

No. _____

In the
Supreme Court of the United States

MICHAEL KANSLER AND VICKI KANSLER,
Petitioners,
v.

MISSISSIPPI DEPARTMENT OF REVENUE,
Respondent.

**On Petition for Writ of Certiorari to the
Mississippi Supreme Court**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Mississippi's income tax refund statute of limitation immune *per se* from Commerce Clause scrutiny under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and the internal consistency test when it produces actual, undisputed double taxation of its residents' income earned in interstate commerce?
2. Does Mississippi discriminate against interstate commerce by permitting certain residents to recover overpaid income taxes well beyond the normal three-year statute of limitations while denying other residents the same benefit, based exclusively on an interstate element or criteria, when that denial produces actual, undisputed double taxation of its residents' income earned in interstate commerce?
3. Does Mississippi violate the Commerce Clause and Due Process Clause of the United States Constitution by failing to afford its resident taxpayers, when audited by a sister state, any pre- or post-deprivation mechanism to preserve their right to claim a credit for taxes paid to other states in order to avoid double taxation of income they earned in interstate commerce?

PARTIES TO THE PROCEEDING

There are no parties to this proceeding other than the named parties, *i.e.*, Michael and Vickie Kansler, and the Mississippi Department of Revenue.

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PETITION FOR WRIT OF CERTIORARI

Michael and Vicki Kansler respectfully petition this Court for a writ of certiorari to review the judgment of the Mississippi Supreme Court.

OPINIONS BELOW

The opinion of the Mississippi Supreme Court is reported at 263 So.3d 641 and is reproduced in the Appendix at App. 1. The final order of the Hinds County Chancery Court granting summary judgment is unreported and is reproduced in the Appendix at App. 30. The order of the Mississippi Board of Tax Appeals is unreported and is reproduced in the Appendix at App. 37. The order and minutes of the Mississippi Department of Revenue's Board of Review are unreported and are reproduced in the Appendix at App. 43. The notice of the Mississippi Supreme Court's denial of the motion for rehearing is reproduced at App. 47.

JURISDICTION

The Mississippi Supreme Court entered its decision on November 29, 2018. The Kanslers timely filed a motion for a rehearing, which the Mississippi Supreme Court denied on February 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

“The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”
U.S. CONST. art. I, § 8, cl. 3.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

“[N]or shall any State deprive any person of life, liberty, or property, without due process of law” U.S. CONST. amend. XIV, § 1.

Sections 27-7-49 and 27-7-313 of the Mississippi Code of 1972 Annotated, as in effect for the tax years and refund claims at issue, are reproduced in the Appendix (“App.”). Mississippi Administrative Code Section 35.III.1.12, as in effect with respect to the tax years and refund claims at issue, is also reproduced in the Appendix.

STATEMENT OF THE CASE

The Mississippi Supreme Court held the state did not violate the Commerce Clause or Due Process Clause when it procedurally barred its residents from obtaining a refund of overpaid Mississippi income taxes resulting from an increased credit for taxes paid to New York following an audit by that sister state. In so ruling, the lower Court forever preserved the actual double taxation of its residents' income earned in interstate commerce. The issues presented are whether the lower court adhered to this Court's precedents, in particular *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015), in reaching its conclusions, and whether Mississippi's scheme violates the Commerce Clause and/or Due Process Clause of the United States Constitution.

1. Mississippi's Income Tax Scheme

Mississippi levies a tax upon each resident's entire worldwide income regardless of the geographic origin of that income. MISS. CODE ANN. § 27-7-5(1); MISS. ADMIN. CODE 35.III.1.12(100). The state levies an identical tax against nonresidents on income generated in Mississippi. MISS. CODE ANN. § 27-7-5(3). To alleviate double taxation of its residents' earnings from other states, Mississippi offers a credit for income taxes paid to those sister states, thereby directly linking a resident's home state income tax liability to the actions of the sister states. MISS. CODE ANN. § 27-7-77; MISS. ADMIN. CODE 35.III.1.12(100).

In order to claim this credit, a resident must actually have paid the tax to the sister state, must

certify that under oath, and must provide a copy of the income tax return filed with the sister state. *Id.*; MISS. ADMIN. CODE 35.III.1.12(102), (103.2). Mississippi law contains no mechanism or procedure allowing a resident to claim the credit prior to actually paying the other state's tax, or to file a protective refund claim when notified of a sister state audit with the likelihood of having to pay undetermined additional taxes to that state.

A resident taxpayer's entitlement to the credit arises automatically upon payment to the sister state. MISS. CODE ANN. § 27-7-77; MISS. ADMIN. CODE 35.III.1.12(100). The law, however, prohibits the resident from recovering any overpaid Mississippi taxes resulting from that credit more than three years after his or her original tax return filing date. MISS. CODE ANN. § 27-7-313; App. 10-12. Thus, the resident at no point has the ability to realize any economic benefit from that increased Mississippi credit, either before or after that payment, or of avoiding double taxation of the earnings generated in interstate commerce.

Importantly, Mississippi indefinitely suspends its three-year refund deadline when an income tax overpayment is discovered during the course of a Mississippi audit, regardless of the nature or origin of the error producing the overpayment. MISS. CODE ANN. § 27-7-49; App. 10-12. No similar tolling is permitted for refunds of Mississippi overpayments resulting from a sister state audit.

