No. 21-___

IN THE

Supreme Court of the United States

FERRELLGAS PARTNERS, L.P.,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

On Petition for Writ of Certiorari to the New Jersey Superior Court, Appellate Division

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a State imposes a fee or tax on interstate commerce, the Commerce Clause requires it to be fairly apportioned among the States where the commerce takes place. Under this Court's precedent, a levy is fairly apportioned only if it is "internally consistent"; that is, if the levy were hypothetically enacted by every State, a multi-state business must pay no more, in the aggregate, than a business conducted wholly within a single State. There is one exception: if the levy is a regulatory fee that is "locally focused," internal consistency is not required.

In this case, New Jersey imposes an annual levy on every partnership doing any amount of business in the State. The levy is computed based on the number of partners in the partnership, regardless of whether the partners are residents or non-residents, at a rate of $150 per partner. The maximum levy is $250,000. The levy is not apportioned; it is, admittedly, not internally consistent. Nonetheless, New Jersey's courts sustained the levy, even when imposed on a partnership engaged in interstate business, with partners all over the nation, because they determined that the levy is a locally focused fee.

The question presented is: whether a levy that raises revenue for a State's general fund, and that is not restricted to the in-state activities of the levy-payor, may be characterized as a locally focused regulatory fee, and thus be imposed without regard to whether it is internally consistent?

PARTIES TO THE PROCEEDING

Ferrellgas Partners, L.P., is petitioner here and was plaintiff–appellant below.

The Director of the Division of Taxation of the Department of the Treasury of the State of New Jersey is respondent here and was defendant–appellee below. The Director has authority under New Jersey law to administer certain fees and taxes imposed by the State, including this partnership levy.

CORPORATE DISCLOSURE STATEMENT

Ferrellgas Partners, L.P., is a publicly traded Master Limited Partnership and has no parent corporation. No publicly held corporation owns 10% or more of Ferrellgas Partners, L.P.'s equity.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Under this Court's Commerce Clause precedent, if a State imposes a levy on interstate commerce—regardless of whether the levy is labeled a "fee" or a "tax"—that levy must pass the test for "internal consistency." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). The internal consistency test asks a hypothetical question: if every State enacted a levy identical to the levy at issue, would a person doing business in multiple States pay more, in the aggregate, than a person conducting the same business entirely within a single State? *See Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 564–65 (2015). If a person conducting a multistate business would pay more, then the levy fails the test. *See id*.

This Court, in *American Trucking Ass'ns, Inc. v. Scheiner* (*ATA–Scheiner*), determined that an unapportioned, flat-dollar levy imposed on interstate commerce fails the internal consistency test because a person engaged in intrastate commerce would pay the levy once, but a person engaged in interstate commerce would pay the fee multiple times. 483 U.S. 266, 284–87 (1987). Following *ATA–Scheiner*, courts in at least eleven States and Puerto Rico have struck down flat-dollar levies because they were not internally consistent.[1]

Then in 2005, this Court decided *American Trucking Ass'ns, Inc. v. Michigan Public Service Commission*. 545 U.S. 429 (2005) (*ATA–Michigan*). In *ATA–Michigan*, this Court held that the internal consistency test was inapplicable in the context of a $100 regulatory fee imposed on purely intrastate activity.

[1] Citations to these cases are collected in footnote 2 on pages 10–11.

See id. at 431. In *ATA–Michigan*, this Court was concerned that *ATA–Scheiner* could be applied to invalidate run-of-the-mill regulatory fees on purely local activity.

Yet in its effort to clarify that point, this Court left the law "in a state of considerable uncertainty" because *ATA–Michigan* put "enormous pressure on the meaning of the word 'local.'" 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.16[1][a][vi] (3d ed. 2003 Supp 2021–2). Consequently, some state courts have interpreted *ATA–Michigan* as if it completely undermines the internal consistency test as applied to flat-dollar fees and taxes. *See American Trucking Ass'ns, Inc. v. Dep't of Transp.*, 124 P.3d 1210, 1220 (Or. 2005) (reversing a lower-court decision that had followed *ATA–Scheiner* on account of the intervening decision of this Court in *ATA–Michigan*). In fact, in petitioner's case, the Tax Court of New Jersey discussed *ATA–Michigan* at length and, in that discussion, favorably cited *dissenting opinions* in *ATA–Scheiner*. App. 62. As a result of that analysis, the Tax Court of New Jersey in petitioner's case determined that the hypothetical test of internal consistency "is certainly not the law." *Id.* Indeed, the state court implied that it believed this Court's internal consistency test is "a judicial fraud." App. 61. n.15 (*citing Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 572–73 (2015) (Scalia, J., dissenting)).

By contrast to the approaches of the Oregon and New Jersey courts, courts in California have applied *ATA–Michigan* narrowly—and thus have continued to apply the internal consistency test to unapportioned levies. *See Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (1st Dist. Ct. App. 2008). In that case, the Court of Appeal of

California was confronted with an unapportioned levy that is like New Jersey's in many ways. Yet that court rejected the notion that *ATA–Michigan* had undermined the internal consistency test. *See id.* at 863. Thus, the court of appeal invalidated the unapportioned levy because it failed internal consistency.

This Court should grant review now because of the uncertainty regarding the vitality of the internal consistency test—especially as it applies to unapportioned levies. The uncertainty has now crystallized into a split between state courts. And the uncertainty is of national importance: at least twelve States have enacted unapportioned levies that fail the internal consistency test, exposing tens of thousands of interstate businesses to multiple taxation. Indeed, this problem is especially acute because, as a result of this Court's decision in *South Dakota v. Wayfair, Inc*., tens of thousands of small businesses are now exposed to the taxing jurisdiction of numerous States—each of which may attempt to impose an unapportioned, flat-dollar levy. 138 S. Ct. 2080 (2018).

OPINIONS BELOW

The order of the Supreme Court of New Jersey denying certification can be found at 251 A.3d 760 (N.J. 2021) and at App. 1. The opinion of the Superior Court of New Jersey, Appellate Division, can be found at 2021 N.J. Super. Unpub. LEXIS 64 (N.J. Super. Ct. App. Div. Jan. 13, 2021) and at App. 2–25.

The opinion of the Tax Court of New Jersey can be found at 2018 N.J. Tax Unpub. LEXIS 65 (N.J. Tax Ct. Dec. 7, 2018) and at App. 26–73.

JURISDICTION

As a result of the COVID-19 pandemic, for state supreme court decisions or orders denying discretionary review, this Court extended the time to file a petition for a writ of certiorari to 150 days from the date of the decision or order if the decision or order was issued between March 19, 2020 and July 18, 2021. *See* Supreme Court Order, Order List 594 U.S. (July 19, 2021).

The denial of review by the Supreme Court of New Jersey was entered on June 1, 2021. App. 1.

This Court's jurisdiction is invoked under 28 U.S.C. § 1257 because the final judgment of the New Jersey courts violates the Commerce Clause of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause provides: "Congress shall have Power To . . . regulate Commerce . . . among the several States . . . ." U.S. Const. art. 1, § 8, cl. 3.

The tax statute at issue provides, in relevant part, that:

> Each entity classified as a partnership for federal income tax purposes . . . having any income derived from New Jersey sources, that has more than two owners shall . . . make a payment of a filing fee of $150 for each owner of an interest in the entity, up to a maximum of $250,000.

N.J. STAT. ANN. 54A:8-6(b)(2)(A) (hereinafter cited as "N.J.S.A."). The statutory provision is included in full at App. 75–78.

STATEMENT OF THE CASE

A. Factual Background.

1. In 2002, New Jersey's Legislature enacted an annual levy on any partnership deriving any amount of income from New Jersey—no matter how minimal. App. 29–30. One dollar is enough. The levy is computed by multiplying the number of partners in the partnership by $150, up to a maximum levy of $250,000. There is no statutory mechanism for apportionment. N.J.S.A. 54A:8-6(b)(2). So a publicly traded partnership, like petitioner, with tens of thousands of partners all over the country pays $250,000 annually, regardless of whether it does 1%, 10%, or 100% of its business in New Jersey. App. 30.

This levy was enacted as part of a comprehensive state tax reform law, intended to "raise about $1 billion" in "general fund revenue" each year. Business Tax Reform Act, L. 2002, c. 40, sec. 22; *Legislative Fiscal Estimate to A. 2501* at 1 (enacted as N.J. P.L. 2002, c. 40) (Sept. 13, 2002). Of that, the levy itself was expected to raise up to $80 million annually. App. 31. All monies raised under the Act, including the partnership levy, are placed in the State's general fund to be spent like any other tax revenue. App. 30–31.

New Jersey's Legislature enacted the levy because it was concerned that partnership income might be escaping New Jersey taxation. App. 53. Additionally, the Legislature labeled the levy a "fee," stating its intent to "compensate the State for the large volume of return processing and compliance enforcement from such entities." App. 30. Yet despite this compensatory intent, neither the Legislature nor the state agency charged with administering the levy, made any effort to associate the amount of the levy with costs incurred by the State for administrative burdens. Instead, as the Director of the New Jersey Division of Taxation conceded, the amount of the levy was determined by "legislative fiat." Transcript of Oral Argument at 50, *Ferrellgas Partners, L.P. v. Director, Division of Tax'n*, 2018 N.J. Tax Unpub. LEXIS 65 (N.J. Tax Ct. Dec. 7, 2018) (included at App. 80). Indeed, New Jersey's annual revenue from the levy was more than twice the total payroll of the entire New Jersey Division of Taxation (the state agency charged with administering taxes of all of New Jersey's taxpayers, of which partnerships are only a small fraction). App. 40–41.

2. Petitioner, Ferrellgas, sells propane in 50 States; about 1% of its sales are in New Jersey. App. 9. It is a Master Limited Partnership, which means that it uses a legal entity form, authorized by Congress, by which it has raised capital by selling partnership "units" that trade like stock. During the relevant time period, Ferrellgas's partnership units were traded on the New York Stock Exchange; it had tens of thousands of partners all over the country. App. 37–38.

Since Ferrellgas sold propane to dealers in New Jersey in each of the three years at issue (2009–2011), it was subject to New Jersey's partnership levy. Ferrellgas had tens of thousands of partners, so its annual partnership levy was computed as $250,000 each year. App. 39. In some years the levy was greater than the amount of its entire New Jersey-source income. Ferrellgas paid the partnership levy to the Director of the New Jersey Division of Taxation, the agency charged with the administration of the levy. App. 9–10.

B. Procedural History.

Petitioner, Ferrellgas, timely claimed a refund of the levy paid for 2009 through 2011 from the Director, following the process established under state law, which is the same process used for tax refunds. App. 39. In its claim, petitioner asserted that the partnership levy fails this Court's test for "internal consistency" and asserted that it was entitled to a refund under the Commerce Clause. App. 39–40. The Director denied the claim and petitioner appealed to the Tax Court of New Jersey, which functions as a trial court. App. 40.

In the tax court, the parties moved for summary judgment on the internal consistency question. The court granted summary judgment in favor of the Director. App. 73. The tax court, citing this Court's decision in *ATA–Michigan*, determined that the hypothetical test of internal consistency "is certainly not the law." App. 62. Indeed, the state court cited favorably a dissenting opinion of this Court that had characterized the internal consistency test as "a judicial fraud." App. 61 n.15 (*citing Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 572–73 (Scalia, J., dissenting)).

On appeal, the Superior Court of New Jersey, Appellate Division, sustained the tax court's decision without significant additional analysis. App. 23–25. The Supreme Court of New Jersey declined review. App. 1.

REASONS FOR GRANTING THE PETITION

The Commerce Clause requires any state tax or fee to be fairly apportioned according to the proportion of the commerce that takes place in the State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). To ensure fair apportionment, this Court requires that the levy pass the test for "internal consistency." That test looks to the structure of the levy to see whether its hypothetical "identical application by every State in the Union would place interstate commerce at a disadvantage as compared to commerce intrastate." *Wynne*, 575 U.S. at 562 (internal quotations omitted). If a person with operations in multiple States would pay more than a person with identical operations, but concentrated in a single State, the levy fails the internal consistency test because the levy "would place interstate commerce at the mercy of those remaining States that might impose an identical" levy. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

By using a hypothetical construct, the internal consistency test identifies levies that "inherently discriminate against interstate commerce without regard to the tax policies of other States." *Wynne*, 575 U.S. at 562. The hypothetical nature of the test allows a levy to be tested "as a matter of law," *Jefferson Lines*, 514 U.S. at 185, and thus without regard to "the shifting complexities of the tax codes of 49 other States . . . ." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 645 (1984).

In this case, New Jersey's courts sustained a $250,000 annual flat-dollar levy imposed without apportionment. The levy clearly fails the internal consistency test: if the levy were enacted by every State, petitioner, Ferrellgas, would be subject to a $250,000 levy in each of the 50 States where it does business—thereby subjecting it to an aggregate levy of $12,500,000 a year. By contrast, if the same partnership conducted the same business, but concentrated it solely in New Jersey, it would pay $250,000 only once. Despite failing the internal consistency test, the courts sustained the levy, citing this Court's decision in *ATA–Michigan*, which the New Jersey courts apparently understood to have undermined the internal consistency test. Indeed, the Tax Court of New Jersey derided the internal consistency test as a "resort to the mechanical application of . . . hypothetical math." App. 60. The tax court cited a dissenting opinion of this Court calling the internal consistency test a "judicial fraud." App. 61 n.15 (citing *Wynne*, 575 U.S. at 572–73 (Scalia, J., dissenting)).

The state court's confusion over the internal consistency test has its roots in a tension between two of this Court's own decisions, which has now blossomed into a conflict among state courts—a conflict that impacts the laws in at least twelve States and affects tens of thousands of businesses.

I. Two decisions, *ATA–Scheiner* and *ATA–Michigan,* have created "considerable confusion," which has now resulted in a split between state courts regarding the vitality of the internal consistency test.

A. Tension between *ATA–Scheiner* and *ATA–Michigan* has left "considerable confusion."

In *ATA–Scheiner*, this Court invalidated two levies (one a fee, the other a tax) imposed by Pennsylvania. 483 U.S. 266, 271 (1987). Both levies were an unapportioned, flat-dollar amount, imposed on any truck using Pennsylvania's roads, regardless of whether that use was wholly in-state or interstate. *See id*. at 273–75. This Court applied the internal consistency test and concluded that the levies failed because, if other States were to enact identical unapportioned levies, a single truck engaged in interstate commerce would pay the full amount of the levies in each State; by contrast, a single truck engaged only in in-state commerce would pay one pair of levies only once. *See id*. at 284–87; *see also Nippert v. Richmond*, 327 U.S. 416, 430 (1946) (noting that "the cumulative burden" of flat municipal levies "will be felt more strongly by the out-of-state itinerant than by the one who confines his movement within the State").

Relying on *ATA–Scheiner*, courts around the country have struck down unapportioned, flat-dollar levies on at least fourteen occasions.[2]

[2] *See Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267, 1281–83 (7th Cir. 1992); *Trailer Marine Transp. Corp. v. Vazquez*, 977 F.2d 1, 30–34 (1st Cir. 1992); *Homier Distrib. Co. v. Staley*, 371 F. Supp. 2d 1006, 1013 (E.D. Ark. 2003); *Am. Trucking Ass'ns., Inc. v. New Jersey*, 852 A.2d 142, 163 (N.J. 2004); *Am. Trucking Ass'ns., Inc. v. Sec'y of Admin.*, 613 N.E. 2d 95, 98, 103 (Mass. 1993); *Am. Trucking Ass'ns, Inc. v. Sec'y of State*, 595 A.2d 1014, 1015–16 (Me. 1991); *Private Truck Council of Am., Inc. v. Okla. Tax Comm'n*, 806 P.2d 598, 605, n.23 (Okla. 1990), *vacated on other grounds sub nom., Nat'l Private Truck Council v. Okla. Tax Comm'n*, 501 U.S. 1247 (1991), *judgment reinstated on remand sub nom., Private Truck Council of Am., Inc. v. Okla. Tax Comm'n*, 879 P.2d 137 (Okla. 1993), *aff'd sub nom., Nat'l Private Truck Council v. Okla. Tax Comm'n*, 515 U.S. 582 (1995); *Am. Trucking Ass'ns, Inc. v. Gray*, 746 S.W.2d 377, 378 (Ark. 1988), *aff'd sub nom. Am. Trucking Ass'ns. Inc. v. Smith*, 496 U.S. 167 (1990); *Commonwealth Transp. Cabinet v. Am. Trucking Ass'ns, Inc.*, 746 S.W. 2d 65, 67 (Ky. 1988); *Am. Trucking Ass'ns, Inc. v. Goldstein*, 541 A.2d 955, 958 (Md. 1988); *Boyd Bros. Transp. v.*

Then, in *ATA–Michigan,* this Court confronted a $100 regulatory fee imposed on trucks using Michigan roads. *Id*. at 431–32. Michigan imposed the fee as part of an act to regulate the trucking industry. 545 U.S. 429 (2003). Michigan's fee compensated the State for "costs such as those of regulating vehicular size and weight, of administering insurance requirements, and of applying safety standards." *Id*. at 435 (internal quotations omitted). And the fee was roughly proportionate to the cost of the State's regulatory activity. *See id.* at 436; *Westlake Tansp., Inc. v. Mich. Pub. Serv. Corp.*, 662 N.W.2d 784, 801 (Mich. Ct. App. 2003) (affirming trial court's finding that Michigan's levies "were not wholly disproportionate") (internal quotations omitted).

