus Curiae Chamber of Commerce of the United States in Support of Petitioners, *Washington Bankers Association v. Washington*, No. 21-1066 (US Mar 3, 2022) 1

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* (3d ed).....4, 14

US Const Art I, § 8, cl 3.....7

INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. As the nation's leading advocate for business, the Chamber represents companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a strong interest in preventing state and local discrimination against interstate and foreign commerce and in the enforcement of federal constitutional principles that prevent States from improperly taxing income earned beyond their borders. Accordingly, the Chamber has regularly filed *amicus* briefs in cases addressing such questions and emphasizing the importance of predictability in the administration of tax laws. *See, e.g.*, Brief of Amicus Curiae Chamber of Commerce of the United States in Support of Plaintiff, *Florida v. California*, No. 163, Orig. (US Dec 29, 2025); Brief for Amicus Curiae Chamber of Commerce of the United States in Support of Petitioners, *Washington Bankers Association v. Washington*, No. 21-1066 (US Mar 3, 2022).

The Chamber's members include a significant number of businesses that engage in commerce throughout the 50 States and around the world. As a result, they are subject to a host of state and local taxes across virtually every jurisdiction. Discriminatory and unfairly apportioned state taxes can significantly affect their business operations—particularly their interstate and international activities. Properly interpreted, the Constitution protects the Chamber's members from state taxes that discriminate against interstate and foreign commerce or reach income earned beyond a State's borders.

Oregon Business and Industry Association ("OBI") is Oregon's statewide chamber of commerce dedicated to serving businesses and promoting regional economic prosperity. As Oregon's leading business organization, OBI's mission is to strengthen Oregon's economy to achieve an economically healthy and competitive state to ensure that all Oregonians have access to good jobs and there is a strong private sector to generate adequate funding for critical public services. With more than 1,500 members who employ more than 250,000 people in every part of Oregon, OBI's members range from small businesses to the State's largest private employers, representing virtually every sector. OBI regularly submits *amicus curiae* briefs on matters of importance to Oregon businesses, including enforcement of constitutional limitations on the State's power to tax.

SUMMARY OF THE ARGUMENT

Businesses need predictable and stable tax laws. A company making major business decisions—including whether to invest or expand abroad—must be able to accurately estimate the tax implications of those decisions. Constitutional limits on the States' power to tax foreign commerce provide that necessary predictability when courts draw clear boundaries around States' tax authority.

Yet States keep testing those boundaries. One way they do that is by adjusting their tax-apportionment formulas to increase their share of earnings generated outside their borders. Agencies often effect those rule changes through guidance that a business might not see until the tax assessment arrives.

In recent years, those changes to apportionment formulas have been increasing the risk of double taxation. And that danger is greatest for companies whose profits are earned outside the United States. That's because "neither [the United States Supreme] Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign." *Japan Line, Ltd. v. County of Los Angeles*, 441 US 434, 447-48 (1979).

This case presents an opportunity to enforce the limits the federal Constitution places on the State's taxing power. Under the Commerce Clause, a state tax must be "fairly apportioned" and must not "discriminate against interstate [or foreign]

commerce." *Complete Auto Transit, Inc. v. Brady*, 430 US 274, 279 (1977). And a tax scheme affecting foreign commerce—like the one at issue in this case—must also avoid presenting an "enhanced risk of multiple taxation." *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 US 298, 311 (1994) (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 US 159, 185 (1983)).

The Department's apportionment method violates every one of those limits. Oregon's tax, as the Department applied it here, is not fairly apportioned. About three-quarters of the income the Department apportioned, more than $31.8 billion, came from earnings made by Microsoft's foreign subsidiaries abroad. *See Microsoft Corporation v. Department of Revenue*, TC 5413, 2025 WL 1232828 at *1, *9 (Or Tax, Apr 29, 2025). Although the Department treats these subsidiaries as part of Microsoft's business when it taxes their income, it acts as if those foreign sales never happened when it divides the company's income to determine Oregon's share. But a "state should not be able to have it both ways." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 9.15[2] (3d ed). The mismatch caused by the Department's method overstates Microsoft's Oregon taxable income "by approximately 182 percent." *Microsoft*, 2025 WL 1232828 at *28. The United States Supreme Court has struck down results on both sides of that figure. *See Norfolk & Western Railway Co. v. Missouri State Tax Commission*, 390 US 317, 326-27

(1968); *Hans Rees' Sons, Inc. v. State of North Carolina ex rel. Maxwell*, 283 US 123, 134-36 (1931).