Another important and unique feature of Mississippi's income tax scheme is that the

Department of Revenue (the “Department”), once it had notified a taxpayer of an audit within the normal three-year assessment period, enjoyed a virtually unlimited amount of time to complete that audit and issue an assessment. MISS. CODE ANN. § 27-7-49(2).¹ This extension did not require the consent of the audited taxpayer. The statute contained no specific time limitation for the issuance of an assessment provided the audit began before the normal statute of limitation expired. The law required only that the “determination shall be made with reasonable promptness and diligence.” *Id.* This will be an important and distinguishing factor when applying the internal consistency test.

2. Factual Background

The Kanslers were residents of and were domiciled in Mississippi during the 2008 and 2009 tax years, but were New York residents prior to moving to Mississippi. App. 4, 31. Mr. Kansler was employed in New York until his company reassigned and relocated him to its Jackson, Mississippi office in May 2007. App. 4, 31. Mr. Kansler continued to be an employee of the company during 2008 and 2009, and he routinely traveled to New York during those years due to his job requirements. App. 31. It is undisputed that Mr.

¹ Mississippi amended § 27-7-49 in 2013 to limit the Department’s unilateral assessment extension to one year beyond the normal three-year period, after which additional extensions can be made via mutual waiver. *See* 2013 Miss. Laws ch. 470 (H.B. 892), § 1, eff. Jan. 1, 2013. That change is inapplicable to the 2008 and 2009 tax years at issue, and will not change the results under the internal consistency test even in the statute’s new form.

Kansler was engaged in interstate commerce in 2008 and 2009 due to his work-related relocation from New York to Mississippi and the cross-border nature of his employment.

The Kanslers timely filed their joint 2008 and 2009 Mississippi resident individual income tax returns, reported their worldwide income as Mississippi taxable income, and paid Mississippi income taxes based upon those amounts. App. 4, 31, 38. Mr. Kansler's income during the 2008 and 2009 tax years consisted of numerous sub-categories of employee compensation, including but not limited to ordinary salary income, bonus income, and income from the exercise of certain stock options.²

In 2012, before Mississippi's income tax refund statute of limitations had lapsed, New York State initiated an audit related to Mr. Kansler's exercise of stock options in 2008, 2009 and 2010, and asserted New York's right to tax an undetermined portion of that income. App. 5, 31, 38-39. Mr. Kansler's employer granted the stock options over multiple years prior to his relocation to Mississippi, and those options vested over multi-year periods following those grants, including the years after the Kanslers established domicile in Mississippi. App. 4, 31, 39. New York considered a portion of the stock option income to be taxable in New York even though he exercised the

² The parties stipulated many of the facts at the trial court, but the lower courts did not incorporate all of the details into the opinions below. Those detailed stipulations will be included in the court record submitted later.

options after he had severed his residency with the state. App. 31-32, 39.

New York conducted its audit over a period of roughly two years. App. 5, 32. The New York audit required the determination of which portions of Mr. Kansler's gross reportable income were attributable to ordinary salary, bonus income, and income from the exercise of the stock options because New York only considered certain portions of the total to have been taxable in that state. App. 31-32. It also required the determination of how many days Mr. Kansler worked within and without New York during the multi-year option vesting periods because New York based its right to tax that option income in part upon the extent of the individual's in-state presence throughout that vesting period.³

On December 29, 2014, New York concluded its audit and formally assessed the Kanslers additional income taxes and interest attributable to the stock option income. App. 5, 32. The Kanslers paid the New York tax liability on December 31, 2014. App. 5, 32. In January 2015, immediately after paying the New York liability, the Kanslers filed amended 2008 and 2009 Mississippi resident individual income tax returns, claimed a credit for the New York income tax payments against their originally reported Mississippi tax liability, and requested a refund of \$257,140 in overpaid Mississippi income taxes resulting from the application of that credit. App. 5, 32, 39. The amended returns did not adjust the Kansler's originally reported

³ These details will be reflected in the record submitted later.

Mississippi taxable income, the only change being to claim the increased nonresident tax credit.⁴

No dispute exists that the Kanslers automatically were eligible for a Mississippi credit following their payment of the New York taxes on the stock option income, or the amount of the Mississippi income tax overpayments attributable to that credit. Because the Kanslers filed their refund claims more than three years after filing their original Mississippi income tax returns, however, the Department denied the refund claims as having been untimely filed pursuant to § 27-7-313. App. 5, 32, 39.

The Kanslers' inability to file the refund claims within Mississippi's three-year refund statute of limitations under § 27-7-313 was due solely to the fact that New York could not conclude its income tax audit within that three-year period so as to enable them to ascertain and pay the New York income tax on the stock option income and file claims to recover the corresponding Mississippi overpayments. App. 32-33.

3. Proceedings Below

The Kanslers timely appealed the Department's denial of the refund claims to the Department's Board of Review (the "Review Board") pursuant to § 27-77-5. App. 5, 32, 39. The Review Board conducted an administrative appeals hearing on or about September 29, 2015, and on October 20, 2015, issued Review Board Order No. 11887 upholding the Department's denial of the refund claims. App. 32, 39-40, 45.

⁴ These details will be reflected in the record submitted later.

Upon receipt of the Review Board Order, the Kanslers timely appealed that ruling to the Mississippi Board of Tax Appeals (the “BTA”) pursuant to § 27-77-5. App. 5, 32, 40. The BTA conducted an administrative appeals hearing on or about June 15, 2016. App. 32, 37. At this hearing, the Kanslers again challenged as unconstitutional the Department’s denial of the refund claims and the Review Board’s order upholding the same. App. 5, 40. On June 21, 2016, the BTA issued its order upholding the Review Board’s determination and denying the refund claims. App. 41. The Review Board and BTA specifically declined to rule on the constitutionality of the statute because as administrative agencies they lacked that authority. App. 5, 40. The Kanslers thereafter appealed the BTA order to the Hinds County Chancery Court. App. 5, 32.