Importantly, Michigan's fee was limited to trucks making point-to-point deliveries in Michigan; trucks passing through Michigan, or making a single stop in Michigan, did not pay the fee. *See ATA–Michigan*, 545 U.S. at 432. In *ATA–Michigan*, therefore, this Court distinguished between a regulatory fee that is focused upon local activity and fees and taxes imposed on interstate commerce. In this way, this Court left space for the "numerous flat fees" that States have historically imposed on regulated local industries and businesses. *See id*. at 434 (citing Wyoming's $40 annual ambulance license fee imposed under the Wyoming Emergency Medical Services Act of 1977 as an example of an unobjectionable regulatory fee); Brief for the United States as Amicus Curiae Supporting

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State Dep't of Revenue, 976 So. 2d 471, 481–82 (Ala. Civ. App. 2007); *Shannon v. Texas*, 129 S.W.3d 670, 673 (Tex. App. 2004); *Am. Trucking Ass'ns, Inc. v. Wisconsin*, 556 N.W.2d 761, 767 (Wis. App. 1996); *Black Beauty Trucking, Inc. v. Ind. Dep't of State Rev.*, 527 N.E.2d 1163, 1165 (Ind. T.C. 1988).

Respondents at 18–22, *ATA–Michigan*, 545 U.S. 429 (2005) (No. 03-1230).

The problem, however, is that this Court did not define what it meant by a regulatory fee that is focused on a local activity—especially where a single person in interstate commerce may conduct "local activity" in multiple states. *See ATA–Michigan*, 545 U.S. at 437; *Cf. Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) (rejecting State efforts to re-characterize interstate activity as intrastate merely by pointing to "a local event at the end of interstate commerce"). One noted commentator, whose treatise has been cited by this Court over twenty times, has observed that *ATA–Michigan* has left "the scope of the internal consistency doctrine in a state of considerable uncertainty." 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.16[1][a][vi] (3d ed. 2001 & Supp. 2021–2).

B. This confusion over *ATA–Michigan* has crystalized into a split between state courts.

Some state courts have interpreted *ATA–Michigan* as if it completely undermines the internal consistency test as applied to unapportioned flat fees and taxes. In Oregon, that State's Court of Appeals followed *ATA–Scheiner* and applied the internal consistency test, invalidating a flat-dollar unapportioned tax. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Dep't of Transp.*, 90 P.3d 15, 23–24 (Or. Ct. App. 2004). During the pendency of an appeal of that decision, this Court decided *ATA–Michigan*. Thereafter, the Oregon Supreme Court reversed. 124 P.3d 1210 (Or. 2005). That court determined that *ATA–Michigan* "effectively refutes" the hypothetical internal consistency test as applied to flat-dollar taxes. *Id.* at 1220.

Similarly, in petitioner's case, New Jersey's courts determined that the hypothetical test of internal consistency "is certainly not the law." App. 62. The court derided the internal consistency test as a "resort to the mechanical application of . . . hypothetical math." App. 60. The New Jersey courts based their determination in large part on *ATA–Michigan*, finding that since the levy reimbursed the State for local costs, the levy did "not implicate the [dormant Commerce Clause] under *ATA–Michigan* . . . ." App. 55.

The New Jersey courts' decisions, therefore, mark a distinct split from the approach of the California Court of Appeal. *See Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (Cal. Ct. App. 2008); *see also Ventas Fin. I, LLC v. Franchise Tax Bd.*, 165 Cal. App. 4th 1207 (Cal. Ct. App. 2008). Like New Jersey's levy, California's levy was imposed on a disfavored form of legal entity—in California's case, a limited liability company. The rationale for California's levy, therefore, is like New Jersey's levy; they are each intended to compensate the State for perceived burdens imposed on state agencies (and loss of state revenue) as a result of a disfavored kind of legal entity. Accordingly, like New Jersey, the California Legislature labeled its levy a "fee" because of the Legislature's intent to compensate the State for the special in-state burdens associated with the taxpayer's choice of legal entity. *See Northwest Energetic*, 159 Cal. App. 4th at 855.

Importantly, like the levy in petitioner's case, the California levy was measured by the entity's interstate activity—and was not apportioned. *See id.* at 850. Like the levy in petitioner's case, the California levy failed the test for internal consistency. *See id.* at 862. And like the levy in petitioner's case, California's tax agency defended the levy by arguing that it should be sustained as a local fee under *ATA–Michigan*. *See id.* at 862–63. The California court, however, unlike New Jersey's courts, invalidated the levy because the levy was not internally consistent.

There is, therefore, a distinct split in how state courts view the ongoing vitality of the internal consistency test as it applies to unapportioned levies.

II. It is important to resolve the confusion over the vitality of the internal consistency test, because at least twelve States impose one or more levies that fail internal consistency and that affect tens of thousands of businesses around the country.

The levy in this case is imposed on partnerships that do any amount of business in New Jersey. But New Jersey is not the only State that imposes an unapportioned levy. In fact, at least twelve States impose unapportioned levies that fail internal consistency.[3] Some levies are an unapportioned flat-dollar amount.

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[3] *See* ALA. CODE § 40-14A-22(c) (2021) ($100 minimum tax); ARK. CODE ANN. § 26-54-104(4)(B) (2021) ($300 minimum tax); CAL. REV. & TAX CODE § 23153(d) (2021) ($800 minimum tax); CONN. GEN. STAT. §§ 12-214(b)(8)(A), 12-219(b)(8)(A) (2021) ($250 minimum tax); D.C. CODE § 47-1807.02(b) (2021) ($250 minimum tax); DEL. CODE ANN. § 15-1208(a) (2021) ($300 minimum tax); MASS. GEN. LAWS ch. 63, § 39(3)(b) (2021) ($456 minimum tax); N.J STAT. ANN. 54:10A-5(e) (2021) ($2,000 minimum tax); OR. REV. STAT. § 314.725 (2021) ($150 minimum tax); R.I. GEN. LAWS § 44-11-2(e) (2021) ($400 minimum tax); TENN. CODE ANN. § 48-247-103(d) (2021) ($300 minimum tax, $50 per LLC member); TENN. CODE ANN. § 67-4-2119 (2021) ($100 minimum tax); UTAH CODE ANN. § 59-7-104(3) (2021) ($100 minimum tax); VT. STAT. ANN. tit. 32 § 5832(2)(C)–(E) (2021) ($750 minimum tax); VT. STAT. ANN. tit. 32 § 5921 (2021) ($250 minimum tax).

For example, Massachusetts imposes an unapportioned $456 tax for the "enjoyment under protection of the laws of Massachusetts."[4] Some levies are, like New Jersey's levy, based on the number of owners of a legal entity. For example, Tennessee imposes an unapportioned levy on limited liability companies at the rate of $50 per member.[5] And other levies, while seemingly progressive, actually function like flat taxes. Typical of these, Vermont imposes a levy on any corporation doing business in Vermont. Once a corporation hits a certain level of receipts, the levy is a flat-dollar amount.[6]

These levies all have one thing in common: they each fail the internal consistency test. These levies may seem to be a small burden. But in the aggregate, this burden can be quite large. To illustrate, consider Tennessee's unapportioned tax on LLCs.[7] Imagine an LLC owned by ten individuals making sales from its only physical location in Tennessee through eBay to customers in all 50 States. Historically, since the LLC was physically located in one State, the LLC would owe a tax to Tennessee of $500 ($50 per owner x 10 owners). But now, this LLC is exposed to paying the $500 tax in each of the 50 States as a result of this Court's decision in *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080 (2018). Before *Wayfair*, a small business with one physical location selling over eBay would pay one levy where it is located. But under *Wayfair*, a

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[4] MASS. GEN. LAWS ch. 63, § 39(3) (2021) (flush text); MASS. GEN. LAWS ch. 63, § 39(3)(b) ($456 minimum tax).

[5] TENN. CODE ANN. § 48-247-103(d) (2021).

[6] VT. STAT. ANN. tit. 32 § 5832(2)(E) (2021) (capping levy at $750).

[7] TENN. CODE ANN. § 48-247-103(d) (2021).

State may now impose a levy regardless of whether a business has a physical presence in the State. Now, after *Wayfair*, that business can be subject to an unapportioned levy in every location where it makes sales. *Id*. at 2099. So for tens of thousands of businesses now subject to unapportioned levies in numerous States, the impact in the aggregate is significant.

This Court, in *Wayfair*, had assumed that "other aspects of the Court's Commerce Clause doctrine" would "protect against any undue burden on interstate commerce" by "taking into consideration" those who "engage in commerce across state lines." *Id*. at 2098. One of those "other aspects" assumed by this Court is that a state tax be "fairly apportioned." *Id.* at 2091. The New Jersey courts, by undermining the internal consistency test, have stripped away the protection offered by apportionment for those who "engage in commerce across state lines," which was essential to this Court's decision in *Wayfair.*

Indeed, after *Wayfair*, other States have recognized the burden that unapportioned levies pose to interstate commerce. In a brief filed with this Court in 2019, the State of Arizona challenged an unapportioned, flat-dollar $800 levy California imposed on members of LLCs. In its brief, the State of Arizona noted that the levy was unapportioned, and if every State enacted such a levy, "investment across state lines would be substantially dampened as those [levies] would serve as an entry barrier to investing in LLCs in any states where investors do not have any prior investments." Brief for State of Arizona, *State of Arizona v. California*, Docket No. 22O150 (Feb. 28, 2019).

This issue is, therefore, very important to tens of thousands of businesses across the country that are exposed to multiple unapportioned levies and fees.

III. This case is a good vehicle to resolve the confusion; another opportunity may not arise.

A. This case allows the Court to define when internal consistency is not relevant.

In *ATA–Michigan*, this Court made clear that a levy need not be internally consistent if it is a regulatory fee that is locally focused. This case allows this Court to define both of these elements—i.e., 1) when is a levy a regulatory fee and 2) in what way must a fee "focus[] upon local activity" so that it is exempted from the test for internal consistency. *ATA–Michigan*, 545 U.S. 429, 438 (2005).

1. The fee-versus-tax distinction. As a threshold matter, this Court can clarify whether, for purposes of the vitality of the internal-consistency test, it is relevant to distinguish between a regulatory fee and a tax. After all, in *ATA–Scheiner*, this Court used the terms "fee" and "tax" interchangeably. In *ATA–Michigan*, the levy was clearly a regulatory fee. If the fee-versus-tax distinction matters, this case provides a good vehicle to define when a levy is a regulatory "fee" for this purpose.

For example, New Jersey's levy was imposed as part of a tax act, not a regulatory act. Is that relevant? The proceeds were placed in the General Fund, not a special fund. Does that matter? The amount of the levy was determined by "legislative fiat," not by evaluating costs to the State. Is that relevant? The levy is collected by the state taxing agency, not a state regulator. Is that important? This Court can, therefore, answer those questions and determine whether the character of a levy as a regulatory "fee" is relevant—and if it is, how a "fee" is defined for this purpose.

2. The relevant "focus upon local activity." Under *ATA–Michigan*, this Court "put[] enormous pressure on the meaning of the word 'local,' because it is apparently the 'local' or 'nonlocal' character of the fee or tax that determines whether it is subject to scrutiny under the internal consistency test." 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.16[1][a][vi] (3d ed. 2003 Supp. 2021–2). This case offers a good vehicle to define which activity should be evaluated for its "local" or "non-local" character, and what "local" means.

In this case, New Jersey computes its levy by reference to the number of partners in a partnership—regardless of whether they are residents or nonresidents. Yet New Jersey's courts believed that the levy was "locally focused" because the levy was intended to compensate for the State's own costs in processing partnership tax returns—costs incurred by the state agencies wholly within New Jersey. Thus unlike Michigan's fee in *ATA–Michigan*, which was limited to fee-payors making point-to-point deliveries in the State, New Jersey has focused on the State's own in-state activity. This case, therefore, provides this Court with a vehicle to clarify that the relevant activity that must be "locally focused" is the activity of the fee-payor, not the state agency.

Further, this Court can clarify whether a "local focus" means that the levy is imposed on, and measured in connection with, "a discrete event facilitated by the laws and amenities" of the State where the levy-triggering event takes place. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 186 (1995). That approach is familiar: for example, this Court has sustained unapportioned sales taxes on the basis that a sale is a discrete event that takes place in a single State—i.e., where title transfers. *See McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Likewise, this Court has sustained unapportioned taxes on services, provided there is a defined confluence of local events that can only take place in a single State. *Jefferson Lines*, 514 U.S. at 189–91 (the sale of a bus ticket at the time and place of the commencement of a bus trip can only take place in one State); *see also Goldberg v. Sweet*, 488 U.S. 252, 263 (1989) (allowing an unapportioned telecommunications tax, but only if the confluence of the billing address and termination or origination of a phone call are in a single State).

This Court could make it clear that a regulatory fee may be imposed without apportionment, so long as the fee is triggered by, and measured in connection with, the confluence of events that would only take place in a single State. This formula would distinguish the point-to-point deliveries in *ATA–Michigan* from the interstate transportation at issue in *ATA–Scheiner*.

B. This case is a good vehicle because it involves a sufficiently large amount at issue to justify litigation—a situation that is not characteristic of unapportioned, flat-fee cases.

This case is a good vehicle because it involves an unusually large unapportioned levy—$250,000 per year—thus making it economically feasible for the levy-payor to hire counsel and present this issue to the Court. By contrast, most unapportioned levies are typically so small ($456 here, $750 there) that they avoid scrutiny because it is not economically feasible to challenge them. Federal district courts are often unavailable because of the jurisdictional bar of the Tax Injunction Act, 28 U.S.C. § 1341 (stripping federal courts of jurisdiction in state tax cases), and principles of comity. Attorney's fees are unavailable. *National Private Truck Council*, 515 U.S. 582 (1995) (prohibiting attorney's fees in state tax cases under 42 U.S.C. § 1988); N.J.S.A. 54:51A-22 (2021) (severely limiting attorney's fees in state tax cases). Class actions are typically prohibited against States; instead, most state statutes require refund claims by individual taxpayers. John F. Coverdale, *Remedies for Unconstitutional State Taxes*, 32 CONN. L. REV. 73, 121 (1999) ("Another serious obstacle to the recovery of unconstitutional taxes is the unavailablility in many states of class actions for the recovery of tax."); *see also* N.J.S.A. 54:49-14(c) (2021) ("A refund claim on behalf of a class is not permitted.").

As a practical matter, these procedural hurdles permit many unapportioned levies to evade review. The absence of a class action mechanism, fee shifting, or federal jurisdiction makes it difficult for businesses to bring challenges to unapportioned levies, especially as the law is unsettled and unapportioned levies tend to be relatively small. However, petitioner's case was able to overcome these procedural hurdles because it involves an unusually large levy of $250,000 per year. The size of this levy was sufficient to justify this litigation.

Thus, this case presents a rare opportunity for this Court to clear up the confusion on this legal question—a question that is important to the tens of thousands of multi-state businesses each of which are now required to pay unapportioned levies imposed by at least twelve other States.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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October 28, 2021

APPENDIX

APPENDIX A

SUPREME COURT OF NEW JERSEY

[Filed June 4, 2021]

C-694 September Term 2020

085367

FERRELLGAS PARTNERS, LP,

Plaintiff-Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

ORDER

A petition for certification of the judgment in A-003904-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 1st day of June, 2021.

/s/ Heather J Baker
CLERK OF THE SUPREME COURT

APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-3904-18T1

FERRELLGAS PARTNERS, LP,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

Argued December 16, 2020 — Decided January 13, 2021 Before Judges Sumners and Geiger.

On appeal from the Tax Court of New Jersey, Docket No. 7051-2014.

Kyle O. Sollie argued the cause for appellant (Reed Smith LLP and Jonathan E. Maddison (Reed Smith LLP) of the Pennsylvania bar, admitted pro hac vice, attorneys; Jonathan E. Maddison and Kyle O. Sollie, on the briefs).

Michael J. Duffy, Deputy Attorney General, argued the cause for respondent (Gurbir S. Grewal, Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Michael J. Duffy, on the briefs).

Vinson & Elkins, LLP, and Clifford Thau, Marisa Antos-Fallon, and Bryan Hogg, (Vinson & Elkins, LLP) of the New York bar, admitted pro hac vice, attorneys for amicus curiae Energy Infrastructure Council (George C. Hopkins, Clifford Thau, Marisa Antos-Fallon, and Bryan Hogg on the brief).

PER CURIAM

Plaintiff Ferrellgas Partners, L.P. appeals from December 7, 2018 and April 1, 2019 Tax Court orders granting partial summary judgment to defendant Director of the Division of Taxation (Division), upholding the denial of a refund of the partnership filing fees (PFF) that plaintiff paid for tax years 2009 through 2011. We affirm.

N.J.S.A. 54A:8-6(b)(2)(A) requires "[e]ach entity classified as a partnership for federal income tax purposes," that has more than two owners, "having any income derived from New Jersey sources," to pay "a filing fee of $150 for each owner with an interest in the entity, up to a maximum of at $250,000," when filing its informational tax return. Because it had more than 67,000 owners, plaintiff paid the maximum $250,000 PFF for tax years 2009 through 2011.