The Department's apportionment method also discriminates against foreign commerce. The Department's formula counts the sales of a *domestic* subsidiary when determining the State's taxable share, but it refuses to count the sales of a *foreign* subsidiary. *See Microsoft*, 2025 WL 1232828 at *8-9. As the United States Supreme Court has explained, a State's "preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause." *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance*, 505 US 71, 79 (1992). Moreover, the Department's method, by design, produces double taxation. Although Microsoft's foreign subsidiaries "paid some foreign tax," *Microsoft*, 2025 WL 1232828 at *31, the Department chose to tax those earnings again. The United States Supreme Court has tolerated that kind of overlap only where it was not "the 'inevitabl[e]' result" of the State's method and the State had no reasonable way to avoid it. *Container Corp.*, 463 US at 188-89; *see Barclays*, 512 US at 318-19. Here the overlap is built into the State's formula and available alternatives would prevent double taxation.

The harms imposed by the State's tax scheme reach far beyond this case. Under the Department's approach, companies with identical operations in Oregon owe very different taxes simply because one of them also engages in business

abroad. If this Court approves that result, other States will be emboldened to pursue similar rules, thereby imperiling the Nation's economy. This Court should enforce the Commerce Clause's limits now, before the Department's approach adds to an increasingly alarming trend.

ARGUMENT

I. Businesses Depend on Predictable and Fair Tax Rules That Respect State Borders.

Any American company deciding whether to build a plant in Portland or open an office in Singapore must estimate the tax consequences of those decisions. But it cannot make that estimate if it has no idea how Oregon will tax income. The point is as old as modern economics: As Adam Smith observed, the "tax which each individual is bound to pay ought to be certain, and not arbitrary." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* bk V, ch II, pt II (1776). The federal Constitution's limits on state taxation serve that end. And those limits are vital where a State—as here—attempts to reach beyond the Nation's borders and tax profits earned by American companies in foreign jurisdictions.

A. Predictable and fair tax rules let businesses plan, and the Constitution guarantees them.

The Constitution ensures predictability in taxation in two ways. The Due Process Clause "centrally concerns the fundamental fairness of governmental

activity," and thus serves to separate legitimate taxation from "mere unjustified 'confiscation.'" *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 588 US 262, 268-69 (2019) (citation omitted). And as this Court has explained, it gives taxpayers "fair warning," so they can "structure their primary conduct with some minimum assurance" about where that conduct will expose them to a State's power. *Ooma, Inc. v. Department of Revenue*, 369 Or 95, 100, 501 P3d 520 (2021) (quoting *Burger King Corp. v. Rudzewicz*, 471 US 462, 472 (1985)).

The Commerce Clause supplies a second safeguard. It gives Congress power to regulate commerce "with foreign Nations" as well as among the States. US Const Art I, § 8, cl 3. The power to regulate foreign commerce is particularly strong because it "is pre-eminently a matter of national concern." *Japan Line*, 441 US at 448. In dealing with other nations, "the people of the United States act through a single government with unified and adequate national power." *Id.* (citation omitted). Thus, when a State chooses to tax a business with foreign operations, that tax receives "additional scrutiny." *Container Corp.*, 463 US at 185. The baseline rule is simple. A State "may not, when imposing an income-based tax, 'tax value earned outside its borders.'" *Id.* at 164 (citation omitted).

These guarantees make the global economy work. In practice, an Oregon company that sets up shop in Germany can expect Germany to tax the profits it earns there. It can also expect Oregon, which played no part in earning those profits, to leave them alone. That expectation is part of what lets American businesses compete overseas. And those expectations are protected by clear constitutional limits. But only if courts are willing to enforce them.

B. States are increasingly reaching beyond their borders for revenue, leaving businesses exposed to double taxation and uncertainty.

Unfortunately for the American business community, States keep testing these limits. Few announce out loud that they are taxing income earned somewhere else. Their usual method is quieter, such as a change to the apportionment formula, often buried in a regulation, that a business may not notice until the tax assessment arrives.