No evidentiary hearing was held at the trial court level. The Chancery Court granted the Department’s Motion for Summary Judgment and denied the Kanslers’ Cross-Motion for Summary Judgment, declining to rule the refund statute of limitations unconstitutional. App. 5, 36. The Chancery Court summarily concluded that the statute did not fail the internal consistency test and that it was not unconstitutional on its face or in application. App. 35-36. The Chancery Court order contained no meaningful analysis of the underlying internal consistency or discrimination tests supporting that court’s conclusions. The Chancery Court opinion contained no analysis or reference to *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). The Kanslers timely appealed the Chancery Court’s summary judgment to the Mississippi Supreme Court.

The Mississippi Supreme Court affirmed the Chancery Court decision on November 29, 2018, broadly concluding tax statutes of limitation fall completely outside the scope of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) and its four component tests, declaring that only “taxes” are subject to that test. App. 13. Based solely and expressly on the fact that this Court has never had an opportunity to address the issue, the Court reached the unprecedented conclusion that a tax statute of limitations is wholly immune from internal consistency scrutiny and openly refused to apply that test. App. 3, 20. In order to avoid applying this Court’s “strictest scrutiny” standard, the Court summarily declared the statute was not facially discriminatory, even though the law denies an existing tax benefit (the ability to recover an income tax payment well outside the normal three-year limitation period) based on an unambiguous interstate element (the identity of the state through whose audit the overpayment was discovered). App. 22. Although no evidentiary hearing had taken place at the trial court, the Court defaulted to the more subjective *Pike* balancing test and concluded the taxpayers had not met their evidentiary burden of proof to overcome the presumed constitutionality of the statute. App. 3-4, 23-24.

The Kanslers timely filed a motion for a rehearing, which the Mississippi Supreme Court denied on February 28, 2019. App. 47.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Mississippi Supreme Court decided several important questions of federal constitutional law that have not been, but should be, settled by this Court. Additionally, the lower court decided several important federal questions in a way that conflicts with numerous relevant decisions of this Court.

In the absence of context-specific precedent from this Court, the Mississippi Supreme Court openly rejected this Court's prior mandates in *Wynne* and other cases as to the appropriate constitutional scrutiny courts must undertake in a Commerce Clause challenge, and thereby preserved forever the double taxation of the Kanslers' income earned in interstate commerce. The lower Court's rulings on these constitutional questions conflict with numerous decisions of this Court and encourage other states to ignore binding precedent and unilaterally to establish inappropriate exceptions to the constitutional tests recognized and repeatedly affirmed by this Court.

The last time this Court entertained a Commerce Clause case in which a lower court abjectly refused to apply the internal consistency test as mandated in *Wynne*, this Court unanimously vacated that decision and remanded it for further consideration consistent with that decision. *First Marblehead Corp. v. Mass. Comm'r of Revenue*, 136 S. Ct. 317 (2015). Mississippi's refusal to follow this Court's precedent in the context of a direct Commerce Clause challenge to actual double taxation of interstate earnings, without applying the internal consistency test or properly scrutinizing the

discriminatory characteristics inherent within Mississippi's income tax scheme, is no less egregious than the Massachusetts court's refusal recently vacated by this Court. A similar result should follow.

Wynne resolved the question whether states must offer their residents a tax credit for taxes paid to sister states on income also taxed in the resident state. The present case asks the derivative and as-yet unanswered question whether a state constitutionally may offer that credit on paper, but procedurally deny its residents engaged in interstate commerce any mechanism by which they might protect themselves against double taxation by claiming a credit for taxes paid to other states when audited by those sister states.

Mississippi's tax scheme offends the fair apportionment and non-discrimination prongs of *Complete Auto Transit*, particularly the internal consistency test as applied in *Wynne*, as well as the Kansler's due process rights. For the reasons below, this Court should grant the Kansler's petition for a writ of certiorari and either reverse the Mississippi Supreme Court's decision or, consistent with *First Marblehead*, vacate and remand the case for a rehearing in accordance with this Court's decision in *Wynne* and the other cases cited herein.

I. This Court has never addressed whether state tax statutes of limitation are immune *per se* from scrutiny under *Complete Auto Transit* and the internal consistency test.

This Court has not had occasion to consider a Commerce Clause challenge to a tax-specific statute of limitations or to conclude definitively whether such laws are subject to scrutiny under *Complete Auto Transit* or, more specifically, the internal consistency test. Nothing in this Court’s prior decisions, however, supports the existence of such an exception for a procedural statute that is so central to a state’s overall income tax scheme, especially when that statute directly results in double taxation of interstate income. This is an important issue of federal constitutional law that this Court has not, but should, settle in the affirmative. Additionally, Mississippi’s court decided this important federal question in a way that conflicts with relevant decisions of this Court.

This Court has established that restrictions within general statutes of limitation will be invalidated if they discriminate against or overly burden interstate commerce. See *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888 (1988). Additionally, this Court has stated unequivocally that lower courts must consider the internal consistency test when assessing “any threat of malapportionment” or double taxation under a state tax scheme. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995) (quoting *Goldberg v. Sweat*, 488 U.S. 252, 261 (1989)).