Plaintiff challenges the constitutionality of the PFF, arguing it violates the Dormant Commerce Clause (DCC) of the United States Constitution because it is not fairly apportioned and discriminates against interstate commerce, and is not internally consistent.[1] It further contends that the PFF is a tax, not a uniform regulatory fee, imposed on interstate commerce, that does not satisfy the internal consistency standard. Plaintiff argues that this court should remand to the Tax Court to cure these constitutional defects through three-factor apportionment.

The Statutory and Regulatory Framework

An entity "classified as a partnership for federal income tax purposes" is required to file an informational tax return setting forth all items of income and loss if the entity has "a resident owner" or "any income derived from New Jersey sources." N.J.S.A. 54A:8-6(b)(1). The return must identify the "name and address of each partner, member, or other owner of an interest in the entity however designated." *Ibid.*

The Business Tax Reform Act (BTRA), L. 2002, c. 40, was enacted to address large and multi-national corporations that earn billions in New Jersey source income but pay minimal taxes. *Sponsor's Statement to A. 2501* 51-52 (June 6, 2002). This was accomplished, in part, by "establish[ing] a revenue stream that captures enforcement and processing costs that New Jersey incurs from processing the vast network of

[1] The Commerce Clause provides: "Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with Indian tribes." *U.S. Const.* art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers Assn v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). This implied restraint on state authority to regulate interstate commerce is commonly known as the Dormant Commerce Clause.

limited liability companies and partnerships." *Id.* at 52. The BTRA was also intended to "affect[] the tracking of the income of business organizations, like partnerships, that do not themselves pay taxes but that distribute income to their owners, the eventual taxpayers." *Assembly Budget Comm. Statement to A. 2501* 1 (June 27, 2002).

To that end, the Legislature considered imposing a filing fee of $150 per owner on partnerships and entities classified as partnerships for federal income tax purposes, up to a maximum of $250,000 per tax year. *A. 2501* (June 6, 2002). The bill was subsequently amended to "[c]larify that the [PFFs] only apply only to partnerships that derive income from New Jersey." *Assembly Budget Comm. Statement to A. 2501* 13; *see also A. 2501* (June 28, 2002). "For pass-through entities that have income from New Jersey sources and more than two members, the bill establishes an annual $150 per owner filing fee, capped at $250,000 per entity annually." *Assembly Budget Comm. Statement to A. 2501* 7.

The Office of Legislative Services estimated that PFF would increase General Fund revenues by $40-$60 million in fiscal year 2003 and $28-$40 million in fiscal years 2004 and 2005. *Legislative Fiscal Estimate to A. 2501* 2 (Sept. 13, 2002).

N.J.S.A. 54A:8-6 was amended to include subsection (b)(2)(A), which imposes the PFF. It provides:

> Each entity classified as a partnership for federal income tax purposes, other than an investment club, having any income derived from New Jersey sources, including but not limited to a partnership, a limited liability partnership, or a limited liability company,

> that has more than two owners shall at the prescribed time for making the return required under this subsection make a payment of a filing fee of $150 for each owner of an interest in the entity, up to a maximum of $250,000.

[N.J. S.A. 54A: 8-6(b)(2)(A).]

The regulations initially proposed by the Division to implement the PFF included "an apportionment methodology for partnerships . . . liable for the [PFF] . . . that have partners . . . that never enter New Jersey." 35 N.J.R. 1573(a) (Apr. 7, 2003). The Division later explained that "only partners or professionals without nexus would be subject to apportionment." 35 N.J.R. 4310(a) (Sept. 15, 2003). Accordingly, the regulations provide that the PFF will be apportioned if a partnership has an office outside New Jersey and nonresident partners with no nexus to this State. N.J.A.C. 18:35-11.2(b). When applicable, apportionment is computed in accordance with N.J.A.C. 18:35-11.2(c), which provides:

The total apportioned partnership fee is equal to the sum of:

> 1. The number of resident partners multiplied by $150.00; plus
>
> 2. The number of nonresident partners with physical nexus to New Jersey multiplied by $150.00; plus
>
> 3. The number of nonresident partners without physical nexus to New Jersey multiplied by $150.00 and the resulting product multiplied by the corporate allocation factor of the partnership.

The Tax Court provided the following examples:

> If a partnership had all resident partners, the fee is $150 times the number of partners. N.J.A.C. 18:35-11.6, Ex. 1. If a Connecticut partnership, which had an office in Connecticut and New Jersey, and New Jersey source income, had 4 partners with no physical nexus to New Jersey, and the partnership's allocation factor was 0.4, the fee would apportioned by multiplying 4 x $150 x 0.4 or $240. *Id.*, Ex. 2. If a limited partner of a New Jersey partnership was a California limited partnership which stored property in the New Jersey partnership's office, had an allocation factor of 10%, and received $1 million in distribution from the New Jersey partnership, then the California limited partner would also be liable, as a partnership, for the fee because it has New Jersey source income. *Id.*, Ex. 3. Assuming all 15 partners of the California limited partnership had no physical nexus to New Jersey, the fee would be 15 x $150 x 0.1 or $225.

In a Technical Bulletin issued in 2005, the Division explained the amount of the PFF is "generally determined by the number of K-1s filed by . . . the partnership, including when a . . . tiered partnership or pass-through entity is involved." TB-55 (Apr. 6, 2005). As to non-resident partners, "[i]f the partnership has income earned outside New Jersey, the filing fee for non-resident partners that do not have physical nexus with New Jersey may be apportioned based on New Jersey source income," determined by applying the corporate allocation factor. *Id.* at 2. The PFF would not apply to partnerships that had "all . . . operations and facilities . . . located outside New Jersey." *Ibid.* The Technical Bulletin also stated that "[i]ncome cannot be allocated outside New Jersey (all income is New Jersey source income) if the partnership has no place of business outside New Jersey." *Ibid.*

The Tax Court's Findings of Fact

Plaintiff is a publicly traded limited partnership incorporated in Delaware that is headquartered and commercially domiciled in Kansas. Partnership interests in plaintiff were regularly traded on the New York Stock Exchange. Plaintiffs "general partner is Ferrellgas Inc., a wholly owned subsidiary of Ferrell Companies, Inc." According to its New Jersey partnership returns (N.J.- 1065), plaintiffs "limited partners are (1) the public 'shareholders,' (2) Ferrell Companies, Inc., (3) Ferrell Companies, Inc., dba Ferrell Propane, Inc., and (4) Jef Capital Management, Inc."

In tax year 2009, plaintiff had 67,019 partners, of whom 2542 were residents or partners with nexus to New Jersey. In tax year 2010, plaintiff had 66,835 partners, of whom 2423 were residents or partners with nexus to New Jersey. In tax year 2011, plaintiff had 82,047 partners, of whom 2927 were residents or partners with nexus to New Jersey.

Plaintiff is the 99% sole limited partner in an affiliated Delaware limited partnership, Ferrellgas, LP (the Operating Partnership). In turn, Ferrellgas Inc. is the Operating Partnership's 1% general partner. Plaintiff facilitates investments by the investing public in the Operating Partnership. The Operating Partnership distributes propane tanks nationwide under the label "Blue Rhino." Plaintiff has a storage facility in New Jersey. Three other locations handle service and delivery calls.

For tax years 2009 through 2011, plaintiff reported the following as allocable to New Jersey:

> (1) property (real and intangible) valued at $11,499,191; receipts of $20,380,367; payroll of $3,434,904, and a total apportionment of 1.1680% for tax year 2009; (2) property (real and intangible) valued at $11,418,129; receipts of $19,077,148; payroll of $3,229,104; and a total apportionment of 1.0550% for tax year 2010; and, (3) property (real and intangible) valued at $11,510,505; receipts of $21,519,209; payroll of $2,887,867; and a total apportionment of 1.0161% for tax year 2011.

This was the same allocation factor used by the Operating Partnership. Plaintiff also reported New Jersey sourced net partnership income of $942,513 in tax year 2009; $597,413 in 2010; and $190,966 in 2011.

The distributive share of New Jersey source partnership income from the Operating Partnership was $1,208,149; $898,503; and $477,459, respectively, for tax years 2009 to 2011. These were offset with plaintiffs ordinary losses from trade or business for each tax year. The court noted that the reported distributive share of New Jersey source partnership income differed from that reported on the K-1 forms issued to plaintiff by the Operating Partnership in tax years 2009 to 2011.

Plaintiff paid the maximum $250,000 PFF in tax years 2009 to 2011. It then sought a full refund of the PFF it had paid in those years, claiming its distributive share of partnership income from the Operating partnership was not reportable income. Plaintiff filed amended NJ-1065s that eliminated the New Jersey source income it had previously reported.

The Division denied plaintiffs refund claims, determining that "pursuant to N.J.A.C. 18:35-1.3(d)(6), a tiered partnership must 'take into account its distributive share of partnership income' and cannot thereafter 'reallocate' it." Because the Operating Partnership had allocated income to New Jersey, plaintiff could not reallocate it.

Plaintiff filed a complaint against the Director and moved for partial summary judgment, contending the PFF is a tax that violated the DCC under three of the four criteria enumerated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because the PFF: (1) discriminated against interstate commerce; (2) was not fairly apportioned; and (3) was not fairly related to the services provided by the Division. In support of its claims, plaintiff provided the following data obtained from the New Jersey Department of Treasury:

> (1) The New Jersey source income reported by all partnerships for tax years 2009-2011 was $26,400,624,146; $42,211,064,190; and $11,679,724,687 respectively.
>
> (2) The partnership filing fees received from all entities in tax years 2009-2011 totaled $44,703,658; $47,109,396; and $47,461,768 respectively.
>
> (3) The salaries paid to all employees of the Division of Revenue who worked on processing [Gross Income Tax] returns for [fiscal years] 2009-2011 totaled $22,933,753; $18,373,397; and $20,101,294.
>
> (4) In each tax year 2009-2011, Taxation processed the following number of NJ-1065s: 168,628; 175,517; and 182,745. For each of those tax years, the total returns filed (for all

> types of income taxes) were about 4.7 to 4.9 million.
>
> (5) All amounts collected as the filing fee were deposited into the General Fund, as part of the [Corporate Business Tax], a category in the General Fund.

While plaintiff did not challenge the validity of the regulations, it claimed they did not cure the partnership levy through apportionment. Plaintiff asserted the Division could cure the DCC violation by apportioning the $250,000 maximum fee. The Tax Court concluded "[t]here was no fee apportionment for [plaintiff] because the number of its domestic or in-[s]tate partners caused the fee to reach the $250,000 cap."

The Division cross-moved for partial summary judgment, arguing the PFF "is a regulatory fee intended to defray administrative costs" associated with "processing, examining, and auditing" plaintiffs partner and partnership returns, and thereby valid under *Am. Trucking Assns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005) *(ATA-Michigan).* The Division asserted "the court need only examine whether the amount [of the PFF] is excessive when the benefits to a taxpayer are compared to the State's interests under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)." The Division maintained the PFF was not excessive since the fee equates to less than $4 per partner. Alternatively, the Division argued that "even if the PFF is deemed a tax, it still does not violate the DCC because it is": (1) "fairly apportioned under its regulations"; (2) nondiscriminatory since it applies to any partnership; and (3) co-relative to the services provided by the State (since plaintiff maintained storage facilities in New Jersey and was able to do business here). The Division noted that applying the apportionment sought by plaintiff would reduce the fee to less than $1 per partner, an unreasonable result.

The Tax Court employed the following test for determining the constitutionality of a state-imposed levy under the DCC:

> (1) If a statute discriminates facially or in practical effect, it is invalid. The challenger has the burden to prove discrimination either way. If discrimination is proven, the State must then justify the statute vis-à-vis the local benefits, and lack of nondiscriminatory alternatives. This is the "less stringent" test, albeit still a heightened scrutiny.
>
> (2) Generally, a tax is subject to a stricter test, i.e., it must also be internally consistent, and thus, must be fairly apportioned. The challenger has the burden to prove the lack of apportionment. The State must then justify the statute as being nondiscriminatory, or that it cannot achieve a more "accurately apportioned fee." A State need not provide both a credit for, and an apportionment of, the challenged tax.
>
> (3) If a statute or regulation is not discriminatory facially or in practical effect, then the statute may need to be examined under the burden-benefit balancing test if the excessiveness of the fee burdens interstate commerce. It would appear that the same initial burden of proof is on the challenger to prove discrimination, and then the excessiveness of the burden on interstate commerce when compared to the governmental benefit, after

> which the burden will shift to the State in proving the opposite.
>
> (4) The label of the levy is irrelevant to decide whether State law or regulation discriminates against interstate commerce.
>
> (5) The DCC protection applies to residents and non-residents.
>
> (6) For purposes of the DCC analysis, flat fees are sometimes treated as taxes, thus subject to the four-part test of *Complete Auto*, but sometimes not, especially if the levy is found to be non-discriminatory and applies only to intrastate transactions.

The court first addressed whether interstate commerce was burdened by the PFF. Recognizing that the Operating Partnership was the entity engaged in nation-wide propane sales, and had not joined in challenging the PFF, the Tax Court found:

> [Plaintiff]'s activity . . . is its investment in its affiliate directly or indirectly, which in turn facilitates (in part or otherwise) the earning of income by the Operating Partnership. Stated differently, the "commerce" being impacted is [plaintiff]'s provision of capital, and its facilitation of the provision of capital by residents and nonresidents, to the Operating Partnership, directly or indirectly, which investment enables [plaintiff] to earn income from the Operating Partnership, thus, to earn New Jersey source income. Such commerce could be interstate because [plaintiff] is a foreign partnership as are some of its partners, thus, capital contributions from such partners, when infused into the Operating Partnership,

> and used in the latter's activities which are both in and out-of-State, can implicate interstate commerce.
>
> [(citations omitted).]

The court found that "simply because [plaintiff] may be . . . involved in interstate commerce does not mean that the DCC is automatically implicated, and without more, render a levy, regardless of whether it is labeled a fee or a tax," unconstitutional.

The court then focused on whether the PFF "discriminates against [plaintiff]'s investment activity by improperly favoring investment activity . . . in a local business, operation, or activity, to the disadvantage of that same investment activity in an out-of-State business, operation or activity." It concluded that the Legislature "wanted to track New Jersey sourced income earned or derived by partnerships engaged in business (as opposed to small investment clubs), since partnerships are not themselves taxed, and instead pass-through the income earned/derived to partners, who/which are taxed."

The court determined "that the activity or transaction for which the fee is imposed is based on the governmental activity of processing/reviewing returns," thereby "regulating partnerships by tracking their New Jersey source income." This "regulation or governmental activity [was] a purely intrastate activity and is not commerce, let alone interstate commerce."

The court noted that "the Legislature's primary concern was to ensure that the pass-through New Jersey-derived income by large pass-through entities be captured," creating an "urgent need" to track "such income, which then required a review of these entities' informational returns and its members' tax returns."

Hence, "the Legislature used the filing fee as a mechanism to pay such costs." The court reiterated that "the fee is imposed only if the partnership derives New Jersey source income." Considering these circumstances, the court held that the PFF "does not implicate the DCC under *ATA-Michigan* even if it is imposed on an interstate commerce participant, such as [plaintiff]," and granted partial summary judgment to the Division.

The court next addressed whether the PFF facially discriminated against plaintiff or its activity. It found N.J.S.A. 54A:8-6(b)(2)(A) "provides no 'home' based advantage, that is, one which favors local over foreign partnerships." The court explained that "the PFF is not imposed based on the location of the partnership, or the nature/scope of its particular business activity." Instead, "the PFF is imposed if the partnership has New Jersey source income to be reported on an NJ-1065." Thus, "New Jersey is not exercising any economic protectionism by unduly favoring in-State activities or transactions over those same activities or transactions conducted interstate." The court found that "[t]he PFF does not bar any pass-through entity from earning income/loss outside New Jersey, nor does it incentivize or promote local business over out-of-State business. To the contrary, domestic partnerships pay the same PFF, and are subject to the same $250,000 cap as non-domestic partnerships." Therefore, N.J.S.A. 54A:8-6(b)(2)(A) "is facially neutral and regulates even-handedly."

The court also considered whether the PFF had a disparate impact on investment activity, resulting in an impermissible burden on interstate commerce by making out-of-state entities or businesses "pay more than their fair share of a State-imposed levy or by making it so expensive, disproportionately for them," to engage in business in New Jersey. The court found it did not, concluding that "[o]ut-of-[s]tate partnerships earning New Jersey source income/loss are not paying any more than an in-[s]tate partnership" with the same income level "since each will pay the same PFF and the same cap amount (if each had more than 1,667 partners)."

The court explained that the "DCC 'does not seek to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.'" (Quoting *ATA-Michigan*, 545 U.S. at 438.) It noted that the PFF paid by plaintiff is "extremely low (if the $250,000 cap is divided by the number of partners), as compared to a smaller partnership." Thus, "the effect on interstate commerce would be minimal or only incidental."

The court further found plaintiff did not provide "any proof that its interstate commerce is unduly burdened." It rejected plaintiffs "resort to the mechanical application of the hypothetical math under the internal consistency component of *Complete Auto*, [as] a substitute for its burden of proving, at least prima facie, that the PFF results in a disparate impact on its interstate investment activity."

