Nos. 18-1569 & 18-1570

In the Supreme Court of the United States

RICHARD CHAMBERLAIN AND MARTHA CRUM,
PETITIONERS

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, ET AL.

SAMUEL EDELMAN AND LOUISE EDELMAN,
PETITIONERS

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE NEW YORK SUPREME COURT,
APPELLATE DIVISION, FIRST AND THIRD DEPARTMENTS*

REPLY BRIEF FOR THE PETITIONERS

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The New York tax scheme at issue here is plainly invalid under *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015). The State of New York taxes the income not only of individuals who are domiciled in New York, but also of non-domiciliary statutory "residents," who are subject to taxation by virtue of engaging

in interstate commerce—namely, by maintaining a dwelling place and spending a sufficient amount of time in New York while retaining a permanent residence in another State. With a narrow exception not applicable here, however, New York does not offer any credit for taxes paid to another State on intangible income. If every State adopted New York's approach, a taxpayer who works and lives in a single State would be subject to taxation once on his intangible income. But a taxpayer who lives in one State but works and maintains property in another would be subject to taxation twice on the same income. Accordingly, New York's tax scheme fails the "internal consistency" test, impermissibly discriminates against interstate commerce, and thereby violates the dormant Commerce Clause.

Faced with that simple syllogism, respondents engage in a protracted exercise in evasion. Respondents offer a variety of creative ways of limiting *Wynne* to its facts. But they identify no meaningful distinction between *Wynne* and these cases—nor could they, given that this Court seemingly granted review in *Wynne* to resolve a conflict with an earlier New York state-court decision upholding the very scheme at issue here. The decisions of the New York courts in these cases—which rely on that earlier decision in the face of *Wynne* and go so far as to conclude that "no substantial constitutional question is directly involved," 18-1569 Pet. App. 1a; 18-1570 Pet. App. 1a—cannot be taken seriously.

As a last-ditch effort to fend off review, respondents contend that the question presented is not of sufficient importance and that review is unnecessary at this time. The numerous amici who have filed in support of petitioners easily refute the first contention. And as to the second, respondents offer no valid reason why this Court should

allow New York—the Nation's business center and the jurisdiction in which the question presented is by far most likely to arise—to flout a decision of this Court indefinitely, accruing millions if not billions of dollars of unconstitutionally collected tax revenue in the meantime.

This Court should not countenance such flagrant disregard of its jurisprudence. If *Wynne* means what it says, the decisions below cannot be allowed to stand. The Court should grant the petitions for writs of certiorari, and it may wish to consider the possibility of summary reversal.

A. The Decisions Under Review Conflict With This Court's Decision In *Comptroller of Treasury of Maryland* v. *Wynne*

In *Wynne*, this Court held that the internal consistency test determines whether a state tax scheme impermissibly discriminates against interstate commerce. See 135 S. Ct. at 1801-1803. As petitioners have shown, New York's tax scheme fails that test. See 18-1569 Pet. 14-16; 18-1570 Pet. 14-16. Respondents claim that *Wynne* is distinguishable on several grounds, but each of those distinctions is immaterial.

1. Respondents first contend (Br. in Opp. 12-13) that the decisions below do not conflict with *Wynne* because New York's tax scheme "contains precisely the tax credit" that the Court in *Wynne* held "would cure the defect in Maryland's tax scheme"—*i.e.*, a credit for *personal* income tax. *Id.* at 12; see N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4(d). In so contending, respondents brazenly attempt to narrow the applicability of *Wynne*'s reasoning to the precise facts of the case.

But *Wynne* is not so limited. In *Wynne*, the Court not only invalidated Maryland's specific tax scheme, but also made clear that courts must use the internal consistency test more generally to determine whether a challenged

state tax scheme impermissibly discriminates against interstate commerce. See 135 S. Ct. at 1801-1803. Indeed, the principal dissent objected to the Court's reasoning precisely on the ground that the Court was "defin[ing] 'inherent discrimination' " against interstate commerce "as internal inconsistency." *Id.* at 1822 n.10 (opinion of Ginsburg, J.); see *id.* at 1820-1823. New York's scheme fails the internal inconsistency test because it does not provide a tax credit for intangible income and thereby discriminates against individuals who live in one State but work and maintain property in another. It is therefore impermissible under *Wynne*.