Due solely to the absence of context-specific precedent, the Mississippi Supreme Court established

a new wholesale exception to the four-pronged *Complete Auto Transit* test, concluding “the *Complete Auto* test is specifically intended for evaluating the constitutionality of taxes, not state regulations in general.” App. 13. The lower Court recognized that this Court “‘has applied *Complete Auto* to invalidate a wide range of state tax credits, deductions and exemptions,’ but we are unaware of any decisions applying the test to a statute of limitations, even when it is related to taxes.” App. 13. “The Kanslers have cited no instance where a Court found a tax scheme failed the internal consistency test because of practical or collateral issues like a statute of limitations, nor are we aware of any.” App. 20. “We reject the Kanslers’ novel attempt to apply the internal consistency test to a statute of limitations.” App. 28. “The extension advocated [here] would open a can of worms.” App. 28.

Thus, the Mississippi Supreme Court, resting exclusively upon the absence of context-specific precedent from this Court, unilaterally has established a broad class of core state tax statutes that it considers wholly immune from both *Complete Auto Transit* and the internal consistency test. It was not the Mississippi Court’s prerogative to refuse to apply the internal consistency test in the face of a valid constitutional challenge and undisputed actual double taxation of interstate earnings. The practical ramifications of this ground breaking decision could be far-reaching if left undisturbed.

Although this Court formally recognized the internal consistency test in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983), its roots

extend well before that case. *See Wynne*, 135 S. Ct. at 832. Since *Container Corp.*, this Court has invoked that test at least eight times, and has never identified any wholesale exception to the test when a taxpayer has raised a Commerce Clause challenge to a state tax scheme, especially one concerning actual, undisputed double taxation of earnings in interstate commerce. *See id.*; *Am. Trucking Assns., Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005); *Jefferson Lines*, 514 U.S. at 175; *Goldberg*, 488 U.S. at 252; *Am. Trucking Assns., Inc.*, 483 U.S. at 266; *Tyler Pipe Industries, Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984).

If this Court subjects § 27-7-313 to a proper internal consistency analysis, the statute will fail. Internal consistency scrutiny will unquestionably demonstrate that Mississippi's statute subjects the earnings of Mississippi residents engaged in interstate commerce to an unacceptable risk of double taxation, a risk not experienced by their solely intrastate counterparts.

A. Application of the Internal Consistency Test. The Kanslers offered the following application of the internal consistency test to both the Chancery Court and the Mississippi Supreme Court. Applying the internal consistency test to Mississippi's tax scheme, a clear and inherent risk of double taxation exists for any Mississippi resident desiring to conduct business or earn income beyond Mississippi's borders. These concerns apply to all multistate taxpayers, whether they earn their income as owners of a pass-through entity (such as the Wynnes) or in the form of an employee salary earned in multiple states (such as the

Kanslers). To date, neither the lower courts nor the Department have provided any application of that test suggesting a different conclusion, all of them having simply avoided the test altogether.

A slightly modified version of this Court's *Wynne* hypothetical bears this out beyond any doubt. When a Mississippi resident elects to expand his or her income generating activities into Louisiana or Alabama, for example, ("Bob" from the *Wynne* hypothetical) that person will have to file tax returns and will be subject to audit in those states, just as Mississippi routinely audits nonresident income tax returns filed by taxpayers residing in other states. His neighbor ("April" in the *Wynne* hypothetical), who limits her income generating activities to intrastate commerce, is not concerned with these multistate audit process, timing, or exposure issues.

As a Mississippi resident, Bob already will have paid a 5% income tax to Mississippi on all of his earnings, regardless of source, the same rate and amount April will have paid to Mississippi on her purely intrastate income. MISS. CODE ANN. § 27-7-5(1); MISS. ADMIN. CODE 35.III.1.12(100). If Mississippi ever audits Bob or April and discovers a tax overpayment, § 27-7-313 will protect them both and will allow them to recover any resulting overpayments no matter how long it takes the Department to conclude those Mississippi audits or any ensuing appeals.

Unlike April, however, Bob is exposed to sister state audits in addition to Mississippi audits. If Louisiana or Alabama later assesses an identical 5% tax on that same income, Bob faces a potential cumulative 10% tax

rate on his interstate income. But Bob automatically qualifies for a larger Mississippi tax credit for those additional taxes paid to Louisiana or Alabama, theoretically putting his net 5% tax liability on par with April's and perfectly balancing the tax burden between interstate and intrastate commerce. MISS. CODE ANN. § 27-7-77; MISS. ADMIN. CODE 35.III.1.12(100).

However, Bob cannot claim that credit or file any protective refund claim prior to Louisiana or Alabama completing their audits and his payment of any resulting assessments. MISS. ADMIN. CODE 35.III.1.12(101), (103.2). Bob knows that the sister state's audit process (including extensions, hearings, appeals, etc.) will likely extend well past three years from the date he filed his original Mississippi tax returns, as do Mississippi's audits of returns filed by residents of those other states. MISS. CODE ANN. § 27-7-49(2).

It is important to recall that under Mississippi law, the Department enjoyed the unilateral ability to indefinitely suspend its assessment deadline per § 27-7-49, so it may issue its assessment years after that normal three-year deadline. Under the internal consistency test, both Louisiana and Alabama are presumed to possess and exercise that same authority. Thus, if that sister state audit and/or the ensuing appeals take more than three years, Bob will be barred forever from recovering the Mississippi overpayment generated by that credit due solely to the time it took the other state to complete its audit.