The court distinguished both *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) and *Am. Trucking Ass'ns v. State*, 180 N.J. 377 (2004) *(ATA-NJ)*, where the plaintiffs presented proof of disparate impact. It noted that in *ATA-Michigan*, the Supreme Court upheld a "flat $100 fee imposed only upon intrastate transactions," finding it non-discriminatory since it taxed "only purely local activity" and not transactions that took place outside the State. 545 U.S. at 434, 437. The Court reached this conclusion even if all States charged similar fees, resulting in the trucker paying much higher aggregate fees, since those higher fees were imposed "only because it engages in local business in all those States." *Id.* at 438.

The Tax Court rejected the assertion "that any levy payable by an interstate commerce participant is automatically suspect unless apportioned." Rather, the focus "is whether a levy discriminates facially or practically." To that end, the internal consistency test "was formulated to insure that 100% of income earned by a taxpayer in a business operating in multi-states is divided among the [s]tates in which the income is earned, so that the total tax paid by the multi-state business is equal to the tax on 100% of income." Accordingly, multi-state income tax is not implicated by the PFF.

The court was "not persuaded that simply because the PFF is deposited into the general funds, it is a flat tax that must be apportioned pursuant to *Complete Auto.* Both fees and taxes raise revenues, just as they both impose a cost on a business."

The court recognized that if *Scheiner* applies, "an unapportioned levy must be internally consistent," citing *ATA-NJ*, 180 N.J. at 397. Here, N.J.S.A. 54A:8-6(b)(2) "imposes the PFF for a purely intrastate reason." "Therefore, *Scheiner* would not automatically apply."

The court further explained that since the statute "is neutral facially, and there is no proof of any disparate impact or undue burden on [plaintiffs] investment activity due to the PFF," the court is neither required to apply the internal or external consistency tests, nor determine "whether the PFF amount is fairly related to the services provided by the State."

Based on these findings, the court denied plaintiffs motion for partial summary judgment. Therefore, "it [did] not address the validity of [the Division's] regulations which permit an apportionment of the PFF."

The court also concluded that it did not need to a determine if Pike applied. Even if Pike did apply, plaintiff had not established that the PFF imposes an excessive burden on interstate commerce.[2]

On the other hand, the Division did not provide any independent information to show that the fee of $150 per partner or $250,000 cap is not excessive. While it contended that salary totals did not reflect the cost of employee benefits, the Division provided no supporting data. "Since neither [plaintiff] nor [the Division] provided any data, evidence or other proof on why the PFF fails or passes the Pike balancing [test], should that test even apply here," the court found it would be inappropriate to grant summary judgment to either party on this issue.

Based on these findings, the court determined that "N.J.S.A. 54A:8-6(b)(2) does not implicate or violate the DCC because it imposes the PFF to defray the costs of a purely intrastate governmental activity, which is to review partnership and partner returns, in order to track whether New Jersey sourced income/loss was reported to New Jersey." "[B]ecause the PFF

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[2] Plaintiff provided data showing that the revenues raised by the PFF were roughly double the $19 million in salaries paid by the Division. The court noted this equated to a modest $4 per-partner fee ($19 million in salaries ÷ 4.7 million returns = $4 per return), which did not prove that the PFF was an excessive burden on plaintiffs investment activity. Moreover, government costs were not clearly limited to salaries.

does not implicate the DCC," the court granted partial summary judgment to the Division.

Following the Tax Court's decision, plaintiff withdrew any remaining claims and requested that final judgment be entered. On April 1, 2019, the court issued an order entering final judgement upholding the denial of the PFF refund. This appeal followed.

Plaintiff raises the following points for our consideration:

POINT I

THE LEVY VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Levy Is Not Fairly Apportioned—In Fact, It Is Not Apportioned At All.

B. The Levy Discriminates Against Interstate Commerce. This Is Proved By The Fact That The Levy Is Not "Internally Consistent"—A Standard Developed By The United States Supreme Court To Test For Discrimination.

POINT II

THE NEW JERSEY TAX COURT AVOIDED THESE CONSTITUTIONAL TESTS BY CONCLUDING THAT THE PARTNERSHIP LEVY IS A WHOLLY IN-STATE REGULATORY FEE THAT DOES NOT "IMPLICATE" INTERSTATE COMMERCE. THE TAX COURT ERRED.

A. Contrary To The Tax Court's Conclusion, The Partnership Levy Was A Revenue-Raising Measure, Not A Regulatory Fee.

1. The Partnership Levy Was Intended To Raise Revenue.

2. The Record Shows That The Partnership Levy Was Not Intended To Function, And Did Not Actually Function, As A "Regulatory Fee."

(a) The Record Shows That The Partnership Levy Is Not A Uniform Charge For Return Processing—Whether Computed "Per Owner" Or Otherwise.

i. The Evidence Is Clear That The Levy Is Not A Uniform Charge For Return Processing.

ii. This Lack Of Uniformity Contrasts With Other Regulatory Fees That Have Been Sustained Because They Are, In Fact, Uniform Charges For Government Services.

(b) The Record Shows That The Partnership Levy Does Not Correlate In Any Way With Agency Costs To Process Returns. In Fact, No Effort Was Ever Made To Do So Because The Levy Is Simply A Revenue-Raising Measure.

3. Since The Partnership Levy Is A Revenue-Raising Measure Imposed On Interstate Commerce, The Tax Court's Reliance On [*ATA-Michigan*]. Was Misplaced.

4. With Respect To The Internal Consistency Standard For Discrimination, The Tax Court Erred In Suggesting That The Taxpayer Must Show Actual Discrimination.

B. A Taxpayer Has The Initial Burden Of Showing Discrimination Through Lack Of

Internal Consistency. If That Burden Is Met, The Supreme Court Of New Jersey Has Held That The State Then Has The Burden Of Proving That A Levy Is A Uniform Regulatory Fee. The Tax Court Acknowledged The State Did Not Meet That Burden In This Case, But Nonetheless Found In Favor Of The State.

POINT III

THIS COURT SHOULD REMAND TO THE TAX COURT FOR THAT COURT TO CURE THE PARTNERSHIP LEVY THROUGH APPORTIONMENT.

A. The Tax Court Has The Authority To Order Apportionment To Cure A Constitutional Defect.

B. There Are Two Reasonable Methods Of Apportionment To Fix The Problems With The Partnership Levy.

1. This Court Should Remand To The Tax Court To Apply Three-Factor Apportionment. Three-Factor Apportionment Is The Standard Method Of Apportionment And Is Supported By The Record In This Case.

2. In The Alternative, This Court Should Remand To The Tax Court To Apply Apportionment Based On The Percentage Of Partners With New Jersey Nexus. This Method Resolves The Constitutional Issues And Is Consistent With The Tax Court's Finding Regarding The Nature Of The Partnership Levy As A Tax On Capital-Gathering.

C. Apportionment Preserves Most Of The Revenue From The Partnership Levy.

D. Methods That Do Not Fix The Apportionment Problems.

1. The Partnership Levy Is Not Saved By Merely Imposing The Partnership Levy Only With Respect To Partners With New Jersey Nexus.

2. The Partnership Levy Is Not Saved By Applying An Apportionment Percentage To The Per-Partner Tax Rate.

We begin by recognizing several well-established principles. "A taxpayer challenging the Director's determination bears the burden of proof." *UPSCO v. Dir., Div. of Taxation*, 430 N.J. Super. 1, 8 (App. Div. 2013) (citing *Atl. City Transp. Co. v. Dir., Div. of Taxation*, 12 N.J. 130, 146 (1953)).

Statutes are presumed to be constitutional. *State v. Lagares*, 127 N.J. 20, 31-32 (1992). "This presumption of validity is particularly strong in the realm of economic legislation 'adjusting the benefits and burdens of economic life.'" *N.J. Ass'n of Health Plans v. Farmer*, 342 N.J. Super. 536, 551 (Ch. Div. 2000) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). In addition, we "defer to the interpretation of the agency charged with the statute's enforcement, and the Director's interpretation will prevail 'as long as it is not plainly unreasonable.'" *Campo Jersey, Inc. v. Dir., Div. of Taxation*, 390 N.J. Super. 366, 380 (App. Div. 2007) (quoting *Koch v. Dir., Div. of Taxation*, 157 N.J. 1, 8 (1999)). Where the issue is strictly legal, we afford no deference to the Director's statutory interpretations and review de novo. *Amer. Fire & Cas. Co. v. Dir., Div. of Taxation*, 189 N.J. 65, 79 (2006).

In turn, "[o]ur review of a decision by the Tax Court is limited." *UPSCO*, 430 N.J. Super. at 7 (citing *Est. of Taylor v. Dir., Div. of Taxation*, 422 N.J. Super. 336, 341 (App. Div. 2011)). "We recognize the expertise of the Tax Court in this 'specialized and complex area.'" *Advance Hous., Inc. v. Twp. of Teaneck*, 215 N.J. 549, 566 (2013) (quoting *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 327 (1984)). "The Tax Court judge's [factual] findings will not be disturbed unless we conclude they are arbitrary or lack substantial evidential support in the record." *UPSCO*, 430 N.J. Super. at 7-8 (citing *Yilmaz, Inc. v. Dir., Div. of Taxation*, 390 N.J. Super. 435, 443 (App. Div. 2007)). "Although the Tax Court's factual findings 'are entitled to deference because of that court's expertise in the field,' we need not defer to its interpretation of a statute or legal principles." *Advance Hous.*, 215 N.J. at 566 (quoting *Waksal v. Dir., Div. of Taxation*, 215 N.J. 224, 231 (2013)).

We review the Division's motion for partial summary judgment using the same standard applied by the Tax Court—"whether, after reviewing 'the competent evidential materials submitted by the parties' in the light most favorable to [plaintiff], 'there are genuine issues of material fact and, if not, whether the moving party is entitled to a judgment or order as a matter of law.' *Grande v. Saint Clare's Health Sys.*, 230 N.J. 1, 23-24 (2017) (quoting *Bhagat v. Bhagat*, 217 N.J. 22, 38 (2014)). Because we review the Tax Court's grant of partial summary judgment to the Division, we conduct a de novo review. *Waksal*, 215 N.J. at 231-32.

Applying those principles, we affirm substantially for the reasons expressed by Tax Court Judge Mala Sundar in her well-reasoned and comprehensive fortyone-page December 7, 2018 opinion. We add the following comments.

The Tax Court rejected the premise "that any levy, whether a fee or a tax, is automatically or per se unconstitutional under the DCC solely because it is a flat amount and the payor of the levy is involved in interstate commerce." We concur. Rather, the court must determine whether the levy discriminates against the identified interstate commerce by imposing an impermissibly disparate impact or excessive burden.

Plaintiff did not present a prima facie case of disparate impact or other form of discrimination violative of the DCC. On the contrary, the record demonstrates that the PFF funds the cost of the Division's processing and reviewing partnership and partner returns filed in New Jersey to track their New Jersey source income, which is a purely intrastate activity. Consequently, N.J.S.A. 54A:8-6(b)(2) does not implicate or violate the DCC, even though plaintiff is involved in interstate commerce.

N.J.S.A. 54A:8-6(b)(2) is facially neutral. Therefore, absent disparate impact or undue burden on plaintiffs investment activity, the court was not required to apply the internal or external consistency tests or to determine whether the PFF amount is fairly related to the services provided by the State. Plaintiff failed to present a prima facie case that the statute discriminates against, or imposes an excessive burden on, interstate commerce. Nor did it demonstrate that the PFF was not fairly related to the Division's processing and review of partnership and partner returns.

Our careful review of the record reveals that material facts are not disputed, and when viewed in the light most favorable to plaintiff, the Division was entitled to partial summary judgment as a matter of law. See R. 4:46-2(c). Judge Sundar's findings are fully supported by substantial credible evidence in the record. Her legal conclusions are sound and consistent with applicable law. Accordingly, we discern no basis to disturb the partial summary judgment granted to the Division.

To the extent we have not specifically addressed any of defendant's remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:1 1-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Joseph H. Orlando
CLERK OF THE APPELLATE DIVISION

APPENDIX C

NOT FOR PUBLICATION WITHOUT APPROVAL OF THE TAX COURT COMMITTEE ON OPINIONS

TAX COURT OF NEW JERSEY

Mala Sundar
JUDGE

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December 7, 2018

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Michael J. Duffy, Esq.
Deputy Attorney General

Re: Ferrellgas Partners, L.P. v. Director,
Division of Taxation
Docket No. 007051-2014

Dear Counsel:

This opinion decides each party's partial summary judgment motion in the above-captioned matter. Plaintiff contends that N.J.S.A. 54A:8-6(b)(2) (the "Challenged Statute"), which requires any partnership having New Jersey source income to pay a per-partner fee of $150 (capped at $250,000) when filing its information return, violates the Dormant Commerce Clause ("DCC") because it is a flat tax, and that defendant's regulations apportioning the same, while valid, are unworkable as applied to plaintiff.

Defendant claims that the levy is a fee to defray governmental costs of reviewing and processing information returns of partnerships, and thus must be upheld unless the levy amount is proven to egregiously exceed costs. Alternatively, defendant argues, the Challenged Statute does not violate the DCC, especially since its regulations provide an apportionment for non-resident, no-physical nexus partners.

The court is unpersuaded that any levy, whether a fee or a tax, is automatically or per se unconstitutional under the DCC solely because it is a flat amount and the payor of the levy is involved in interstate commerce. Rather, the court must examine the nature of the interstate commerce claimed to be negatively treated by New Jersey, the nature of the activity that the State law is regulating or expensing, and whether the regulated activity or expensing by the State law discriminates against the identified interstate commerce.

As explained below, the court finds that pursuant to the plain language and legislative history of the Challenged Statute, the partnership filing fee (hereinafter "PFF") is imposed as costs for the governmental activity of processing/reviewing returns of partnerships and their partners filed in New Jersey so as to track their New Jersey source income. This is a purely intrastate activity. As such, the Challenged Statute does not implicate the DCC, and is not susceptible to being invalidated under the DCC simply because plaintiff is presumably involved in interstate commerce – its investment activity in partnerships. Thus, defendant's partial summary judgment motion is granted in this aspect only.

Plaintiff is also not entitled to partial summary judgment because (1) the Challenged Statute is not facially discriminatory: all partnerships or entities treated as such, must pay the PFF regardless of the location of the partnership or partner, or the nature of the partnerships' business, provided the entity earns New Jersey sourced income; and (2) plaintiff has not provided even a *prima facie* showing that the PFF, in practical effect, discriminates against interstate commerce, i.e., its investment activity. Merely relying on the computation of an identical amount multiplied by 50 States under the hypothetical formulation of the internal consistency test does not satisfy plaintiff's burden of initially proving a disparate impact of the PFF upon interstate commerce. That defendant promulgated regulations apportioning the fee based solely on the lack of physical nexus of a nonresident partner does not require a conclusion that the Challenged Statute violates the DCC. Indeed, the regulations are an invalid exercise since they exceed the scope of the Challenged Statute by apportioning the fee.

Finally, both parties are not entitled to partial summary judgment if the PFF was viewed as having an incidental but not disparate impact on plaintiff's investment activity, and the court were to engage in a cost-benefit analysis for purposes of the DCC to determine if the PFF excessively burdens interstate commerce. Plaintiff has not proven excessive burden, and defendant has not proven the PFF is not excessive.

BACKGROUND

(I) The Challenged Statute and Regulations

Under the Gross Income Tax ("GIT") Act, an entity classified as a partnership for federal income tax purposes is required to file an informational return showing all items of income and loss if the entity has "a resident owner" or has "any income derived from New Jersey sources." N.J.S.A. 54A:8-6(b)(1). The return must include the "name and address of each partner, member, or other owner of an interest in the entity however designated." *Ibid.* A copy of the informational return must be provided to each partner or owner. N.J.S.A. 54A:8-6(b)(3).

In 2002, New Jersey enacted the Business Tax Reform Act ("BTRA"), L. 2002, c. 40, to attempt a cure to the "core problems" of large and multi-national corporations earning billions in New Jersey source income but paying only a minimum tax. *Statement to A. 2501* 51 (June 6, 2002). This was to be accomplished by, among others, "establish[ing] a revenue stream that captures enforcement and processing costs that New Jersey incurs from processing the vast network of limited liability companies and partnerships." *Id.* at 52.[1] *See also Assembly Budget Comm. Statement to A. 2501* 1 (June 27, 2002) (the BTRA was "intended to reform New Jersey's system of taxation of corporations and other business entities," thus, among others, "affects the tracking of the income of business organizations, like partnerships, that do not themselves pay taxes but that distribute income to their owners, the eventual taxpayers.").

To this end, the BTRA proposed several amendments to the Corporation Business Tax ("CBT") Act and the GIT Act. One proposal was to impose a filing

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[1] The other two measures were the closure of "loopholes" that allowed an artificial reduction of income, thus, payment of little to no CBT, and to impose an alternative minimum assessment. However, small businesses were provided additional incentives by reducing the tax rate, and expanding certain credits. *Statement to A. 2501* 51-52.

fee under the GIT Act upon partnerships, including entities classified as a partnership under the federal income tax statute such as limited liabilities companies ("LLCs"), at $150 per owner, capped at $250,000. *A. 2501* (June 6, 2002). It was subsequently amended to "[c]larify that the partnership fees apply only to partnerships that derive income from New Jersey." See *Assembly Budget Comm. Statement to A. 2501* 13; *A. 2501* (June 28, 2002).