The Chamber recently documented this trend for the United States Supreme Court. California, for instance, recently implemented a rule that strips certain out-of-state receipts out of its sales-factor formula while simultaneously taxing the income those receipts generate. *See* Brief of Amicus Curiae Chamber of Commerce of the United States in Support of Plaintiffs at 11-12, *Florida v. California*, No. 163, Orig. (US Dec 29, 2025) (discussing Cal Code Regs tit 18, § 25137(c)(1)(A)). Shrinking the sales-factor's denominator in this way inflates California's share of a business's revenue out of proportion to the income it actually generates in the State,

thereby increasing the risk that a business will be taxed more than once. *See id.* at 11-12. Other States, including Minnesota, have adopted nearly identical rules presenting the same risks. And Massachusetts has proposed one. *Id.* at 12-13.

The first casualty of this approach is the principle that a business's income should be taxed only once. A State that counts a company's income but ignores that some of the activity that produced it took place in other States or abroad takes more than its fair share. At the same time, the places where that revenue-generating activity occurred remain free to tax the same income. This problem is bad enough when it occurs in interstate commerce, but it only compounds when it occurs in foreign commerce. Among the States, the United States Supreme Court can police taxation formulas to eliminate double taxation. Not so abroad. As it has observed, "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign," and no other "authoritative tribunal" stands ready to ensure that the same income is taxed only once. *Japan Line*, 441 US at 447-48. Nor can the States resolve this issue themselves. As the United States Supreme Court has observed, a State "is in no position to negotiate with foreign governments," and neither treaties nor federal law offers a way to resolve double taxation caused by state tax systems. *Container Corp.*, 463 US at 192 n 31.

Predictability is the second casualty. Where, as here, a State can change the reach of its tax levies by revising a regulation or a revenue bulletin, businesses will rarely know in advance what share of their income the State will claim. Thus, companies that choose to expand into foreign markets will suffer. Their foreign profits are already taxed abroad. And they have no way to predict whether a State will reach for those profits too, and if so, how much it will take, or when.

The harm does not stop there. When a State overreaches in this way, foreign nations "may retaliate against American-owned instrumentalities present in their jurisdictions," and "the Nation as a whole would suffer." *Japan Line*, 441 US at 450; *see Kraft General Foods, Inc.*, 505 US at 79 (recognizing that the discriminatory treatment of foreign commerce "may create problems, such as the potential for international retaliation, that concern the Nation as a whole"). History bears this out. The worldwide approach to taxation that California once employed provoked a "battalion of foreign governments," who protested "in diplomatic notes, amicus briefs, and even retaliatory legislation." *Barclays*, 512 US at 320. The British Parliament went so far as to enact a law that, if implemented, would have taxed American companies on dividends from their British subsidiaries. *See id.* at 324 n 22.

The federal Constitution answers these concerns with a simple principle. "No State can legislate except with reference to its own jurisdiction." *Bonaparte v. Appeal Tax Court of Baltimore*, 104 US 592, 594 (1881). The Constitution thus "restricts a State's power to reach out and regulate conduct that has little if any connection with the State's legitimate interests." *Mallory v. Norfolk Southern Railway Co.*, 600 US 122, 154 (2023) (Alito, J., concurring in part and concurring in the judgment).

But that constitutional limitation works only so long as courts enforce it clearly. A State that respects the line can write tax rules that comply with it. And a business that knows where the line is can best decide where to invest and expand.

The question here is whether a State may claim a share of a company's foreign income while ignoring that the income was earned—and taxed—abroad. It may not. That answer matters not only to Microsoft, but to companies everywhere. American businesses of every size sell overseas, and many of them also sell in Oregon. If a State may choose to count their foreign profits while treating the foreign operations behind those profits as though they do not exist, none of those businesses can know in advance how much of their worldwide income the State will tax.

If the Department's approach is authorized by this Court, other States may take note. And if they follow the same path, the Nation's foreign commerce could

face "varying degrees of multiple taxation," threatening our economy. *Japan Line*, 441 US at 450-51. The Constitution forbids that result, *see id.* at 448, and this Court should say so.

II. Oregon's Taxation Scheme Violates the Commerce Clause, Including the Heightened Protections the Clause Affords Foreign Commerce.