Bob, therefore, knows he could face a cumulative 10% state tax rate on his multistate earnings due solely to the interstate nature of his income-generating activities and his inability to recover his Mississippi overpayments resulting from the otherwise available credit for those Louisiana or Alabama tax payments. April has no such exposure to double taxation specifically because she opted not to enter interstate commerce. She is subject only to Mississippi audits, and if those audits uncover tax overpayments her ability to recover those amounts will always be protected.

Bob also recognizes that he would never suffer more than a 5% cumulative rate if, like April, he opted to confine his income generating activities exclusively within Mississippi. Bob can expect to have higher tax liabilities and ultimately will retain less of what he earns than will his purely intrastate neighbor, even though their jobs and net incomes may be identical except for that cross-border element.

Bob's risk would be entirely mitigated if Mississippi treated refunds originating with sister state audits on par with its own audits and allowed Bob to recover his overpayments related to increased credits resulting from the sister state audits. Absent that relief, the double taxation of Bob's cross-border income will be preserved forever.

This risk constitutes a powerful incentive for Bob to confine his business activities to Mississippi, to shy away from interstate commerce, and places Bob and every other Mississippi resident at a distinct economic and competitive disadvantage if they should desire to

expand their businesses outside Mississippi. Mississippi maintains a discriminatory refund limitation period that serves as a tariff on Bob and other resident interstate taxpayers.

The above example is not a mere hypothetical; it is precisely what the Kanslers experienced in the present controversy. The risk of interstate commerce being subjected to double taxation, as revealed in theory via the internal consistency test, has manifested itself in the undisputed facts of this case. The Mississippi Supreme Court's decision promotes "tendencies toward economic Balkanization" by creating a direct and powerful incentive for taxpayers to avoid expanding their business or income generating activities across state lines. *See Wynne*, 135 S. Ct. at 822.

B. Other States Are Similarly Refusing to Apply the Internal Consistency Test. The Mississippi Supreme Court's open refusal to consider the internal consistency analysis represents a trend by state courts to establish creative ways to avoid that test following *Wynne*, especially in the context of challenges to limitations on the availability of credits for taxes paid to other states. For example, the New York courts recently refused in a similar manner to apply that test in two cases involving actual double taxation of multistate earnings.

In *Edelman v. N.Y. State Dept. of Taxation & Fin.*, leave to appeal denied and appeal dismissed, No. 2018-1235, slip op. (N.Y. Ct. App. Mar. 26, 2019), the New York courts rejected a challenge to that state's refusal to grant a credit for taxes paid on investment income to Connecticut. 162 A.D.3d 574 (N.Y. App. Div. 2018).

The taxpayers were domiciled in Connecticut but worked in New York. *Id.* As the domiciliary state, Connecticut previously had taxed that same income. *Id.* Because they maintained a dwelling in New York, that state taxed them as residents on their entire income, but refused to provide a credit for the Connecticut taxes previously paid on that same income. *Id.* The New York courts acknowledged this Court's broad holding in *Wynne* that "the 'internal consistency' test must be applied wherever there is Commerce Clause scrutiny," but determined the matter was exempt from Commerce Clause and internal consistency scrutiny on the basis that the statute did not affect interstate commerce, thereby permanently preserving the undisputed double taxation of that income. *Id.* at 575-76.

Most recently, in *Chamberlain v. N.Y. State Dept. of Taxation & Fin.*, New York's courts followed the earlier *Edelman* decision and under a virtually identical fact pattern again rejected a challenge to that state's refusal to grant a credit for taxes paid on investment income to Connecticut, the taxpayer's state of domicile. 166 A.D.3d 1112, 1113-14 (N.Y. App. Div. 2018). That Court again refused to apply the internal consistency test by concluding the matter was exempt from Commerce Clause scrutiny on the basis that the statute did not affect interstate commerce. *Id.*

The Mississippi Supreme Court's decision encourages other courts to invent creative procedural mechanisms to undermine *Wynne*, and encourages other states to advance the trend of ignoring this Court's prior Commerce Clause decisions and

mandates solely in order to protect the local fisc. This Court should grant certiorari to confirm that state tax statutes of limitations are subject to constitutional scrutiny under both *Complete Auto Transit* and the internal consistency test.

II. This Court has never determined whether a state discriminates against interstate commerce when it extends or denies the ability to recover overpaid income taxes, well beyond the normal three-year statute of limitations, based exclusively on an interstate element.

The Kanslers contend that Mississippi's statute of limitations violates the Commerce Clause by facially discriminating against interstate commerce and subjecting interstate commerce to a risk of double taxation. The state denies an existing tax advantage or benefit (*i.e.*, the statutory ability to recover audit-generated tax refunds outside the normal three-year statutory window), based exclusively on an interstate element (the fact that an audit by a state other than Mississippi uncovered the error creating the overpayment), and denies that benefit only to those residents doing business across state lines (*i.e.*, Mississippi residents who are subject to audit by states other than Mississippi).

That risk has manifested in this case in the form of actual, undisputed double taxation of the Kanslers' interstate income. By rendering permanent the double taxation of that cross-border income, Mississippi's law "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within

the State.” *Or. Waste Systems v. Dep’t of Envtl. Quality*, 511 U.S. 93 (1994). The ability of those interstate residents to realize any economic benefit or advantage from that audit-related credit turns exclusively “on the basis of some interstate element,” which the state may not do. *Bos. Stock Exchange v. State Tax Comm’n*, 429 U.S. 318, 332 n.12 (1977); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996).

In the absence of context-specific precedent from this Court, the Mississippi Supreme Court failed to apply the correct constitutional scrutiny and has established a new legal standard that other states are likely to follow to justify the double taxation of interstate earnings.