2. Respondents next argue (Br. in Opp. 14-15) that the "paramount fact" distinguishing this case from *Wynne* is that the taxed income here was "not derived from any economic activity in the taxing jurisdiction"—that is, petitioners' State of domicile. *Id.* at 14. Respondents add that, if the taxed income were derived from petitioners' State of domicile, New York would provide a credit for taxes paid to that State. See *id.* at 14-15. Thus, respondents conclude, New York's tax scheme "do[es] not conflict with *Wynne*" and "passes the internal consistency test." *Id.* at 15.

That argument fails at every step. As a preliminary matter, the Court's analysis in *Wynne* did not hinge on some threshold inquiry concerning whether the taxpayer derived the income subject to double taxation from economic activity outside the taxing State. Rather, the analysis simply turned on whether the challenged state tax scheme "fail[ed] the internal consistency test." *Wynne*, 135 S. Ct. at 1803. Because Maryland's tax scheme failed that test, the Court deemed it invalid under the dormant Commerce Clause. See *id.* at 1803-1804, 1807.

Respondents correctly note that a New York resident who pays taxes to another jurisdiction on intangible income is eligible for a tax credit if that income is "from property employed in a business, trade or profession carried on in the other jurisdiction." N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4(d). But respondents do not contend that the credit is available to petitioners or other similarly situated taxpayers whose income comes from the sale of stock in a New York-based business. And in fact, the credit is largely an illusion: as the New York Court of Appeals has stated, the credit is "not generally available for intangible income, because that income has no identifiable situs." *Tamagni* v. *Tax Appeals Tribunal of State*, 695 N.E.2d 1125, 1129, cert. denied, 525 U.S. 931 (1998). New York courts have routinely refused to apply the credit to various forms of intangible income. See, *e.g.*, *Leach* v. *Chu*, 540 N.Y.S.2d 596, 598 (N.Y. App. Div. 1989); *In re Mallinckrodt*, No. 807553, 1992 WL 346998, at *7-*9 (N.Y. Tax App. Trib. Nov. 12, 1992).[*]

More broadly, even assuming that the credit respondents cite is available for *some* forms of intangible income (though not the type of income at issue here), that merely makes the magnitude of the internal inconsistency smaller; it does not eliminate it altogether. Respondents admit as much when they recognize that, "if two States tax a resident's intangible income based on the taxpayer's dual residency in *both* States, and if that income does not derive from activities in *either* State, it will be taxed twice." Br. in Opp. 16; see *id.* at 1 (noting that "New York does not offer its residents a credit for tax paid to another State on income from intangible assets when that income

[*] Precisely because petitioners' intangible income was not traceable to New York, they could not have obtained a tax credit from Connecticut for the taxes they paid to New York on that same income. See Conn. Gen. Stat. § 12-704(a)(1).

cannot be traced to activities in that State"). As long as New York continues to tax the intangible income of domiciliary and non-domiciliary residents alike, the only way for the State to eliminate the internal consistency problem (and thus the constitutional problem) with its tax scheme would be to provide a broader credit to non-domiciliary residents for intangible income that is taxed by another State—such as the income at issue here.

3. Respondents further contend (Br. in Opp. 16-18) that New York's tax scheme does not fail the internal consistency test even though it results in the discriminatory double taxation of the intangible income of non-domiciliary residents. That contention lacks merit.

a. Respondents first argue that the internal consistency test does not apply at all here, on the theory that the tax on petitioners' intangible income "does not implicate interstate commerce" and thus cannot violate the dormant Commerce Clause. Br. in Opp. 16. The tax is purely intrastate, respondents assert, because it arises from petitioners' status as statutory residents of New York. See *ibid.*

That argument begs the question. As *Wynne* made clear, the internal consistency test is the method of *determining* whether a state tax scheme discriminates against interstate commerce. See 135 S. Ct. at 1801-1802. Respondents cannot avoid the internal consistency test with the bald assertion that the challenged tax "does not implicate interstate commerce." Br. in Opp. 16. The internal consistency test—not respondents' say-so—governs that determination.