The "per-owner processing fee," was imposed "on the owners of pass-through entities," which "are not subject to tax themselves, but 'pass-through' their income to their owners . . . who are subject [to tax] in their separate capacities." *Assembly Budget Comm. Statement to A. 2501* 7. "For pass-through entities that have income from New Jersey sources and more than two members, the bill establishes an annual $150 per owner filing fee, capped at $250,000 per entity annually." *Ibid.* "One of the key objectives" of the BTRA "was to reach pass-through business entities that profited economically from their presence in New Jersey, yet paid nothing in taxes to the State," and that the "processing fee was intended to compensate the State for the large volume of return processing and compliance enforcement from" such entities. *Press Release, Office of the State Treasurer, Partnership Fee Waived for Investment Clubs Below $60,000* (Nov. 26, 2002). However, the fee was not intended for "[f]riends and neighbors who pool their money for . . . investment growth," or for "small investment clubs with limited shared capital assets," since these clubs were not pass-through entities "as envisioned in the" BTRA, and do not "do business like large pass-through entities." *Id.*

The fiscal analysis of the BTRA bill estimated the "fiscal impact," *i.e.* the "[i]ncrease in General Fund revenue," as generating several million dollars for fiscal years ("FY") ending 2003-2005, and tabulated the "Revenue Increase in $Millions" from the "partnership processing fee" as estimated by the Office of Legislative Services ("OLS") to be between $40-$60 million for FY 2003; and $28-$40 million for FYs 2004 and 2005. *Legislative Fiscal Estimate to A. 2501* 2 (September 13, 2002). This document noted that "[w]hile no formal analysis was provided by the Executive Branch," the Treasurer had provided revenue estimates, which for the "partnership processing fee" was between $50-$80 million for FY 2003. *Ibid.* The document also noted that the "OLS estimates do not account for behavioral changes" after the law would be enacted, such as dissolution, change in status, relocation, change in business or accounting practices. *Ibid.* Further, the "administration projection" of the partnership processing fee was "based on data currently collected by the Division of Taxation," from which it was not possible to "determine . . . precisely which of the partnerships would be excluded from the payment of this fee." *Id.* at 3. Thus, the OLS provided a "more conservative estimate" of the "partnership processing fee." *Ibid.*

N.J.S.A. 54A:8-6 was thus amended to include new subsection (b)(2), the Challenged Statute, as follows:

> Each entity classified as a partnership for federal income tax purposes, other than an investment club, having any income derived from New Jersey sources, including but not limited to a partnership, a limited liability partnership, or a limited liability company, that has more than two owners shall at the prescribed time for making the return required under this subsection make a payment of a

> filing fee of $150 for each owner of an interest in the entity, up to a maximum of $250,000.
>
> [N.J. S.A. 54A: 8-6(b)(2)(A).][2]

A partnership must make an installment payment of the filing fee for the succeeding tax year at 50% of the fee paid for the current tax year. N.J.S.A. 54A:8-6(b)(2)(B). This installment will be used as a credit for the succeeding year's fee, and to the extent it exceeds the fee actually due, will be credited to future years. *Ibid.* For purposes of administration and collection, including the imposition of interest and penalties, the fee is governed by the State Tax Uniform Procedure Law ("STUPL"). N.J.S.A. 54A:8-6(b)(2)(C).[3]

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[2] An identical proposal was made for a professional corporation ("PC"). See *Assembly Budget Comm. Statement to A. 2501* at 7 (". . . similar filing fee per licensed professional for [PCs] with more than two licensed professionals" was imposed by the BTRA). Thus, a domestic PC or foreign for-profit entity which renders "professional services," with "more than two professionals," must pay a filing fee of $150 "for each licensed professional," maxed at $250,000. N.J.S.A. 54:10A-18(c)(2). However, this statute does not condition the fee on having New Jersey source income unlike the per-partner fee in N.J.S.A. 54A:8-6(b)(2)(A). Note that PCs are not pass-through entities, thus, must file CBT returns.

[3] The statute provides that "[n]otwithstanding" N.J.S.A 54:48-2 and 48-4, the "per-partner fee . . . and the installment payment . . . shall, for purposes of administration, be payments to which the provisions of' STUPL apply, as well as for the enforcement of "collection" of such fee. N.J.S.A. 54A:8-6(c). N.J.S.A. 54:48-2 defines "State tax" as a levy "payable to or collectible by . . . Taxation" and "State tax law" to mean one which "imposes or levies" such a tax. N.J.S.A. 54:48-4 provides that the collection of any State tax is enforceable under the STUPL, unless specifically prohibited by a State tax law which imposes such a tax. The STUPL provisions are similarly applicable to the $150 per-professional fee imposed on PCs. See N.J.S.A. 54:10A-18(c)(4).

In 2003, defendant ("Taxation"), while promulgating regulations to implement the PFF, observed:

> The social impact of the BTRA and the rules and amendments implementing it will be a step in the direction of restoring an even playing field to the taxation of business enterprises in New Jersey. Good tax policy should result in similarly situated or comparable taxpayers paying a comparable tax. It should not reward taxpayers simply because they are capable of structuring their enterprises in a particular fashion.
>
> In implementing the statute by the rules and amendments [Taxation] . . . has exercised . . . discretion in a variety of ways intended to increase the equitable treatment of similarly situated taxpayers. These include . . . providing an apportionment methodology for partnerships and [PCs] liable for the partnership fee or the [PC] fee that have partners or professionals that never enter New Jersey.
>
> [35 N.J.R. 1573(a) (April 7, 2003).][4]

Thus, while the proposed regulations implemented the statutory requirement for the fee, and the amount payable by a partnership, it also proposed "an apportionment methodology" if (1) the partnership included nonresident partners, some with "physical nexus" to New Jersey, and some without such nexus; and (2) the partnership has an office outside New Jersey. See 35

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[4] Taxation noted that investment clubs were exempt from the fee as it would unduly burden "small investments clubs" which were estimated to be around 1400-1500 in number, with "11 members" and "an average asset base of $63,000." 35 N.J.R. 1573(a).

N.J.R. 1573(a) (April 7, 2003). "Apportionment" of the PFF would effectively "decreas[e] the liability for partnerships whose direct physical connection with New Jersey is remote." *Ibid.* However, because the apportionment computation uses the CBT allocation factor, "adjustment of the factor may be sought in instances that its application produces a distortion, such as instances where there is no property or payroll, for example." *Ibid.*

Following the proposal, Taxation received a comment inquiring as to "why the filing fee is not apportioned for professionals/partners *with* nexus." See 35 N.J.R. 4310(a) (Sep. 15, 2003) (emphasis added). To this query, Taxation responded that due to "the absence of legislative guidance on the issue of apportioning the fee," Taxation had determined that "at this time only partners or professionals without nexus would be subject to apportionment." *Ibid.*

The regulations thus provide that the PFF can be apportioned if a partnership has an office outside this State, and nonresident partners with no physical nexus here. N.J.A.C. 18:35-11.2(b). The computation is as follows:

> The total apportioned partnership fee is equal to the sum of:
>
> 1. The number of resident partners multiplied by $ 150.00; plus
>
> 2. The number of nonresident partners with physical nexus to New Jersey multiplied by $ 150.00; plus
>
> 3. The number of nonresident partners without physical nexus to New Jersey multiplied by $ 150.00 and the resulting product multi-

plied by the corporate allocation factor of the partnership.

[N.J.A.C. 18:35-11.2(c).]

The allocation factor to be used is that of the partnership, which when promulgated in 2003 was the "property, payroll and double weighted receipts fractions," and was amended to "the single receipts fraction" in 2016 due to a change in the CBT law in this regard. See 47 N.J.R. 2445(a) (Oct. 15, 2015); N.J.A.C. 18:35-11.2(c)(i).

Examples of the computation are as follows: If a partnership had all resident partners, the fee is $150 times the number of partners. N.J.A.C. 18:35-11.6, Ex. 1. If a Connecticut partnership, which had an office in Connecticut and New Jersey, and New Jersey source income, had 4 partners with no physical nexus to New Jersey, and the partnership's allocation factor was 0.4, the fee would apportioned by multiplying 4 x $150 x 0.4 or $240. *Id.*, Ex. 2. If a limited partner of a New Jersey partnership was a California limited partnership which stored property in the New Jersey partnership's office, had an allocation factor of 10%, and received $1 million in distribution from the New Jersey partnership, then the California limited partner would also be liable, as a partnership, for the fee because it has New Jersey source income. *Id.*, Ex. 3. Assuming all 15 partners of the California limited partnership had no physical nexus to New Jersey, the fee would be 15x $150x 0.1 or $225. *Ibid.*

Taxation also issued a Technical Bulletin explaining the "Partnership Filing Fee." See TB-55 (April 6, 2005). It set forth the liability for the fee (partnerships with "3 or more owners and New Jersey source income or loss"), the amount of the fee ($150 per owner capped at $250,000 and "generally determined by the number of K-1 s filed by . . . the partnership, including when a . . . tiered partnership or pass-through entity is involved"), and the due date of filing/payment. *Id.* Taxation noted that as to "tiered partnerships, each partnership pays the filing fee required for its partners." *Ibid.* Taxation also noted that "[s]ince one purpose of the filing fee is to cover processing costs, there is no exemption or proration of the fee" for part-year owners/partners or partnerships which were created mid-year. *Ibid.* As to nonresident partners, Taxation stated, "[i]f the partnership has income earned outside New Jersey, the filing fee for nonresident partners that do not have physical nexus with New Jersey may be apportioned based on New Jersey source income," determined with reference to the corporate allocation factor. M. at 2. Among the exceptions to the fee was a partnership that had "all operations and facilities . . . located outside New Jersey." *Ibid.* An expense sourced to New Jersey invited the fee, such as property taxes on 'raw' land in New Jersey," but not fees on a "New Jersey checking account" or paid to a New Jersey "accounting firm," or paid for filing annual reports. *Ibid.* The Bulletin also separately outlined the requirements for a partnership to pay a tax on behalf of its nonresident partners and the respective GIT and CBT rates. *Ibid.* It noted that "[i]ncome cannot be allocated outside New Jersey (all income is New Jersey source income) if the partnership has no place of business outside New Jersey." *Ibid.*

The Bulletin was then twice revised. See TB-55(R) issued April 3, 2009, and July 13, 2016. The April 2009 Bulletin was almost identical to the one issued in 2005. The July 2016 Bulletin corrected the numbers of partners required for the fee to be imposed to two or more, and noted that the fee applied if the partnership has New Jersey sourced income or loss or "any type of New Jersey resident partner."[5] It also added that late payment of the fee will invite penalties and interest, and that Taxation has three years under the GIT Act to assess such fees. See N.J.S.A. 54A:9-4. The remainder of the bulletin was almost similar to the one issued in 2009, except that it did not mention that one purpose of the fee is to cover processing costs.

(II) Facts

Plaintiff ("FGP") is a publicly traded limited partnership incorporated in Delaware, and listed on the New York Stock Exchange. It is headquartered and commercially domiciled in Kansas. Partnership interests in FGP are represented by "units" which are regularly traded on the stock exchange market. FGP's 1% general partner is Ferrellgas Inc., a wholly owned subsidiary of Ferrell Companies, Inc. Per its New Jersey partnership returns ("NJ-1065"), FGP's limited partners are (1) the public "shareholders," (2) Ferrell Companies,

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[5] *See also* Division of Taxation, Tax Topic Bulletin GIT-9P Income from Partnerships, 4 (rev'd. 12/17) (an entity classified as a partnership federally "[h]aving any income or loss derived from New Jersey sources that has more than two owners may be required to make a payment of $150 for each owner of an interest in the entity, up to a maximum of $250,000."); Taxation's electronic Notice as to Partnership Filing Requirements (last updated June 5, 2018) that "[p]artners having both general and limited partnership interest shall be counted twice when determining the total partnership fee owed;" as to "[t]iered partnerships - each partnership pays the filing fees required for its partners;" and that "Schedule J" of Form 1065 "must be completed to claim an apportioned filing fee." (Available at https://www.state.nj.us/treasury/taxation/partnotice.shtml) (last accessed Sep. 11, 2018).

Inc., (3) Ferrell Companies, Inc. dba Ferrell Propane Inc., and (4) Jet Capital Management, Inc.

For tax year 2009, FGP had 67,019 partners of which 2,542 were residents or partners with nexus to New Jersey. For tax year 2010, of the 66,835 partners, 2,423 were residents or partners with nexus to New Jersey. For tax year 2011, of the 82,047 partners, 2,927 were residents or partners with nexus to New Jersey.

FGP is the 99% sole limited partner in an affiliated limited partnership Ferrellgas, L.P., a Delaware limited partnership (hereinafter the "Operating Partnership"). The Operating Partnership's 1% general partner is Ferrellgas Inc. (which is also the general partner of FGP).[6] FGP, as limited partner, facilitates investments by the investing public in the Operating Partnership. The Operating Partnership distributes propane on a nation-wide basis (popularly known as `Blue Rhino" propane tanks, which can be purchased at third-party retail stores). It has a storage facility in New Jersey, and three other locations to handle service/delivery calls.

For the tax years at issue, the Operating Partnership filed its NJ-1065s. On Schedule J, Allocation Schedule, FGP reported as allocable to New Jersey: (1) property (real and intangible) valued at $11,499,191; receipts of $20,380,367; payroll of $3,434,904, and a total apportionment of 1.1680% for tax year 2009; (2) property (real and intangible) valued at $11,418,129;

[6] Both Ferrellgas Inc. and Ferrell Companies, Inc. are wholly owned by a leveraged employee stock ownership trust set up under the Ferrell Companies Employee Stock Ownership Plan so that employees of Ferrellgas Inc. can own stock in these corporate entities, and indirectly in FGP and the Operating Partnership.

receipts of $19,077,148; payroll of $3,229,104; and a total apportionment of 1.0550% for tax year 2010; and, (3) property (real and intangible) valued at $11,510,505; receipts of $21,519,209; payroll of $2,887,867; and a total apportionment of 1.0161% for tax year 2011. Note that it used the same allocation factor as the Operating Partnership. FGP also reported New Jersey sourced net partnership income of $942,513; $597,413; and $190,966 for each tax year 2009 to 2011.[7]

(III) Procedural History

For each tax year, FGP paid Taxation $250,000, the maximum amount of the filing fee. It then claimed a refund on grounds its distributive share of partnership income from the Operating Partnership was not reportable income pursuant to *BIS LP Inc. v. Dir., Div. of Taxation*, 25 N.J. Tax 88 (Tax 2009), *aff'd*, 26 N.J. Tax 489 (App. Div. 2011). It also filed amended NJ-1065s zeroing out the New Jersey source income it had previously reported.

Taxation administratively denied the refund claims. It noted that pursuant to N.J.A.C. 18:35-1.3(d)(6), a tiered partnership must "take into account its distributive share of partnership income" and cannot thereafter "reallocate[]" the same. Therefore, and since the Operating Partnership had allocated income to New Jersey, FGP could not reallocate it. Taxation

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[7] The distributive share of New Jersey source partnership income from the Operating Partnership was $1,208,149; $898,503; and $477,459 for each tax year 2009-2011. These were offset with FGP's ordinary losses from trade or business of -$265,636; -$300,640; and -$286,493 for each respective tax year. Note that the reported distributive share of New Jersey source partnership income differed from that on the K-1s issued to FGP by the Operating Partnership for each tax year, which was $1,222,097; $907,482; and, $484,201.

then issued final determinations in this regard for each tax year.

FGP filed a timely complaint, and then moved for partial summary judgment claiming that the fee is a tax, and violated the DCC under three of the four criteria enunciated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because the fee discriminated against interstate commerce, was not fairly apportioned, and was not fairly related to the services provided by New Jersey.[8] FGP also provided the following data obtained from the Department of Treasury pursuant to its request under the Open Public Records Act ("OPRA"):

> (1) The New Jersey source income reported by all partnerships for tax years 2009-2011 was $26,400,624,146; $42,211,064,190; and $11,679,724,687 respectively.
>
> (2) The partnership filing fees received from all entities in tax years 2009-2011 totaled $44,703,658; $47,109,396; and $47,461,768 respectively.
>
> (3) The salaries paid to all employees of the Division of Revenue who worked on pro-

[8] In its complaint, FGP also alleged that it has no income derived from New Jersey, no nexus, the filing fee was paid for each owner and "not for the partnership itself," thus, since the non-resident investing public which are owners of FGP lack nexus to New Jersey, the fee violates the Due Process and Equal Protection Clause. FGP also sought costs and attorney fees (at $75 per hour) claiming that Taxation's denial did not have a reasonable basis in law because it had litigated and lost *BIS LP Inc.*, and the status of FGP was the same as the limited foreign partner in that case. For purposes of the instant motion, the parties agreed not to address nexus, the first part of the four-part criteria in *Complete Auto.*

cessing GIT returns for FYEs 2009-2011 totaled $22,933,753; $18,373,397; and $20,101,294.

(4) In each tax year 2009-2011, Taxation processed the following number of NJ-1065s: 168,628; 175,517; and 182,745. For each of those tax years, the total returns filed (for all types of income taxes) were about 4.7 to 4.9 million.

(5) All amounts collected as the filing fee were deposited into the General Fund, as part of the CBT, a category in the General Fund.

While not challenging the validity of the regulations, FGP contended that they do not cure the apportionment problem. However, per FGP, this court can cure the DCC violation by applying the regulatory apportionment to the $250,000 cap amount.[9]

Taxation cross-moved for partial summary judgment arguing that the levy is a regulatory fee intended to defray administrative costs of processing, examining, and auditing the significant numbers of partner/partnership returns, and thus, its constitutionality should be upheld pursuant to *Am. Trucking Ass'ns v.*

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[9] There was no fee apportionment for FGP because the number of its domestic or in-State partners caused the fee to reach the $250,000 cap.