A. The Tax Advantage or Benefit at Issue. This Court has never addressed specifically whether the ability to recover overpaid income taxes beyond the normal three-year refund claim deadline is the type of tax benefit or advantage protected under the Commerce Clause and subject to *Complete Auto Transit* scrutiny. This is an important issue of federal constitutional law that this Court has not, but should, settle in the affirmative, as the Mississippi Supreme Court based its decision entirely upon the absence of such context-specific precedent. Mississippi’s court also decided this important federal question in a way that conflicts with relevant decisions of this Court.

As a key procedural element within Mississippi’s overall income tax scheme, Mississippi’s extended refund recovery period is consistent with the types of tax benefits this Court previously has recognized as enjoying Commerce Clause protection. The Mississippi

Supreme Court failed altogether to address or analyze this key statutory element, even though that contested benefit has been at the heart of the Kanslers' discrimination claims throughout these proceedings.

Instead, the Court avoided the issue by summarily concluding "the *Complete Auto* test is specifically intended for evaluating the constitutionality of taxes, not state regulations in general." App. 13. The lower Court recognized that this Court "'has applied *Complete Auto* to invalidate a wide range of state tax credits, deductions and exemptions,' but we are unaware of any decisions applying the test to a statute of limitations, even when it is related to taxes." App. 13.

This Court's numerous tax-related Commerce Clause decisions suggest that Mississippi's extended refund period is consistent with the types of tax benefits or advantages previously recognized as triggering *Complete Auto Transit* scrutiny. Each of these mechanisms afforded taxpayers the ability to reduce their overall state tax liability no less than Mississippi's existing procedure for extending the refund recovery period, and they should be scrutinized under the same standards.

In *Oregon Waste Systems*, the benefit was in the form of lower waste disposal taxes. In *Fulton Corp.*, it was a deduction in computing the intangibles tax base. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609-20 (1997), the tax advantage was the availability of a local property tax exemption. In *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), it was a more favorable means of

calculating the franchise tax base based solely upon the state of incorporation.

Statutes of limitation undoubtedly are within the purview of Commerce Clause scrutiny. *Bendix*, 486 U.S. at 888.

“Although statute of limitations defenses are not a fundamental right, it is obvious they are an integral part of the legal system and are relied upon to protect the liabilities of persons and corporations active in the commercial sphere. Such defenses may not be withdrawn from out-of-state persons or corporations on conditions repugnant to the Commerce Clause. Where a State denies ordinary legal defenses or like privileges to out-of-state persons or corporations engaged in commerce, the state law will be reviewed under the Commerce Clause to determine whether the denial is discriminatory on its face or an impermissible burden on commerce.”

Id. at 893 (internal citations omitted). Ohio’s general statute of limitations provided a valuable economic benefit (protection against late-brought claims) no less than Mississippi’s tax statute of limitations does (granting an extended refund recovery deadline). The ability to obtain a refund of overpaid income taxes is no less an “integral part of the legal system” in the context of Mississippi taxes than are Ohio’s protections against general legal claims. That Mississippi taxpayers have “relied upon” this refund mechanism to recover audit-discovered tax overpayments is obvious from the fact

that the Legislature saw fit to incorporate that benefit into the law.

No authority existed for the Mississippi courts to ignore the nature and economic significance of the tax benefits provided by § 27-7-313. The Mississippi Supreme Court has exploited a narrow void in this Court's precedent to preserve a scheme that directly discriminates against and burdens interstate commerce.

B. The Prohibited Interstate Element. As with the prior sub-question, this Court has never addressed specifically whether the identity of the state whose audit uncovered an error giving rise to a home state tax overpayment represents the type of geographic or interstate element prohibited under the Commerce Clause. This is an additional important issue of federal constitutional law that this Court has not, but should, settle in the affirmative. Mississippi's court decided this important federal question in a way that conflicts with relevant decisions of this Court.

The Mississippi Supreme Court marginalized and dismissed the Kanslers' double taxation as merely "incidental" and the "collateral effects of a statute of limitations" without any acknowledgement of the discriminatory element within Mississippi's refund statute. App. 3-4. The only class of taxpayers burdened by Mississippi's arbitrary refusal to extend that audit-related refund deadline are those residents earning income in interstate commerce and subject to sister state audits. Only their income earned in interstate commerce is exposed to this audit-based risk of double taxation.

This Court has never had the opportunity to construe this particular type of statute or clarify whether this is the type of undue burden and risk of double taxation prohibited by the Commerce Clause, but has repeatedly denounced the use of interstate elements or criteria in conferring or denying tax benefits or advantages:

Under our precedents, the dormant Commerce Clause precludes States from ‘discriminat[ing] between transactions on the basis of some interstate element.’ This means, among other things, that a State ‘may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.’ ‘Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of ‘multiple taxation.’”

Wynne, 135 S. Ct. at 823 (citations omitted) (quoting, in turn, *Bos. Stock Exch.*, 429 U.S. at 332 n. 12; *Armco*, 467 U.S. at 642; *Nw. States Portland Cement Co. v. Minn.*, 358 U.S. 450, 458 (1959) (citations omitted).

The interstate element within § 27-7-313 is geographically indistinguishable from numerous examples identified and invalidated previously by this Court. In *South Central Bell*, the prohibited interstate element was the taxpayer’s state of incorporation. In *Oregon Waste Systems*, it was the geographic origin of the waste. In *Fulton Corp.*, it was the extent to which a corporation did business in North Carolina versus

other states. In *Camps Newfound/Owatonna*, it was the state of residence of summer camp attendees. In the present case, the improper interstate element is the fact that a sister state audit rather than a Mississippi audit generated the Mississippi income tax overpayment sought to be recovered.