In any event, respondents' argument fails on its own terms. New York's tax scheme burdens interstate commerce because it defines statutory "residents" based on interstate activities—doing as little as renting an apartment in New York and entering the State (however

briefly) on a sufficient number of days per year. See N.Y. Tax Law § 605(b)(1)(B); N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(4). By taxing certain forms of income of domiciliary and non-domiciliary residents alike, New York subjects non-domiciliary residents to disfavored treatment. That is a fundamental violation of the dormant Commerce Clause. While New York is free to define statutory residence as it pleases, it cannot define it in terms of interstate activity and then impose a heavier burden on individuals who engage in that activity. New York crossed the constitutional line when it imposed a tax that—when generalized across all States—inflicts double taxation on individuals who choose to engage in certain interstate commerce, but not on those who do not.

b. Respondents also argue that New York's tax scheme does not fail the internal consistency test because "that test depends on a comparison of similarly[] situated taxpayers." Br. in Opp. 17. In respondents' view, "single-state residents (domiciliaries) are not similarly situated to dual-[s]tate residents (statutory residents)." *Ibid.* Because dual-state residents receive "privileges and protections" from their State of domicile, respondents say, the double taxation of those residents, as compared to New York-domiciled residents, is justified. *Ibid.* (quoting *Tamagni*, 695 N.E.2d at 1132).

That argument proves far too much, because it could be made in every case in which a taxpayer challenges the tax scheme of a State where he is not domiciled. In those situations, the taxpayer presumably receives some "privileges" from his State of domicile, in addition to the benefit of doing business in the taxing State. But this Court has never suggested that the receipt of those "privileges" bars non-domiciliaries from challenging a discriminatory state tax. In fact, it has routinely permitted such challenges. See *Oklahoma Tax Commission* v. *Jefferson*

Lines, Inc., 514 U.S. 175, 178 (1995); *American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266, 275 (1987); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 276 (1977).

What is more, respondents' contention that New York's tax scheme "does not fail the internal consistency test" because non-domiciliary and domiciliary residents "are not similarly situated," Br. in Opp. 17, is hard to square with their contention that the taxation of statutory residents "does not implicate interstate commerce" in the first place, *id.* at 16. Respondents cannot have it both ways. Non-domiciliary residents engage in interstate commerce by working and maintaining property in the taxing State, and the discriminatory burden on that commerce causes New York's tax scheme to flunk the internal consistency test. In *Wynne*, this Court made clear that, "if a State's tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State." 135 S. Ct. at 1797. Any difference between domiciliary and non-domiciliary residents is therefore immaterial for purposes of the dormant Commerce Clause.

In closing, respondents assert that "[t]here is no reason why New York should cede" taxation of a non-domiciliary resident's intangible income to the resident's State of domicile. Br. in Opp. 18. But there is a perfectly good reason why New York should do so: because the State believes it appropriate to tax the income of *its own domiciliaries* without apportionment. If every State adopted New York's approach, a taxpayer who lives in one State but works and maintains property in another would be subject to double taxation on his intangible income, but a taxpayer who works and lives in a single State would not.

That is why New York's tax scheme fails the internal consistency test and thereby violates the dormant Commerce Clause under *Wynne*.