The Department's apportionment method violates the Commerce Clause. A state tax on interstate or foreign commerce survives only if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate [or foreign] commerce, and is fairly related to the services provided by the State." *Complete Auto*, 430 US at 279; *Container Corp.*, 463 US at 170 ("[A]n apportionment formula must, under the Commerce Clause, also not result in discrimination against interstate or foreign commerce."). A tax affecting foreign commerce must also avoid an "enhanced risk of multiple taxation." *Barclays*, 512 US at 311 (quoting *Container Corp.*, 463 US at 185).

Here, the Department's apportionment method violates the Commerce Clause in two independent ways. *First*, it is not "fairly apportioned" because it applies a sales factor drawn entirely from domestic receipts to a tax base consisting largely of foreign earnings. *Second*, it discriminates against foreign commerce while exposing a company's foreign earnings to an enhanced risk of international multiple taxation.

A. The Department of Revenue's formula is not fairly apportioned.

Fair apportionment requires a formula that is both externally and internally consistent. *See Container Corp.*, 463 US at 169. The Department's apportionment method fails the first requirement. And it passes the second only if the same income is treated one way for the tax base and another way for the rest.

1. External consistency demands that the factors used in the formula "actually reflect a reasonable sense of how income is generated." *Id*. A State's tax scheme fails that test when the income it attributes to itself is "out of all appropriate proportion to the business transacted * * * in that State," or when its method leads "to a grossly distorted result." *Moorman Mfg. Co. v. Bair*, 437 US 267, 274 (1978).

The United States Supreme Court's cases show where that line falls. The Court has struck down a formula that produced a more-than-250 percent increase in taxable income, *see Hans Rees'*, 283 US at 134-36, and an assessment more than double the value of the property actually in the State, *see Norfolk & Western*, 390 US at 326-27. By contrast, it has upheld results that differed by about 14 percent, *see Container Corp.*, 463 US at 184, and by an average of about 48 percent, *see Moorman*, 437 US at 271 & nn 4-5.

The Department's apportionment method falls on the wrong side of that line. For the tax year at issue, Microsoft and its domestic subsidiaries (the "Water's-Edge

Group") reported $42,350,143,724 in business income on their Oregon return. *Microsoft*, 2025 WL 1232828 at *5, *9. About three-quarters of that income, $31,876,112,700, was the "20 Percent Repatriation Amount." *Id.* at *1, *9. It consisted of earnings that Microsoft's controlled foreign corporations, or "CFCs," had built up abroad since the early 2000s. *Id.* at *9. Yet the sales factor used to apportion that income "did not include any receipts attributable to the Federal Repatriation Amount." *Id.*; *see id.* at *2, *8. In short, the Department counted the foreign income, but it counted none of the foreign sales behind it.

The Department does not dispute that the CFCs were part of Microsoft's unitary business. Indeed, it relies on that fact to keep their earnings in Oregon's tax base. *See Microsoft*, 2025 WL 1232828 at *24; Appellant's Opening Brief ("Dept. Br.") at 6-7, 26. Yet when it comes to the sales factor, the Department insists that "the CFCs' activity was not Microsoft's activity." Dept. Br. at 26, 31-32. But a "state should not be able to have it both ways," taxing a subsidiary's income on a unitary theory "but then apportioning such income by factors reflecting only the parent's own operations on a separate-company basis." Hellerstein, *State Taxation* ¶ 9.15[2].

That mismatch is fatal. A sales factor estimates a State's share of income by comparing the taxpayer's sales in the State with its sales everywhere. *See* ORS 314.650; ORS 314.665(1). Here, three-quarters of the income came from CFCs

that "license, manufacture, and distribute Microsoft-branded products outside the United States." *Microsoft*, 2025 WL 1232828 at *8; *see id.* at *9. The Department concedes that these are "sales in foreign jurisdictions." *Id.* at *8. A sales factor that ignores the activity behind three-quarters of the income it apportions does not "actually reflect a reasonable sense of how income is generated." *Container Corp.*, 463 US at 169.