In *Targa Resources, L.P. v. Dir., Div. of Taxation*, Docket No. 010749-2015, plaintiff ("Targa"), a publicly traded entity with over 65,000 partners, advocated similar arguments, except it contended that the regulations were invalid, but if this court could construe the Challenged Statute to preserve its constitutionality, then, the regulatory apportionment should be applied based on Targa's business allocation percentage. FGP and Targa attended each other's oral arguments and filed briefs in support of each other's position, with Taxation filing responsive briefs.

Mich. Pub. Sew. Comm'n., 545 U.S. 429 (2005) (hereinafter *"ATA-Michigan"*). Further, as a regulatory fee, the court only need examine whether the amount is excessive when the benefits to a taxpayer are compared to the State's interests under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Here, Taxation maintains, the fee is not excessive since $250,000 divided by the number of FGP's partners equates to a fee of less than $4 per partner. Alternatively, Taxation argues, even if the PFF is deemed a tax, it still does not violate the DCC because it is fairly apportioned under its regulations (no apportionment being required for New Jersey residents, who can avail of a credit for taxes under the GIT Act); it is non-discriminatory (applies to any partnership); and is co-relative to the State's services (by maintaining storage facilities in New Jersey, FGP availed itself of the State's public services, in addition to being able to do business here). Altering the regulatory apportionment as suggested by FGP would exceed this court's authority per Taxation, plus render the fee to less than a dollar per partner ($250,000 multiplied by FGP's allocation factor divided by number of partners), an unreasonable result.

FINDINGS

(I) Principles of Review

Every statute is presumed to be constitutional. "This presumption of validity is particularly strong in the realm of economic legislation adjusting the benefits and burdens of economic life." *N.J. Ass'n of Health Plans v. Farmer*, 342 N.J. Super. 536, 551 (App. Div. 2000) (citation and internal quotation marks omitted).

Where, as here, the issue is one of law, Taxation's assessments or statutory interpretations are not entitled to any particular deference or be considered presumptively correct. *American Fire & Cas. Co. v. Dir., Div. of Taxation*, 189 N.J. 65, 79 (2006) (court not "bound by the agency's interpretation . . . of a strictly legal issue") (citation and internal quotation marks omitted). *See also Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1, 10 (1st Cir. 1992) ("In deciding whether discrimination exists . . . the deference normally afforded them in matters of economic regulation" is absent since the concern is, among others, "the national interest in a unified economy, [and] the lack of power of affected non-residents of the state to protect themselves through the state's political process . . .") (citation omitted). Nonetheless, a regulatory "interpretation" of a statute "receives substantial deference" being "necessary to assist in the application of statutes to achieve the legislative purpose," provided they do not "undermine legislative intent." *Manheim NJ Invs., Inc. v. Dir., Div. of Taxation*, 30 N.J. Tax 18, 33 (Tax 2017) (citations omitted).

(II) The DCC Analysis

In *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093-94 (2018), the Court, agreeing that physical presence is no longer a requirement to establish nexus and thus, the ability to tax,[10] explained that the purposes of the DCC was "to prevent States from engaging in economic discrimination so they would not divide into

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[10] In so doing, the Court abrogated the holding in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) that required physical presence to prove nexus. See *Wayfair, Inc.*, 138 S. Ct. at 2099. The Court noted that the "nexus requirement is closely related . . . to the due process requirement that there be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* at 2093 (citations and internal quotation marks omitted).

isolated, separable units." The "two primary principles" which limit a "State's authority to regulate interstate commerce" are that (1) State laws "may not discriminate against interstate commerce," and, (2) "States may not impose undue burdens on interstate commerce." *Id.* at 2090-91. "[T]hese two principles guide the courts in adjudicating cases challenging state laws under the" DCC. *Id.* at 2091. Thus, there must be no disparate treatment of in-state versus out-of-state business/trade/commerce, or disparate effect on interstate commerce. If the statute "regulat[es] even-handedly to effectuate a legitimate local public interest," then it will be "upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Ibid.* (citing and quoting *Pike*, 397 U.S. at 142).

Where a State statue imposes a tax (on income or on a transaction), then the same "dual principles" viz., no facial discrimination or disparate impact on interstate commerce, also "animate" such cases. *Wayfair, Inc.*, 138 S. Ct. at 2091. A State tax is valid "so long as it" meets the four-part test of *Complete Auto*, a "now-accepted framework." *Wayfair, Inc.*, 138 S. Ct. at 2091. Thus, a tax statute will be "sustained" where its "practical effect" (as opposed to its "formal language") shows that the tax imposed "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279 (overruling *Spector Motor Srvc v. O'Connor*, 340 U.S. 602 (1951) which had held that a tax for the privilege of engaging in business in a State was per se unconstitutional).

A tax is fairly apportioned if it is internally and externally consistent. Thus,

> The first . . . component of fairness in an apportionment formula is what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed. The second and more difficult requirement is what might be called external consistency – the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated.
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> [*Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169-70 (1983).]

Internal consistency is based on pure hypothesis: a presumption that each State will impose a tax exactly the same as the challenged tax, and therefore the taxpayer's total income will be taxed multiple times unless reasonably apportioned. *Stryker Corp. v. Dir., Div. of Taxation*, 18 N.J. Tax 270, 290 (Tax 1999), *aff'd*, 168 N.J. 138 (2001). *See also Bank of Am. Consumer Card Holdings v. Dir., Div. of Taxation*, 29 N.J. Tax 427, 475 (Tax 2016) ("Internal consistency analyzes the hypothetical function of a tax formula, not its real world effects on a taxpayer."). Hypothesizing that "every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a" tax,

> because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax

> schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.
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> [*Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1803 (2015).]

See also Goldberg v. Sweet, 488 U.S. 252, 260-61 (1989) (". . . the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) ("A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."). Note that "the risk of cumulative tax burdens upon interstate transactions" can also be "avoided by a tax credit" for taxes paid to another taxing regime. *KSS Transp. Corp. v. Baldwin*, 9 N.J. Tax 273, 286 Tax 1987) (citations omitted), *aff'd*, 11 N.J. Tax 89 (App. Div. 1989). However, a State need not provide both a credit for, and an apportionment of, the tax. *Id.* at 286 (citation and quotation omitted).

Protection under the DCC is not restricted to nonresidents. See *Wynne*, 135 S. Ct. at 1798-99 (the "dictum" that the DCC did not "protect state residents from their own state taxes," see *Goldberg* 488 U.S. at 266, has been "repudiated," thus, although a State can tax a resident's income from all sources without violating due process, it can be vulnerable to an attack that such tax violates the DCC) (relying upon *Quill Corp.*, 504 U.S. at 305). Although *Quill* has since been abrogated by *Wayfair, Inc.*, *see supra* note 10, the abrogation was not to the effect that the DCC does not extend to residents.

Prior precedent treated State levies which were deemed regulatory fees or user fees differently from taxes for purposes of the DCC. *See*, *e.g.*, *Edison Co. v. Montana*, 453 U.S. 609, 622, n.12 (1981) (where the "charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that the fees charged do not appear to be manifestly disproportionate to the services rendered.") (citations and internal quotation marks omitted); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707, 716-17 (1972) ($1 per-passenger fee imposed to defray the cost of constructing and maintaining the airport's facilities valid under the DCC if the fee fairly approximates the use, is not discriminatory, and is not "excessive in comparison with the governmental benefit conferred.").[11]

However, later United States Supreme Court precedent extended the *Complete Auto* analysis to fees or taxes. *See e.g. Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 271, 273-74 (1987) (labeling Pennsylvania's "lump-sum annual fees" for issuance of an identification marker and axle taxes which reduced this fee as "'flat taxes'"). This then blurred the distinction between taxes and fees for purposes of a DCC analysis. *See also Am. Trucking Ass'ns v. State*, 180 N.J. 377, 403 (2004) (hereinafter *"ATA-NJ"*) (although the United States Supreme Court precedent "for ease of reference" defines

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[11] The *Evansville* test would not apply here since the PFF is not imposed for the use of a facility in New Jersey. *See also Am. Trucking Ass'ns v. DOT*, 124 P.3d 1210, 1216 (Ore. 2005) ("[A]side from the *Evansville-Vanderburgh* case itself, the test articulated therein has never actually been used again by a majority of the Court to decide a Commerce Clause controversy," in addition to the fact that the case was overruled by statute).

a levy "that is impermissible because it discriminates against or unduly burdens interstate commerce" as a tax, and "a charge that reflects—fairly, evenly, and sustainably—the States' police power interests and concerns" as a fee, ultimately, the label of the levy "has no effect on the result."); *Nw. Energetic Sew., LLC v. Ca. Franchise Tax Bd.*, 71 Cal. Rptr. 3d 642, 659 n.12 (Ct. App. 2008) (no "difference whether the [l]evy is characterized as a tax or a fee for [DCC] purposes" as evident from the Supreme Court's precedent, making the DCC "appli[cable] to taxes and regulations that discriminate against or unduly burden interstate commerce.") (citation omitted).

Thus, our Supreme Court "reject[ed]" the argument "that as long as a flat fee is a regulatory user fee, it is not subject to the four-prong test of *Complete Auto*," because this contention "ignores the" principle "that it is the practical effect of the charge that controls, not its formal language or purported structure." *ATA-NJ*, 180 N.J. at 409 (citation and internal quotation marks omitted). Rather, it held, based on *Scheiner*, if a statute involves "unapportioned state fees and taxes," then it is "unconstitutional if it violates the internal consistency test . . . ." *ATA-NJ*, 180 N.J. at 397.

However, the United States Supreme Court subsequently held that there is "[n]othing in our case law" that "suggests that . . . [a] neutral, locally focused [unapportioned] fee or tax is inconsistent with the [DCC]," thus, Michigan's flat $100 "fee [that] taxes purely local activity" was valid. *ATA-Michigan*, 545 U.S. at 434, 437-38. This validity was not destroyed even if the fee would flunk the internal consistency's hypothetical test. *Id.* at 438.

The initial burden of proof is upon the party challenging a statute's constitutionality to show that the levy is discriminatory. *ATA-NJ*, 180 N.J. at 396. The State must then show the fee is not discriminatory, or alternatively, "that a more accurately apportioned fee is impracticable." *Id.* at 397. This is same standard of proof for a tax, namely, that the plaintiff has the burden to prove that a "fee is unapportioned," and "i[f] *Scheiner* controls," the State must then show the fee is not discriminatory, and a better apportionment cannot be achieved. Ibid. Even if the court applies "a less stringent constitutional test," then the challenger "retain[s] the burden to prove that the fee discriminates in practical effect." *Ibid.* (citations omitted). It would appear that the same initial burden and burden shifting would apply for user or regulatory fees, *i.e.*, for plaintiff to first show that the fee excessively burdens interstate commerce, and then for the government to show that the fee is not excessive when compared to the governmental benefit.

The above various rulings[12] provide the following framework for a DCC analysis of a State-imposed levy:

> (1) If a statute discriminates facially or in practical effect, it is invalid. The challenger has the burden to prove discrimination either way. If discrimination is proven, the State must then justify the statute *vis-à-vis* the local benefits, and lack of nondiscriminatory alternatives. This is the "less stringent" test, albeit still a heightened scrutiny.

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[12] As was pertinently noted, the United States Supreme Court's "[DCC] jurisprudence is less than a model of clarity," due to the differing tests for exactions for "general regulatory measures," taxes, or user fees, thus, creating a "quagmire of judicial responses," causing "several distinct but overlapping tests." *MERSCORP Holdings, Inc. v. Malloy*, 131 A.3d 220, 235 (Conn.), *cert. denied*, 137 S. Ct. 372 (2016).

(2) Generally, a tax is subject to a stricter test, *i.e.*, it must also be internally consistent, and thus, must be fairly apportioned. The challenger has the burden to prove the lack of apportionment. The State must then justify the statute as being nondiscriminatory, or that it cannot achieve a more "accurately apportioned fee." A State need not provide both a credit for, and an apportionment of, the challenged tax.

(3) If a statute or regulation is not discriminatory facially or in practical effect, then the statute may need to be examined under the burden-benefit balancing test if the excessiveness of the fee burdens interstate commerce. It would appear that the same initial burden of proof is on the challenger to prove discrimination, and then the excessiveness of the burden on interstate commerce when compared to the governmental benefit, after which the burden will shift to the State in proving the opposite.

(4) The label of the levy is irrelevant to decide whether State law or regulation discriminates against interstate commerce.

(5) The DCC protection applies to residents and non-residents.

(6) For purposes of the DCC analysis, flat fees are sometimes treated as taxes, thus subject to the four-part test of *Complete Auto*, but sometimes not, especially if the levy is found to be non-discriminatory and applies only to intrastate transactions.

(A) What is the Interstate Commerce Claimed to be Negatively Burdened by the Filing Fee?

Before the court starts its DCC analysis, it must determine the "commerce" or the transaction or activity which is being allegedly discriminated by the PFF. *See e.g. DIRECTV v. Utah State Tax Comm'n*, 364 P.3d 1036, 1042 (Utah 2015) ("[T]he threshold matter [is] . . . defining *interstate commerce* . . . [namely,] identifying the 'interstate element' on which discrimination is prohibited, or in other words, the grounds on which a business is counted as a 'local' one that may not be favored.") (citation omitted). Neither party found it necessary to identify this element of the DCC analysis but presumed that interstate commerce is implicated.

Evidently, the activity or transaction is not the sale of the propane tanks nation-wide since that is the Operating Partnership's business, and the Operating Partnership has not challenged the fee as violating the DCC. FGP's status is that of a partner, and thus, it is the recipient of income from the Operating Partnership. However, because it is treated as a partnership, it is also subject to the PFF. FGP's activity, from the facts presented here, is its investment in its affiliate directly or indirectly, which in turn facilitates (in part or otherwise) the earning of income by the Operating Partnership. Stated differently, the "commerce" being impacted is FGP's provision of capital, and its facilitation of the provision of capital by residents and nonresidents, to the Operating Partnership, directly or indirectly, which investment enables FGP to earn income from the Operating Partnership, thus, to earn New Jersey source income. *See, e.g., Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501 (7th Cir. 2017) ("[T]he movement of goods, services, funds, and people" is interstate commerce.); *Gibbons v. Ogden*, 22 U.S. 1, 189-90 (1824) (The term "[c]ommerce" in the Commerce Clause is "traffic," however, "it is something more: it is intercourse."). Such commerce could be interstate because FGP is a foreign partnership as are some of its partners, thus, capital contributions from such partners, when infused into the Operating Partnership, and used in the latter's activities which are both in and out-of-State, can implicate interstate commerce.

However, simply because FGP may be considered as being involved in interstate commerce does not mean that the DCC is automatically implicated, and without more, render a levy, regardless of whether it is labeled a fee or a tax, as violating the DCC. *See*, *e.g.*, *ATA-Michigan*, 545 U.S. at 432-34 (rejecting plaintiff's claim that trucks which carry "both interstate and intrastate loads engage" more in interstate business, therefore, the flat $100 fee per truck violated the DCC). Rather, the question for purposes of the DCC is what is the activity for which the PFF is imposed under the Challenged Statute, and whether the same discriminates against FGP's investment activity by improperly favoring investment activity (via direct/indirect capital contributions to a partnership) in a local business, operation, or activity, to the disadvantage of that same investment activity in an out-of-State business, operation or activity. See *Wayfair, Inc.*, 138 S. Ct. at 2100 (DCC "cases usually prevent States from discriminating between in-state and out-of-state firms.") (Gorsuch, J., concurring).

(B) What is the Activity Targeted by the Challenged Statute?

The Challenged Statute imposes a fee upon a partnership provided it derives New Jersey source income, and such fee must be paid when the NJ-1065 is filed (plus 50% of the fee as an installment for the succeeding tax year). The legislative history shows that our Legislature wanted to track New Jersey sourced income earned or derived by partnerships engaged in business (as opposed to small investment clubs), since partnerships are not themselves taxed, and instead pass-through the income earned/derived to partners, who/which are taxed. This would entail processing and reviewing information and tax returns, which would cost money, therefore, the Legislature used the filing fee as a mechanism to pay such costs. The legislative history would thus support a reading that the activity or transaction for which the fee is imposed is based on the governmental activity of processing/reviewing returns, and the government is regulating partnerships by tracking their New Jersey source income. Such regulation or governmental activity is a purely intrastate activity and is not commerce, let alone interstate commerce.

Legislative history also shows a concern that income earned by large pass-through entities may be escaping tax, and thus merited a fee. Whereas small firms or investment clubs should not be charged the same fee because they do not operate like large partnerships do. Cognizant that pass-through entities do not pay income tax, the Legislature's primary concern was to ensure that the pass-through New Jersey-derived income by large pass-through entities be captured, and because these large multi-national entities can (and did) use sophisticated planning so that the pass-through income is difficult to trace and be captured, there was an urgent need for the "tracking" of such income, which then required a review of these entities' informational returns and its members' tax returns. Tracking such income, and ensuring that the reported income is captured, and if constitutionally permissible, taxed at the partner-level, was the underlying basis for the imposition of the partnership processing fee. It is eminently within a State's regulatory power to ensure proper compliance with reporting income that should be sourced to the State, and for the State to track income that is sourced but not taxed since it is passed-through (i.e., not taxed at the entity level, but to be taxed at the recipient level), so that a State can assure that/decide whether income derived from within the State is not improperly escaping being taxed.