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review In These Cases

Contrary to respondents' contention (Br. in Opp. 18-21), the question presented in these cases is one of unusual legal and practical importance. See 18-1569 Pet. 21-24; 18-1570 Pet. 21-24. The numerous amici who have filed in support of petitioners only underscore the point. As they explain, the State of New York is "tak[ing] advantage of its commercial preeminence to coerce individuals to either forgo New York's economy, change domicile to New York, or pay tax on the same income twice." Business Council Br. 13; see NFIB Br. 14. Other state legislatures, moreover, "are watching this petition." Williamson Br. 14. If the Court denies review, "[t]he temptation to mimic New York's approach would extend to any state interested in collecting more tax revenue"—especially States whose populations "travel frequently across state lines." Tax Foundation Br. 16.

Respondents claim that amici's concerns are "ill-founded," supposedly because of the "high bar" to qualify as a non-domiciliary statutory resident under New York law. Br. in Opp. 18. But an individual can qualify as a statutory resident merely by renting residential property in New York and setting foot inside the State more than 183 days in a year. See 18-1569 Pet. 6; 18-1570 Pet. 6. As evidence that the requirements for statutory residency are "steep," respondents cite the number of individuals who earn income in New York without becoming residents. See Br. in Opp. 18. The relevant numbers here, however, are the number of non-domiciliary statutory residents in New York and the amount of taxes on intangible

property the State collects from them—both numbers to which respondents presumably have access, but on which they conspicuously remain mum. If anything, the risk of double taxation from New York's tax scheme could be artificially inflating the number of nonresident taxpayers, by sidelining individuals who would otherwise buy or rent residential property in New York.

Respondents note that the challenged aspects of New York's tax scheme are "not recent innovations." Br. in Opp. 19. But the longevity of a constitutional violation is no defense—especially when this Court definitively ruled on the constitutionality of the scheme only four years ago. See *Wynne*, 135 S. Ct. at 1787. While respondents contend that "[t]here is no evidence that [New York's] tax scheme has had any dampening effect" on economic growth, Br. in Opp. 19, others have not been so sanguine about the effects of New York's aggressive use of double taxation. See, *e.g.*, Craig Karmin, *New Law Sought After N.Y. Tax Ruling*, Wall St. J., at A20 (May 27, 2011); Megan McArdle, *Own a Second Home in New York? Prepare for a Higher Tax Bill*, The Atlantic (Feb. 11, 2011).

Respondents suggest that many other States have a similar taxation scheme, potentially creating "many opportunities for the courts of other States to rule on challenges like the one at issue here." Br. in Opp. 21. But they muster little evidence in support of that proposition, citing only ten States that have *both* materially identical definitions of statutory residents *and* similar limitations on credits for intangible income. See *id.* at 20 & nn.6-7. Of the 10 most common commuter destinations for out-of-state workers, only four—New York, the District of Columbia, Missouri, and Virginia—have statutes appearing to limit their credit for taxes paid to another State to income derived from the other State. See Brian McKenzie, U.S. Census Bureau, *Out-of-State and Long Commutes:*

2011, at 9, tbl. 6 (2013) <tinyurl.com/longcommutes>. And by regulation, the District of Columbia provides a specific credit that would unambiguously prevent the double taxation of individuals in petitioners' position. See D.C. Mun. Regs. tit. 9, § 114.2(c).

Finally, even if further percolation were likely, it would be of limited value here. Petitioners seek this Court's review on the basis of a conflict not among decisions of the lower courts, but rather with a decision of the Court itself. In the past, the Court has not hesitated to intervene when a state court issues a decision that is plainly inconsistent with one of the Court's decisions, especially on a question of constitutional law. See 18-1569 Pet. 24; 18-1570 Pet. 23-24. And there is all the more reason for the Court to do the same here: New York is the jurisdiction in which the question presented is by far most likely to arise, and the resolution of that question potentially affects hundreds of thousands of persons who commute to New York from other States, as well as millions if not billions of dollars in resulting tax revenue that is currently being collected unconstitutionally.

This Court would provide a roadmap for other lower courts to disregard its decision in *Wynne* if it allows the decisions below to stand. The Court should grant review and correct those profoundly erroneous decisions.

* * * * *

The petitions for writs of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the cases for briefing and oral argument.

Respectfully submitted.

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SEPTEMBER 2019