The numbers bear this out. The Department's method produced Oregon taxable income of $225,218,064.[1] *See Microsoft*, 2025 WL 1232828 at *9. Adding the repatriation income to the sales-factor denominator, on the other hand, would have produced $79,872,371. *See id.* at *28 & n 47. The Department's method thus overstates the company's Oregon taxable income "by approximately 182 percent." *Id.* at *28. That overstatement falls between the results the Court struck down in *Norfolk & Western* and *Hans Rees'*, and far above the results it upheld in *Container Corp.* and *Moorman*.

[1] Figures in this brief are drawn from Microsoft's original Oregon return as described in the Tax Court's order. The parties later stipulated to adjusted figures, under which the Department's method yields a sales factor of approximately 0.5320 percent, reinclusion yields a sales factor of 0.3916 percent and Oregon taxable income of $161,965,650, and the tax paid after conference adjustments was $16,856,719. (ER-6, 20-21); Dept. Br. at 12 & n 9. The Tax Court found that the stipulated adjustments do not materially change the legal analysis. *Microsoft*, 2025 WL 1232828 at *2 n 5.

The Tax Court treated Oregon's 80 percent dividends-received subtraction as the answer to this problem. It found that the 1984 legislature adopted the subtraction "as a proxy for factor relief." *Microsoft*, 2025 WL 1232828 at *22; *see id.* at *3. But the subtraction only shrinks the tax base. It does nothing to change the sales-factor denominator. So, the remaining $31,876,112,700 is still apportioned by a sales factor that counts none of the foreign receipts behind it. *Id.* at *9.

The Tax Court also compared Oregon's result with the figure a worldwide combined report would have produced. *Id.* at *28-29. But external consistency tests the formula the State *actually* used. *See Container Corp.*, 463 US at 169-70. And Oregon abandoned worldwide combined reporting decades ago. *See Microsoft*, 2025 WL 1232828 at *19.

These constitutional questions bear on the Department's appeal. If the Department prevails on reinclusion, the unmodified assessment is what Microsoft will owe. *See* Dept. Br. at 42; *Microsoft*, 2025 WL 1232828 at *3. The serious constitutional doubts that assessment raises are reason enough to affirm the Tax Court's construction of ORS 314.665(6)(a).

2. The Tax Court's internal-consistency ruling rests on the same mismatch. That test asks whether a formula, "if applied by every jurisdiction," would tax "no more than all of the unitary business's income." *Container Corp.*, 463 US at 169.

The Tax Court found that test met only by relabeling the 20 Percent Repatriation Amount as a "dividend" to the Water's-Edge Group. *See Microsoft*, 2025 WL 1232828 at *26. But the United States Supreme Court has rejected that reasoning. Courts "must look principally at the underlying activity, not at the form of investment." *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 US 425, 440 (1980). And "[t]ransforming the same income into dividends from legally separate entities works no change in the underlying economic realities of a unitary business." *Id.* at 441. The Tax Court itself found that "most if not all of" the amount at issue "demonstrably consists of earnings and profits the CFCs earned by working together with the Water's-Edge Group." *Microsoft*, 2025 WL 1232828 at *12. If the income is unitary when Oregon taxes it, it is unitary when a court asks how Oregon apportions it.

B. The Department of Revenue's formula discriminates against foreign commerce and creates an enhanced risk of international multiple taxation.

The Department's apportionment method also runs afoul of the protections the Commerce Clause affords foreign commerce. It taxes income earned abroad more heavily than comparable domestic income. That offends the antidiscrimination principle that "lies at the 'very core'" of the United States Supreme Court's Commerce Clause cases. *National Pork Producers Council v. Ross*, 598 US 356,

369 (2023) (citation omitted); *see Kraft General Foods, Inc.*, 505 US at 79. And it stacks Oregon's claim on top of earnings already taxed abroad, creating the "enhanced risk of multiple taxation" the Clause forbids. *Barclays*, 512 US at 311.

1. The Commerce Clause forbids States from discriminating "against * * * foreign commerce." *Container Corp.*, 463 US at 170. In *Kraft General Foods, Inc.*, the United States Supreme Court struck down an Iowa tax that reached dividends from foreign subsidiaries but not dividends from domestic ones. 505 US at 75-82. A State's "preference for domestic commerce over foreign commerce," the Court held, "is inconsistent with the Commerce Clause." *Id.* at 79.