Bendix would also appear to mandate the result on this sub-issue. Justice Scalia, in his concurring opinion, acknowledged “[t]he Ohio tolling statute . . . is on its face discriminatory because it applies only to out-of-state corporations. That facial discrimination cannot be justified on the basis that ‘it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’” *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 898 (1988) (Scalia, J., concurring) (internal citations omitted). “Because the present statute discriminates against interstate commerce by applying a disadvantageous rule against nonresidents for no valid state purpose that requires such a rule, I concur in the judgment that the Ohio statute violates the Commerce Clause.” *Id.*

At no point did the Mississippi Supreme Court address substantively the existence of that geographic, interstate element or acknowledge that this interstate factor is found within the face of the statute itself. App. 20-28. The Mississippi Supreme Court incorrectly concluded “[t]he statute and its various tolling provisions make no distinction between in-state and out-of-state taxpayers or between interstate and intrastate commerce.” App. 22. This keystone conclusion is based not only on an incorrect statement

of Mississippi law and the facts of the case, it also reflects the unilateral adoption of an improperly narrow legal test fundamentally inconsistent with this Court's prior holdings.

C. Mississippi Law Discriminates Against Interstate Commerce. The statute at issue is the classic example of a facially discriminatory tax scheme and this Court should, consistent with its numerous prior decisions, invalidate it under the Commerce Clause's "strictest scrutiny" standard and recognize that the statute is "virtually *per se* invalid." *Fulton Corp.*, 516 U.S. at 331; *Or. Waste Systems*, 511 U.S. at 99-01. "Because Mississippi's statute is facially discriminatory, the more deferential [*Pike*] standard is inapplicable." *Camps Newfound/Owatonna*, 520 U.S. at 582-83 n.16. This quasi-legislative balancing test "is only available where other [nondiscriminatory] legislative objectives are credibly advanced and there is no patent discrimination against interstate trade." *Id.* (internal quotation omitted).

This Court in *Bendix* summarily acknowledged that the Ohio statute of limitations discriminated against interstate commerce. "The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry." *Bendix*, 486 U.S. at 891. The statute was so obviously discriminatory that an extended analysis of that question was unnecessary; the *Pike* analysis that followed was undertaken solely and expressly to demonstrate that the discriminatory statute could not survive even that lesser scrutiny. "We choose, however, to assess the interests of the state, to

demonstrate that its legitimate sphere of regulation is not much advanced by the statute while interstate commerce is subject to substantial restraints.” *Id.*

Since the 1988 *Bendix* decision, this Court has had no occasion to consider the constitutionality of any other statutes of limitation that were conditioned on interstate elements, likely because such geographic conditions are uniformly considered prohibited at this point. The Mississippi Supreme Court was mistaken in its understanding that *Bendix* required it to apply the *Pike* balancing test in assessing a discriminatory statute of limitations.

In addition to being facially discriminatory, § 27-7-313 also discriminates against interstate commerce by subjecting those cross-border earnings to the risk of multiple taxation. It is undisputed that the specific interstate earnings at issue in this case have been taxed by two states, by New York on a nonresident basis and by Mississippi due to the Kansler’s residence. It also is undisputed that this double taxation would have been avoided if Mississippi extended its refund period as it would have following one of its own audits.

By providing no procedural mechanism to permit the Kanslers to claim the benefit of the otherwise available nonresident credit, § 27-7-313 has “subjected interstate commerce to the burden of multiple taxation” and is discriminatory. *See Wynne*, 135 S. Ct. at 1794 (quoting *Nw. States Portland Cement Co.*, 358 U.S. at 458). By refusing to apply *Wynne* or the internal consistency test, the Mississippi courts avoided any consideration of this second aspect of the discrimination analysis.

D. Discrimination Against Interstate Commerce Precludes a *Pike* Analysis. Avoidance of a proper facial discrimination or internal consistency analysis allowed the lower Court improperly to shift the burden of proof to the taxpayer in this case. A tax law that is discriminatory on its face must be invalidated unless the state can show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Fulton Corp.*, 516 U.S. at 331. The state's burden of justification is so heavy that "facial discrimination by itself may be a fatal defect." *Id.* That the discrimination comes in the form of a deprivation of a generally available tax benefit (*e.g.*, an extended refund claims period), rather than a specific penalty on the activity itself, is of no consequence under Commerce Clause jurisprudence. *Camps Newfound/Owatonna*, 520 U.S. at 578-79.

The state carries the heavy burden to demonstrate that the facially discriminatory tax scheme is a "compensatory tax" designed simply to make interstate commerce bear a burden already borne by intrastate commerce. *Fulton Corp.*, 516 U.S. at 331. This compensatory tax concept assures that "when the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." *Id.* at 332 (citing *Henneford v. Silas Mason Co.*, 300 U.S. 577, 584 (1937)).

If the discriminatory statute is to be salvaged as a permissible compensatory tax scheme, the burden of proof shifts to the state to satisfy each of the following three conditions: (1) the state must, as a threshold matter, identify the intrastate tax burden for which the state is attempting to compensate; (2) the tax on interstate commerce must be shown to roughly approximate, but not exceed, the amount of the tax on intrastate commerce; and (3) the events on which the interstate and intrastate taxes are imposed must be substantially equivalent, that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Fulton Corp.*, 516 U.S. at 332-33.