That the review of informational returns encompasses, and indeed requires, a review of a partnership's income earned everywhere, does not implicate the DCC, nor convert the PFF into a levy violating the DCC. Taxation has always been statutorily obligated to determine the proper/reasonable amount of income/loss allocable to New Jersey. See N.J.S.A. 54:10A-6; -8 (CBT); N.J.S.A. 54A:5-7 (GIT). Indeed, every State from which FGP derives income would examine returns to ensure that the correct or reasonable amount of income is allocated to that State. Cf. *Vizio, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018) (rejecting an argument that "Connecticut is prohibited from referencing national market share when it assesses recycling fees because doing so regulates—thereby placing a burden on—interstate commerce.").

Verily, the fee is imposed only if the partnership derives New Jersey source income. Note that this is also an alternative condition for filing the NJ-1065, the other being that the partnership has a resident partner. See N.J.S.A. 54A:8-6(b)(1) ("Each entity classified as a partnership for federal income tax purposes, including but not limited to a partnership," a limited liability partnership, or an LLC, "having a resident owner of an interest in the entity or having any income derived from New Jersey sources, shall" file an NJ-1065). Leaving aside the question of whether the fee would apply to a partnership with no New Jersey source income, but yet must file an NJ-1065 because it has a partner who/which is a New Jersey resident/domestic entity,[13] the filing fee is imposed not for earning that income, but is instead a recovery of State costs for tracking that income. Cf. *Nw. Energetic Sew.*, 71 Cal. Rptr. 3d at 658 (finding unconstitutional a fee imposed on an LLC computed at "a percentage of the LLC's total *worldwide* income," as opposed to a "flat fee imposed on all LLC's for the privilege of doing business locally in California," and consequently, the fee "*does* tax a share of interstate transactions.").

Under these circumstances, the court is satisfied that the PFF is imposed to expense the costs of and for a purely intrastate or local activity, which is tracking of New Jersey source income via filed returns. As such, it does not implicate the DCC under *ATA-Michigan* even if it is imposed on an interstate commerce participant, such as FGP here.

Summary judgment should be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

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[13] Taxation's July 2016 Bulletin notes that the fee applies if the partnership has New Jersey sourced income or loss or "any type of New Jersey resident partner." This conflicts with the language of the Challenged Statute especially considering the legislative clarification of the original proposed bill that the fee will "apply only to partnerships that derive income from New Jersey." *Assembly Budget Comm. Statement to A. 2501* 13; *A. 2501* (June 28, 2002).

fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2 (c). Whether the PFF is imposed on an intrastate or interstate activity is a legal question, thus summary judgment on this issue in favor of Taxation is proper.

(C) The PFF Does Not Facially Discriminate against FGP or FGP's Activity.

There are additional reasons for denial of FGP's partial summary judgment motion. First, the Challenged Statue provides no "home" based advantage, that is, one which favors local over foreign partnerships. The Legislature was only concerned with a core problem of ensuring that New Jersey sourced income of pass-through entities be tracked.[14] The imposition of the PFF is not based on the location of the partnership, or the nature/scope of its particular business activity. Thus, regardless of whether (1) the partnership is domestic or foreign; (2) the partnership entity derives income only from New Jersey or from all other States; (3) the partnership engages in intrastate or interstate activities or business (whatever be the nature); (4) the partners of the partnership are New Jersey residents or non-residents, or are foreign or domestic corporate or pass-through entities; or (5) the partners of the partnership do business (whatever be the nature of such business) wholly intrastate or partially intrastate, the PFF is imposed if the partnership has New Jersey source income to be reported on an NJ-1065.

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[14] This is not necessarily true for PCs because those are not pass-through entities. However, the court does not decide this issue since the fee on PCs is imposed under a different statute, and since FGP is treated as a partnership, thus, falls within the scope of the Challenged Statute herein.

New Jersey is not exercising any economic protectionism by unduly favoring in-State activities or transactions over those same activities or transactions conducted interstate. *See*, *e.g.*, *DIRECTV*, 364 P.3d at 1042 (the United States Supreme Court's precedent involving a "strict [DCC] scrutiny have involved favoritism for entities or business operations *within* a particular state—and attendant discrimination against entities or business operations *outside* such state.").

The PFF does not bar any pass-through entity from earning income/loss outside New Jersey, nor does it incentivize or promote local business over out-of-State business. To the contrary, domestic partnerships pay the same PFF, and are subject to the same $250,000 cap as non-domestic partnerships. Thus, New Jersey is not requiring that an activity which was done out-of-State now be done only in New Jersey.

There are no "in-state businesses gainers or out-of-state businesses losers." *Id.* at 1047 (citation and internal quotation marks omitted). Nor is there any "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Therefore, the Challenged Statute is facially neutral and regulates evenhandedly.

(D) There is no Proof of that the PFF Causes a Disparate Impact on FGP's Investment Activity

Second, the court has no proof of a disparate impact on FGP or FGP's investment activity. It may be a possible outcome that entities or individuals which/who invest in partnerships would face lesser return for their investments (i.e., through a possible lower pass-through distributive share of income since the amount paid as the PFF would be deducted as an entity-level business expense from the entity-level income). It may be that there would be less of an incentive to do business using a partnership or LLC form of business entity, since the PFF is an added expense/cost to the entity. It may be that there would be a similar disincentive to form partnerships with over 1,667 partners (since that number times $150 is $250,000). Do these possibilities result in an impermissible burden on interstate commerce? In other words, does the Challenged Statute prevent out-of-State entities or businesses from doing business in New Jersey by making them pay more than their share of a State-imposed levy or by making it so expensive, disproportionately for them, to participate in New Jersey business, and thus, cause a disparate impact on FGP's investment activity?

Initially, the court opines that this is not so. Out-of-State partnerships earning New Jersey source income/loss are not paying any more than an in-State partnership earning income in New Jersey since each will pay the same PFF and the same cap amount (if each had more than 1,667 partners). Of course, the cost of doing business in the partnership form of a business model has increased due to the PFF, just as it would for any kind of levy. However, this in-and-of itself does not state a cause of action under the DCC especially where both such in-State and out-of-State entities are equally burdened with the PFF. See *ATA-Michigan*, 545 U.S. at 438 (DCC "does not seek to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business" (citation omitted)).

That smaller sized intrastate or interstate partnerships would pay a lesser amount than a large, publicly-traded partnership such as FGP, which could almost always pay $250,000 (the cap amount), does not convert the statute into an attempt to unconstitutionally burden or discriminate against interstate commerce. This is a business model FGP chose (for whatever business purposes, whether to easily obtain larger amounts of investment, or otherwise to protect/increase the stock/investment of the employees of its general partner, Ferrellgas Inc.). Cf. *DIRECTTV*, 364 P.2d at 1042-44 (precedent shows that the DCC "is not implicated by mere discrimination based on 'differences between the nature of [two] businesses,' and not on the 'location of their activities,' or due to the "category of companies.") (citing and quoting *Amerada Hess Corp. v. Dir., Div. of Taxation*, 490 U.S. 66, 78 (1989)). Indeed, under the economies of scale, the PFF for a large partnership such as FGP is extremely low (if the $250,000 cap is divided by the number of partners), as compared to a smaller partnership. This would also evidence that if the PFF was somehow deemed to impact interstate commerce (FGP's investment directly or indirectly in the Operating Partnership), the effect on interstate commerce would be minimal or only incidental.

More importantly, FGP has not provided any proof that its interstate commerce is unduly burdened. For instance, there is nothing to show that of the number of returns filed by pass-through entities, the largest percentage is that of out-of-state such entities; that the largest percentage of those entities' income is from non-New Jersey sources; and that such percentages would prove that the PFF is discriminatory in practical effect against such entities and in favor of local businesses. Nor is there anything to show that pass-through entities such as FGP, are the largest out-of-state investors, and thus are the most prejudiced by the PFF because the cost to invest in, or contribute capital to, their affiliated partnerships, which sell/trade tangible goods, or sell services, in-state and out-of-state, is much greater than the cost to an in-state similar investor.

FGP's resort to the mechanical application of the hypothetical math under the internal consistency component of *Complete Auto* is not a substitute for its burden of proving, at least *prima facie*, that the PFF results in a disparate impact on its interstate investment activity. Even in *Scheiner* there was a separate independent proof of disparate impact. See 483 U.S. at 276 (domestic trucks traveled five times more miles on Pennsylvania roads compared to out-of-state truckers, but the cost per mile of the flat taxes was about five times higher for out-of-state vehicles when compared to local trucks, and while both domestic and out-of-state trucks traveled about the same number of miles on Pennsylvania highways, "less than" a sixth of axle tax revenues were from local vehicles, thus, disparate impact on interstate commerce was shown). Similarly, in *ATA-NJ*, the plaintiff provided proof of disparate impact and the burden then shifted to the State, which was unable to meet it. See 180 N.J. at 387-89, 411 (fee challengers "made a *prima facie* showing that the fees discriminate in practical effect . . . [by] show[ing] that, based on several measures, out-of-state truckers pay between twice as much and almost three times as much as in-state truckers pay," thus, the "fact" is that " among businesses similarly engaged, out-of-state truckers will pay a distinctly higher cost per activity on average than in-state truckers will pay"). Indeed, the lower court found that since "neither" party proved "what the relative impact of the fee is on in-state and out-of-state haulers," and with no proof of non-discrimination or fairness, the court was "compelled" to invalidate the fee "under the presumption that a flat truck fee is violative of the" DCC. *Id.* at 394.

Precedent is also uniform in this regard. See *ATA-Michigan*, 545 U.S. at 414-17 (rejecting plaintiff's argument that it need not provide any "empirical[]" evidence to show that the flat fee was burdensome or had a practical discriminatory effect on "interstate trucking"); *MERSCORP Holdings, Inc.*, 131 A.3d at 481 (no showing by plaintiff to prove that higher recording fees will prevent participation in the activity, or that the "market would be compromised"); *Am. Trucking Ass'ns.*, 124 P.3d at 1220 (". . . plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination . . . [otherwise] virtually every uniformly assessed local fee would be in jeopardy if it touched some aspect of interstate commerce. That, of course, is not the aim of the [DCC]."). *See also Dunn v. Idaho State Tax Comm'n*, 403 P.3d 309, 315 (Idaho, 2017) ("*Wynne* endorsed the internal consistency test as a method of identifying discriminatory tax schemes" but "does not do away with the other showings necessary to implicate the Commerce Clause, i.e., 'a substantial effect on an identifiable interstate economic activity or market.'").[15]

Importantly, much after *Scheiner* and *ATA-NJ* were decided, the United States Supreme Court upheld a flat fee that taxed trucks as non-discriminatory although the fee would fail the internal consistency test. Thus, in *ATA-Michigan* the Court upheld the

[15] Two Justices have consistently and strongly criticized the internal consistency requirement as "a judicial fraud." *Wynne*, 135 S. Ct. at 1808-10 (Scalia J. and Thomas J. dissenting).

validity of Michigan's "flat $100 fee" because it did not "tax activity that takes place, in whole or in part, outside the State." 545 U.S. at 434. The Court "concede[d]" that if the same fee was imposed by all States, "an interstate truck" would pay much more in fees, under the hypothetical internal consistency test. *Id.* at 438. The Court explained away this hypothetical problem by holding that a trucker transporting goods in-and-out of State is paid much more "only because it engages in local business in all those States." *Ibid.*

Thus, FGP's reliance on the hypothetical fee imposition by 50 States as proof of disparate impact on interstate commerce (i.e. on its investment activity) is misplaced, and is certainly not the law. As the dissents in *Scheiner* noted, "internal consistency" should not be seen as a "rule of general application," and precedent did not "establish[] a grandiose version of the `internal consistency test' as the constitutional measure of all state taxes under the" DCC, thus, do not "stand for the proposition that *nondiscriminatory* state taxes must also generally be 'internally consistent' to pass constitutional muster." 483 U.S. at 303 (O'Connor, J., dissenting) (citing *Armco, Inc.*, 467 U.S. 638). Otherwise, "any unapportioned flat tax involving multistate activities" would be invalidated. *Id.* at 303-04 (Scalia, J., dissenting). *See also Am. Trucking Ass'ns*, 124 P.3d at 1219 (". . . the Supreme Court has never viewed hypothetical possibilities, standing alone, as sufficient to constitute unconstitutional discrimination for Commerce Clause purposes").

The focus of the query in a DCC challenge is not that any levy payable by an interstate commerce participant is automatically suspect unless apportioned. Rather it is whether a levy discriminates facially or practically.[16] *See also ATA-NJ*, 180 N.J. at 403 (a levy is a tax if it is "an impost that is impermissible because it discriminates against or unduly burdens interstate commerce.") This definition also evidences the crux of a DCC challenge — discrimination. If the only test for a levy was whether it passed the hypothetical internal consistency test, then any flat levy would necessarily fail simply by virtue of the arithmetic. If so, the presumptive constitutionality of any statute imposing any flat levy would be easily overcome, and thus, the burden imposed upon a challenger would become almost illusory. In any event, such is not the intent of the DCC, nor of the internal consistency test. The latter test was formulated to insure that 100% of income earned by a taxpayer in a business operating in multi-states is divided among the States in which income is earned, so that the total tax paid by the multi-state business is equal to the tax on 100% of income, if that income was earned intrastate. Here, no such multi-state income tax is implicated at all due to the partnership filing fee. Thus, FGP labeling the PFF as a flat tax so that the *Complete Auto* tests are automatically applied is no less controlling that Taxation labeling the PFF as a purely regulatory fee so that the *Complete Auto* tests should not apply.[17]

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[16] As one article noted, "the apportionment prong is not an independent concept but is merely an application of the nondiscrimination requirement" of the *Complete Autot* test. See Ryan Lirette and Alan D. Ward, *Putting the Commerce Back in the Dormant Commerce Clause: State Taxes, State Subsidies, and Commerce Neutrality*, 24 *J.L. & Policy* 467, 477 (2016).

[17] In this regard, the court is not persuaded that simply because the PFF is deposited into the general funds, it is a flat tax that must be apportioned pursuant to *Complete Auto.* Both fees and taxes raise revenues, just as they both impose a cost on a business. *See generally BTD-1996 NPC 1 LLC v. 350 Warren*

The Court in *ATA-NJ* noted that "[i]f *Scheiner* applies," then an unapportioned levy must be internally consistent. 180 N.J. at 397. Here, this court has found that the Challenged Statute imposes the PFF for a purely intrastate reason. Therefore, *Scheiner* would not automatically apply. Additionally, the Challenged Statute is neutral facially, and there is no proof of any disparate impact or undue burden on FGP's investment activity due to the PFF. Therefore, the court is not bound to examine the application of the internal or external consistency tests, or whether the PFF amount is fairly related to the services provided by the State. *See*, *e.g.*, *Edelman v N.Y. State Dept. of Taxation & Fin.*, 162 A.D.3d 574, 575-576 (N.Y. App. Div. 2018) ("Where Commerce Clause scrutiny reveals that the statute at issue does not affect interstate commerce, there is no need for a test determining whether the statute unduly burdens interstate commerce."); *Park Pet Shop, Inc.*, 872 F.3d at 502 ("[n]o disparate treatment, no disparate impact, no problem under the" DCC) (citation omitted).

Thus, FGP's motion for partial summary judgment is denied for the additional reasons that the Challenged Statute is commerce-neutral and there is no proof of a disparate impact on interstate commerce.

(E) Is a DCC Violation Proven because Taxation's Regulations Apportion the PFF?

Due to the court's denial of partial summary judgment to FGP, it need not address the validity of Taxation's regulations which permit an apportionment

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L.P., 170 N.J. 90 (2001) (revenue raised in connection with the State's regulation of a business, and used to "defray[] the expense fairly attributable to the regulative process" is not a tax even if the revenues collected exceed the governmental costs).

of the PFF. However, because these regulations permit an inference that Taxation acknowledges a DCC problem with the Challenged Statute, the court briefly addresses the validity of the regulations.

First, the regulatory apportionment (only to non-resident partners, with no physical nexus to New Jersey, and if the partner is an entity, then only if it has an office outside New Jersey, see N.J.A.C. 18:35-11.2(b)), exceeds the statute's plain language and intent, and as such, improperly exceeds the scope of the statute.[18] See *Fedders Fin. Corp. v. Dir., Div. of Taxation*, 96 N.J. 376, 392 (1984) (". . . an administrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment . . . nor may it give the statute any greater effect than its language allows.") (citations and internal quotation marks omitted).

Second, the regulations permit an apportionment at the partner level. Yet, all parties agree that the PFF is imposed at the entity level. The fee is based on the fact that the partnership has New Jersey source income, not how much, and not how much of that income is distributed to a partner. The role of the partner in the Challenged Statute is for a head count,

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[18] The requirement of an office outside New Jersey is also suspect. Prior law required 100% allocation of corporate income to New Jersey if the corporate entity did not have a regular place of business outside the State. N.J. S.A. 54:10A-6. This requirement was removed effective July 1, 2010. See L. 2008, c. 120 § 2. Since Taxation's regulations as to the partnership filing fee were promulgated in 2003, its conditioning an apportionment only if the partnership had an office outside New Jersey, was appropriate. This no longer being a statutory requirement, Taxation's insistence on the same as a condition for the fee apportionment is questionable.

not for a consideration of the partner's residency or nexus, or lack thereof.