The Department's sales factor employs exactly that kind of impermissible preference. Had Microsoft's foreign subsidiaries been domestic members of the Water's-Edge Group, their receipts would have entered the denominator along with their income. But because they were foreign, the Department taxed their earnings and left out their receipts, just as its 2018 revenue bulletin directed. *See Microsoft*, 2025 WL 1232828 at *2, *8-9. That is discrimination. A State may not tax a business more heavily "only to the degree that" it "participates in interstate commerce." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 US 564, 578 (1997) (quoting *Fulton Corp. v. Faulkner*, 516 US 325, 333 (1996)). Nor may it "force a taxpayer to conduct its foreign business through a domestic subsidiary in order to

avoid discriminatory taxation of foreign commerce." *Kraft General Foods, Inc.*, 505 US at 78.

The Tax Court distinguished *Kraft General Foods, Inc.* based on a footnote. *See Microsoft*, 2025 WL 1232828 at *29-30. That footnote observed that, on an aggregate comparison, "it would be difficult to say" that a State discriminates by taxing a foreign subsidiary's dividend rather than an apportioned share of its earnings. *Kraft General Foods, Inc.*, 505 US at 80 n 23. But the footnote kept going. The "more appropriate comparison," the Court said, "is between corporations whose subsidiaries do not do business in" the taxing State. *Id*. That comparison favors Microsoft. A Water's-Edge Group member that does no business in Oregon still has its receipts counted in the denominator. But the CFCs' receipts are not counted at all. (ER-4 n 1.) And the footnote said nothing about how a State may apportion foreign earnings once it chooses to tax them.

2. The Department's method also invites international multiple taxation. Among the States, the United States Supreme Court can police double taxation by requiring proper apportionment. But it cannot police a *foreign* sovereign. *See Japan Line,* 441 US at 446-47.

Under its modern test regarding the constitutionality of multiple taxation,[2] the United States Supreme Court asks two questions. *See Barclays*, 512 US at 318-19. The first is whether double taxation is "the 'inevitabl[e]' result" of the State's method or instead depends "solely on the facts of the individual case." *Container Corp.*, 463 US at 188. The second is whether "the alternatives reasonably available to the taxing State" could have avoided it. *Id.* at 189; *see id.* at 191-93. The Department's method fails on both counts.

Start with inevitability. In *Container Corp.*, the taxing overlap was the result of "two distinct methods of allocating the income" of one enterprise, and whether multiple taxation occurred turned on the facts of the case. 463 US at 188. Here, however, the overlap comes from the method itself. The 20 Percent Repatriation Amount consists largely of what the CFCs earned selling Microsoft products abroad. *See Microsoft*, 2025 WL 1232828 at *8, *12. Yet the Department's sales factor counts none of their receipts. (ER-4 n 1.) If every State used the same method, the States would divide those earnings among themselves as though the foreign sales

[2] *Japan Line* reasoned that when a foreign sovereign taxes value in full, "[i]f a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results." 441 US at 447. *Container Corp.* later declined to read *Japan Line* as "an absolute prohibition on state-induced double taxation in the international context." 463 US at 189. And *Barclays* explained that *Container Corp.* "effectively modified, for purposes of income taxation," *Japan Line*'s multiple-taxation inquiry. 512 US at 319 n 18.

never happened. And whatever the foreign countries taxed, the States would tax again. The Department does not dispute that the CFCs, "in the aggregate, paid some foreign tax." *Microsoft*, 2025 WL 1232828 at *31. It says only that some CFCs "appear to have paid little or no foreign tax." *Id.* But that goes to the size of the overlap and does not change the fact that it is the method that produces it.

Oregon also has a ready alternative to this approach, which would eliminate multiple taxation. In *Container Corp.*, California's alternative was the arm's-length approach used abroad, which "could not eliminate the risk of double taxation" and might make it worse. 463 US at 189-91; *see Barclays*, 512 US at 318-19. Forcing California to adopt that approach, the Court reasoned, would have been "perverse." *Container Corp.*, 463 US at 193. Oregon faces no such choice. It need not abandon its water's-edge system or its single sales factor. It need only count the foreign receipts behind the foreign earnings it taxes in its sales-factor denominator. *See Microsoft*, 2025 WL 1232828 at *4. Any overlap that remained would then depend only "on the facts of the individual case," as in *Container Corp.*, 463 US at 188.