The Department failed to develop or include in the record any facts whatsoever to meet its burden under the compensatory tax defense. The Department made no effort to identify the intrastate tax burden for which the state is attempting to compensate by denying only multistate residents that extended refund period. *Id.* at 332-33. Indeed, no comparable intrastate tax burden exists. The Department failed to offer any facts showing the tax burden placed on interstate commerce, via the shorter audit-related refund claim deadline, roughly approximates but does not exceed the tax on intrastate commerce. *Id.* No effort was made to establish that the events upon which the interstate and intrastate deadlines are imposed are substantially equivalent, or that they are so sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Id.* No such facts could have been established even had it tried, because the limited refund period produces the exact opposite result—a

higher cumulative tax burden on interstate commerce than intrastate commerce.

Because this Court has never squarely addressed a procedural tax statute under *Complete Auto Transit*, the Mississippi Supreme Court has created a new exception to this Court's ubiquitous Commerce Clause tests in order to improperly default to the more deferential *Pike* analysis. In doing so, it has effectively shifted the burden of proof back to the taxpayer in direct contravention of this Court's precedent for discriminatory schemes. This Court should grant certiorari to clarify that procedural tax statutes producing double taxation of interstate commerce are subject to the same constitutional scrutiny as the more substantive tax provisions previously addressed by this Court, and to recognize that Mississippi's statute fails the appropriate constitutional tests.

III. This Court has never determined whether the Commerce Clause or Due Process Clause requires a state to offer residents engaged in interstate commerce, and uniquely exposed to income tax audits by sister states, either a pre- or post-deprivation mechanism to claim a credit for taxes paid to those sister states in order to avoid double taxation of interstate earnings.

This Court has not yet had an opportunity to address this critical but practical question of the constitutionality of a state's imposition of procedural rules and barriers that achieve the same ultimate result as the deficient Maryland scheme—to facilitate

and forever preserve the double taxation of their residents' interstate earnings. In *Wynne*, this Court held that the Commerce Clause demands that a state offer its residents a credit for income taxes paid to sister states if it adopts its residents' worldwide income as its tax base. Left unanswered was whether a state may, consistent with *Wynne* and the Commerce and Due Process Clauses, offer its residents on paper a credit for those taxes while refusing to provide any procedural mechanism whereby they can obtain the benefit of that credit.

The prerequisites to the Kanslers' entitlement to the credit were not satisfied until well after their refund statute had expired, and no protective refund claim procedure existed. In this regard, the Mississippi Supreme Court misstated both the law and the undisputed facts of the case when it dismissed the Kanslers' due process claims on the basis that they purportedly "could have asked for [the credit] in their original tax return, and after that they had three years to amend their returns." App. 29. In fact, under Mississippi's procedural restrictions there never existed a point in time in which they could have claimed the credit on an original or amended Mississippi return and realized the economic benefit of that credit.

"The commerce clause forbids discrimination whether forthright or ingenious." *Best & Co. v. Maxwell*, 311 U.S. 454, 455 (1940). Accordingly, this Court has stated that "[i]n each case it is our duty to determine whether the statute under attack . . . will in its practical operation work discrimination against

interstate commerce.” *Id.* at 455-56. This Court also has held that a state must offer either meaningful pre-deprivation or post-deprivation relief for an unconstitutional tax. *See McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18, 39-40 (1990). The complete absence of any means by which a taxpayer may protect against double taxation of interstate income—a risk not experienced by purely intrastate income or taxpayers—is a significant constitutional factor that the courts should consider in determining whether the statute is fairly apportioned or discriminates against interstate commerce.

Because Mississippi’s statutes do not permit taxpayers to file protective refund claims or otherwise claim a credit in excess of that actually paid, there is no dispute that Mississippi’s scheme does not offer pre-deprivation relief under the circumstances of the present case. This means that the only option in the present case is some form of post-deprivation relief. That has been construed to mean either “leveling up” or “leveling down” to place taxpayers on equal footing. “Whenever a State impermissibly taxes interstate commerce at a higher rate than intrastate commerce, that infirmity could be cured by lowering the higher rate, raising the lower rate, or a combination of the two.” *McKesson Corp.*, 496 U.S. at 39-40; see also, *Associated Indus. of Mo. v. Lohman*, 511 U.S. 641, 653 (1994); *Fulton Corp.*, 516 U.S. at 346-47.

It is undisputed that Mississippi cannot “level up” under the circumstances. The Department cannot go back and assess other purely intrastate residents with additional taxes for the 2008 and 2009 tax years

because those years are closed to audit. Nor can the state demand its sister states refund the monies they collected on audit, thereby reversing the double taxation.

This means the only remedy for this double taxation is to “level down” the tax on interstate commerce, that being the precise purpose of Mississippi’s credit. But Mississippi procedurally offers no post-audit remedy once the sister state review is completed and the taxpayer has paid his finally determined liability. That strict and unqualified window for recovery closed after three years, even though the sister state audit was still in process. That taxpayer had no means to go back after payment to level down his multistate tax burden to place it on par with his purely intrastate counterparts because Mississippi offers no post-deprivation remedy for his multiple taxation.

This Court should grant certiorari to clarify that states such as Mississippi constitutionally must provide its residents either a pre- or post-deprivation mechanism to claim a credit for income taxes paid to another state when audited by a sister state.

CONCLUSION

For the foregoing reasons, this Court should grant the Kanslers' petition for a writ of certiorari and either reverse the Mississippi Supreme Court's decision or remand the case to that Court for a rehearing consistent with this Court's decision in *Wynne* and the other cases cited herein.

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