Container Corp. and *Barclays* thus do not save the Department's approach. *Contra Microsoft*, 2025 WL 1232828 at *31-32. Under those cases, double taxation in foreign commerce still "deserves to receive close scrutiny." *Container Corp.*, 463 US at 189. And *Container Corp.* warned that if California's method had

"'inevitably' led to double taxation, * * * that might be reason enough to render it suspect." *Id.* at 193. The Department's method does exactly that. And Oregon has a ready way to avoid it.

III. Oregon's Tax Scheme Penalizes Companies That Compete Abroad and Invites Other States to Follow Suit.

The Department's apportionment method showcases the harms described in Part I above. Begin with predictability. As relevant here, Oregon's water's-edge system used to give businesses a clear indication of their tax burden by excluding "the income of corporations formed under the law of foreign countries" from the tax base. *Microsoft*, 2025 WL 1232828 at *21. But after Congress swept decades of foreign earnings into a company's taxable income, the Department issued Revenue Bulletin 2018-01. *See id.* at *8. And it read that Bulletin to bar any factor representation, "adhering to its published position that no amount [of foreign sales] could be included in either the numerator or the denominator." *Id.* at *2-3. Where a State can announce a rule in a bulletin, after the fact, which reaches decades of earnings, that eviscerates a company's ability to predict its tax burden.

The Department's approach is also unfair in that it leads to multiple taxation. The Department does not dispute that Microsoft's foreign subsidiaries, "in the aggregate, paid some foreign tax." *Id.* at *31. But Oregon refuses to account for the fact that those profits were earned abroad, and instead taxes them as though they

were all generated in the State. The Department's formula thereby permits Oregon to tax those earnings a second time, allowing it to collect revenue out of all proportion to the company's in-state business activities.

The harm imposed by the Department's apportionment method is not limited to Microsoft. The Department's guidance provides that any corporation that owned at least 20 percent of a foreign subsidiary is subject to the same sales-factor formula. *See Microsoft*, 2025 WL 1232828 at *2, *8. That describes many American businesses, which typically operate abroad "through corporations organized in the country in which they are doing business." *Kraft General Foods, Inc.*, 505 US at 76 n 15 (citation omitted).

An illustration makes this clear. Consider two companies with identical operations in Oregon. One sells only in the United States. The other also sells in Europe and Asia through local subsidiaries. The second must add its repatriated foreign earnings to its Oregon tax base, while the sales factor that divides that base excludes the foreign receipts. *See Microsoft*, 2025 WL 1232828 at *2, *9. Its Oregon tax bill thus goes up with every dollar it earned overseas, even though its Oregon business activities are no different from its domestic competitor's. A tax like that tends "to discourage domestic corporations from plying their trades in interstate commerce." *Camps Newfound*, 520 US at 578.

Other States are likely watching what happens here. If this Court allows Oregon to tax repatriated foreign earnings while leaving the foreign receipts out of its formula, other States may be emboldened to do the same. Indeed, similar rules in other contexts have proliferated rapidly, as explained in Part I.B. This Court should therefore enforce the Commerce Clause's limits now, before the Department's method becomes a model for others.

At bottom, companies that compete abroad need to know that Oregon will account for where they actually do business when it assesses their tax liability. *See Container Corp.*, 463 US at 169. The United States Supreme Court has already struck down other Oregon taxes on foreign commerce. *See Japan Line*, 441 US at 453 & n 19. This Court should not wait for that Court to step in again. It should hold that the Department's apportionment method, as applied to Microsoft's repatriation income, violates the Commerce Clause.

CONCLUSION

The Court should reverse the Tax Court's rejection of Microsoft's constitutional arguments and hold that the Department's apportionment method, as applied to Microsoft's repatriation income, violates the United States Constitution's Commerce Clause. At a minimum, the Court should affirm the Tax Court's holding

that ORS 314.665 requires the 20 Percent Repatriation Amount to be included in the sales factor's denominator.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

I certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b) and the word count of this brief (as described in ORAP 5.05(1)(a)) is 5,534 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(3)(b)(ii).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 9, 2026, I directed the foregoing to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon all counsel of record by using the electronic filing system.

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