Third, the benefit of the apportionment inures only to partnerships which have nonresident partners (individuals or foreign corporate/pass-through entities). Thus, a partnership with only domestic partners (corporate or New Jersey resident individuals), will always have to pay a full fee even if that entity does business in multiple States. It is unclear how this distinction achieves fairness when the partnerships are similarly situated (operating or deriving income from multiple States including New Jersey, and having to file informational returns in New Jersey and elsewhere). Either way, Taxation will (or should) be reviewing the same number of returns (of the partnerships and of the partners), and expending the same quantity and quality of review and effort in examining those returns.

Note that a justification that residents cannot claim protection of the DCC is incorrect. See *Wynne*, 135 S. Ct. at 1798-99. Taxation claims that a resident can claim credit for taxes paid in other States under N.J.S.A. 54A:4-1. However, the plain language of this credit statute does not allow for such an expansive reading as proffered by Taxation primarily because the credit is for a tax "on income" paid by the individual taxpayer. Here, the PFF is imposed upon and paid by a partnership, and the measure of the fee is not income earned by the partner (or even by the partnership).

True, this court must strive to save the constitutionality of the Challenged Statute, and try to construe it in a manner to achieve that purpose. *See e.g. Whirlpool Properties, Inc.*, 208 N.J. at 151. Nonetheless, this principle does not apply here since the court is not finding the Challenged Statute as unconstitutional under the DCC. Even if it had, the plain language of the Challenged Statute does not permit imposition of an apportionment. See *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) (court cannot "rewrite a plainly-written" statute, "write in an additional qualification which the Legislature pointedly omitted in drafting its own enactment," or "engage in conjecture or surmise which will circumvent the plain meaning of the act."). Although this court need not accept a regulation if it incorrectly interprets the law, nonetheless, the court lacks authority to "cure" a regulation by providing an apportionment of the PFF as desired by FGP. *See, e.g.*, *Camps Newfound/Owatonna v. Twp. of Harrison*, 520 U.S. 564, 618 (1997) (DCC analysis should not be used to "make policy-laden judgments that [courts] are ill-equipped and arguably unauthorized to make") (citation omitted) (Thomas, J., dissenting); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 27778 (1978) (rejecting a request that a State use the three-factor apportionment formula similar to other States to avoid multiple taxation, as opposed to the statutorily prescribed single factor, since this "would require extensive judicial lawmaking.").[19]

The court is aware that in an unrelated GIT case, it did not strike down Taxation's regulation that had provided a credit for taxes paid to other states by a New Jersey resident who was a shareholder in an

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[19] Note that even if the court were to find (based on facts and evidence before it) that the Challenged Statute violates the DCC by causing a disparate impact on interstate commerce, it still cannot cure the statute by (1) enforcing the regulatory apportionment; (2) re-writing the regulations and substitute the allocation methodology proffered by FGP which is limited to only how the $250,000 cap should be apportioned.

S corporation that did business outside New Jersey even though the statute, N.J.S.A. 54A:4-1(c), plainly stated that no credit is allowed "for the amount of any income tax or wage tax imposed for the taxable year on S Corporation income allocated to this State." See *Beljakovic v. Dir., Div. of Taxation*, 26 N.J. Tax 455 (Tax 2012). However, that case is readily distinguishable. There, unlike here, the statute provided for an apportionment (by a credit for income taxes paid to other States by New Jersey residents), yet disallowed the same for a resident S corporation shareholder. Thus, when the regulations provided for an apportionment (by a credit for taxes paid to other states) to a resident S corporation shareholder, but only for income sourced outside the State, they were in conformance with the statutory intent, and were thus, proper. Here, the Challenged Statute does not provide for any apportionment, thus, does not allow for a reading that the same is readily or implicitly inferable. Therefore, *Beljakovic* does not control or require acceptance/ application of Taxation's fee-apportionment regulations.

(F) Application of the Pike Balancing Test

As noted above, a statute that regulates a business or trade will be upheld provided it is done "even-handedly to effectuate a legitimate local public interest," and does not impose such a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Wayfair, Inc.*, 138 S. Ct. at 2091 (citing and quoting *Pike*, 397 U.S. at 142).[20]

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[20] A state law "may fall into one of three categories, for purposes of a [DCC] analysis: (1) disparate treatment; (2) disparate impact; and (3) laws that do not give local firms any competitive advantage over those located elsewhere." *Park Pet Shop, Inc.*, 872 F.3d at 502. The law which falls under third category is one "which affect[s] but [does] not burden commerce," and is analyzed

Pike did not involve a levy (a fee or tax). Rather, the Court analyzed a regulation whereby Arizona barred a corporation from transporting uncrated cantaloupes to be packed and processed in the entity's California packing/processing facility, and found that "the practical effect of" Arizona's regulation "would be to compel the company to build packing facilities in or near . . . Arizona" causing loss of time and money. *Pike*, 397 U.S. at 138, 140. In ruling that an even-handed regulation will not be stricken when "its effects on interstate commerce are only incidental," but would if the burden on interstate commerce was excessive, *id.* at 142, the Court held:

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues . . . but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens . . . .
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> [*Ibid.*] (citations omitted)

While Arizona's interest in showing its name on the packaging maybe legitimate, it was "tenuous" when compared to the unnecessary costs it imposed on the corporation. *Id.* at 154. The resultant burden on

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under a "rational-basis review." *Ibid.* Here, the parties' motions addressed only the DCC analysis. Therefore, although this court has found no DCC issues, it will not apply the rational basis suggested in *Park Pet Shop, Inc.*, 872 F.3d at 502.

interstate commerce was "constitutionally, more significant than its extent." *Ibid.*

Here, it is not even clear whether *Pike* should apply. This court was not able to find, neither did the parties provide, any controlling case to which *Pike* applies in the in the context of a challenged fee or tax. Additionally, *Pike* only applies should the court find no discrimination, facially or in practical effect. Here, the court found that the DCC is not implicated since the fee is to defray costs of a purely intrastate activity, and further that the Challenged Statute is facially neutral, and with no proof of disparate impact on interstate commerce. As a result there is no need to examine the application of *Pike* here.

Even if the court were to examine the application of *Pike* (if the PFF may have an incidental but not disparate impact on FGP's investment activity), FGP has not shown that the PFF imposes an excessive burden on its interstate commerce. While it did provide information to show that the salaries paid (*i.e.* the governmental costs sought to be recovered from partnerships) appear to be about half of the revenues raised by the PFF, rendering the per-partner fee of $4 ($19 million in salaries divided by 4.7 million returns = $4 per return), this does not prove that the PFF is an "excessive" burden on its investment activity. Additionally, it is not even clear that salaries only can be the only measure of governmental costs sought to be recovered from partnerships.

Even if FGP's initial "raw" salary information can be deemed to equate to the State's costs,[21] Taxation

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[21] Although FGP's OPRA request included information as to the "expenses or costs" such as wages, equipment cost, information technology cost, it apparently agreed to narrow its request

has not provided any independent information to show that the fee at the rate of $150 per-partner or the $250,000 cap is not excessive. It complains that the total salaries are underestimated since they must include the value of employee benefits. Yet, it provides no data in this regard. It complains that the results look low due to over-simplified math, yet does not provide any data to show why the math is unreliable or provides an incredible/unreasonable result. Indeed, although the fiscal estimate noted that the projected revenues from the partnership filing fee was based on data "collected by" Taxation, Taxation claimed that its files contain almost nothing in this regard.

Further, Taxation's argument that the $250,000 cap when applied to FGP equals to a cost of about $4 per-

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to salaries paid. Further, FGP's OPRA requests were denied for one reason or other. Its request for any "study, analysis, or other document" relative to "the cost of receiving and processing returns" under the GIT Act, was denied on grounds there were none. The OPRA unit stated that Taxation "did not prepare any fiscal information for Assembly Bill 2501," thus, any records as to the fiscal estimates did not exist. Neither was such information available as to the OLS' estimates, since they were "destroyed" in 2009. A similar unavailability response attached to FGP's request on "how the Legislature arrived at the $150 per owner processing fee," including any study or analysis in this regard. The OPRA unit also denied FGP's request for data or worksheets to support the computation of amounts shown in the annual budgets as appropriation for Taxation and Division of Revenue for FYs 2009-2011, as being unduly onerous, not in possession, and privileged as advisory, deliberative information. FGP's request for "any study, analysis or other document" describing Taxation's "audit and appeal resources devoted to" examining, auditing, or appealing any "partnership issues" arising from NJ-1065s or other related returns or schedules, for FYs 20082012, including "auditor or conferee headcount," time spent on audits, and "any other measure of audit or appeal resources," was denied as overbroad and vague.

partner does not prove the reasonableness of the fee amount. Rather, it tends to show otherwise since the activity of reviewing returns can be performed for less than $4 perpartner. Similarly, its argument that a 3-partner partnership will pay only $450 as the fee, which is lesser than the minimum CBT in 2009 ($500 to $2,000), does not prove that the $150 per partner is reasonable.[22] This is especially true where the minimum CBT, which is imposed for the "privilege" of exercising a corporate franchise, does not vary by shareholder count. Thus, a large corporation with several hundred shareholders will certainly not pay $250,000 as would FGP.[23]

Since neither FGP nor Taxation provided any data, evidence or other proof on why the PFF fails or passes the *Pike* balancing, should that test even apply here,

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[22] The CBT Act imposes a minimum "tax" on any corporate entity domestic or foreign at a flat amount which until 2005 was not based on any factor, and then from 2006 onwards was "based on the New Jersey gross receipts" at amounts ranging from $500 (gross receipts of less than $100,000) to $2,000 (for gross receipts of $1 million or more). See N.J.S.A. 54:10A-5(e). Different amounts were imposed on S corporations. *Ibid.*

[23] Further, charging $150 per-partner for a small partnership, but providing a volume discount of about $3-$4 per-partner for a large partnership such as FGP, while may not implicate the DCC or the *Pike* test, nonetheless raises concerns. If the BTRA intended to level the playing field between large and small businesses so that so that tax revenues are not minimized due to sophisticated planning engaged by large entities, the $250,000 cap subverts that purpose inasmuch as it reduces the cost per-partner in a large firm, as compared to a small firm. Note that the court's findings here are restricted solely to the DCC analysis, and the application of *Pike* in that context. Therefore, the court's above conclusion does not mean that the PFF cannot be deemed excessive or unreasonable under any other constitutional or legal reasons.

the court finds that grant of summary judgment in this regard to either party is inappropriate.

CONCLUSION

For the aforementioned reasons, the court finds that the Challenged Statute, N.J.S.A. 54A:8-6(b)(2) does not implicate or violate the DCC because it imposes the PFF to defray the costs of a purely intrastate governmental activity, which is to review partnership and partner returns, in order to track whether New Jersey sourced income/loss was reported to New Jersey. Therefore, and only to this extent, namely, that because the PFF does not implicate the DCC, Taxation's motion for partial summary judgement is granted.

Plaintiff's motion for partial summary judgment should also be denied because (1) the Challenged Statute is commerce neutral, and (2) FGP has not provided any proof of disparate impact on interstate commerce, which is its investment activity. Merely relying on the mathematical computation of a hypothetical amount under the internal consistency test does not satisfy FGP's burden to prove disparate impact on interstate commerce. That Taxation promulgated regulations providing a limited apportionment of the fee does not state a claim for violation of DCC, which regulations, in any event, exceed the plain language and intent of the Challenged Statute.

Finally, should the balancing test of *Pike* apply, FGP has not proven excessive burden on interstate commerce, and Taxation has not proven the contrary. Thus, both parties' motions for partial summary judgment are denied as to this aspect.

Very truly yours, Mala Sundar, J.T.C.

APPENDIX D

United States Constitution,
Article I, Section 8, Clause 3

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

APPENDIX E

N.J. STAT. § 54A:8-6

This section is current through New Jersey 219th Second Annual Session, L. 2021, c. 161 and J.R. 3

§ 54A:8-6. Requirements concerning returns, notices, records and statements

(a) General. The director may prescribe regulations as to the keeping of records, the content and form of returns and statements, and the filing of copies of federal income tax returns and determinations. The director may require any person, by regulation or notice served upon such person, to make such returns, render such statements, or keep such records, as the director may deem sufficient to show whether or not such person is liable under this act for tax or for collection of tax.

(b) Partnerships. (1) Each entity classified as a partnership for federal income tax purposes, including but not limited to a partnership, a limited liability partnership, or a limited liability company, having a resident owner of an interest in the entity or having any income derived from New Jersey sources, shall make a return for the taxable year setting forth all items of income, gain, loss and deduction and such other pertinent information as the director may by regulations and instructions prescribe. The director shall prescribe a State return form that, at a minimum, includes the name and address of each partner, member, or other owner of an interest in the entity however designated, of the entity for taxable years ending on or after December 31, 1994. Such return shall be filed on or before the fifteenth day of the fourth month following the close of each taxable year.

(2)

(A) Each entity classified as a partnership for federal income tax purposes, other than an investment club, having any income derived from New Jersey sources, including but not limited to a partnership, a limited liability partnership, or a limited liability company, that has more than two owners shall at the prescribed time for making the return required under this subsection make a payment of a filing fee of $150 for each owner of an interest in the entity, up to a maximum of $250,000. For the purposes of this paragraph, "investment club" means an entity: that is classified as a partnership for federal income tax purposes; all of the owners of which are individuals; all of the assets of which are securities, cash, or cash equivalents; the market value of the total assets of which do not exceed, as measured on the last day of its taxable year, an amount equal to the lesser of $250,000 or $35,000 per owner of the entity; and which is not required to register itself or its membership interests with the federal Securities and Exchange Commission; provided that beginning with taxable years commencing on or after January 1, 2003 the director shall prescribe the total asset value amounts which shall apply by increasing the $250,000 total asset amount and the per owner $35,000 amount hereinabove by an inflation adjustment factor, which amounts shall be rounded to the next highest multiple of $100. The inflation adjustment factor shall be equal to the factor calculated by dividing the consumer price index for urban wage earners and clerical workers for the nation, as prepared by the United States Department of Labor for September of the calendar year prior to the calendar year in which the taxable year begins, by that index for September of 2001;

(B) Each entity required to make a payment pursuant to subparagraph (A) of this paragraph shall also make, at the same time as making its payment pursuant to subparagraph (A) of this paragraph, an installment payment of its filing fee for the succeeding return period in an amount equal to 50% of the amount required to be paid pursuant to subparagraph (A). The amount of the installment payment shall be credited against the amount of the filing fee due for the succeeding return period, or, if the amount of the installment payment exceeds the amount of the filing fee due for the succeeding return period, successive return periods.

(C) Notwithstanding the provisions of R.S. 54:48-2 and R.S. 54:48-4 to the contrary, the fee required pursuant to subparagraph (A) of this paragraph and the installment payment required pursuant to subparagraph (B) of this paragraph shall, for purposes of administration, be payments to which the provisions of the State Uniform Tax Procedure Law, R.S. 54:28-1 et seq., shall be applicable and the collection thereof may be enforced by the director in the manner therein provided.

(3) Each entity required to file a return under this subsection for any taxable year shall, on or before the day on which the return for the taxable year is required to be filed, furnish to each person who is a partner or other owner of an interest in the entity however designated, or who holds an interest in such entity as a nominee for another person at any time during that taxable year a copy of such

information required to be shown on such return as the director may prescribe.

(4) For the purposes of this subsection, "taxable year" means a year or period which would be a taxable year of the partnership if it were subject to tax under this act.

(c) Information at source. The director may prescribe regulations and instructions requiring returns of information to be made and filed on or before February 15 of each year as to the payment or crediting in any calendar year of amounts of $100.00 or more to any taxpayer under this act. Such returns may be required of any person, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of this State, or of any municipal corporation or political subdivision of this State, having the control, receipt, custody, disposal or payment of interest, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits or income, except interest coupons payable to bearer. A duplicate of the statement as to tax withheld on wages, required to be furnished by an employer to an employee, shall constitute the return of information required to be made under this section with respect to such wages.

(d) Notice of qualification as receiver, et cetera. Every receiver, trustee in bankruptcy, assignee for benefit of creditors, or other like fiduciary shall give notice of his qualification as such to the director, as may be required by regulation.

APPENDIX F

[1] TAX COURT OF NEW JERSEY
MERCER COUNTY, NEW JERSEY

Docket No. 007051-2014

FERRELLGAS PARTNERS, L.P.,
Plaintiff,
vs.

DIRECTOR, DIVISION OF TAXATION.
Defendant.

TRANSCRIPT OF MOTION
Place: Tax Court
25 Market Street Trenton, N.J. 08625
Date: May 26, 2017

BEFORE:
HONORABLE MALA SUNDAR, J.T.C.

TRANSCRIPT ORDERED BY:

Matthew Setzer, Esq. (Reed Smith LLP)

APPEARANCES:

KYLE SOLLIE, ESQ.
(Reed Smith LLP) Attorney for the Plaintiff

MICHAEL DUFFY, ESQ.
(Deputy Attorney General) -And-

STEVEN DeLUCA, ESQ.
(Deputy Attorney General) -And-

RAMANJIT K. CHAWLA,
(Deputy Attorney General)
Attorneys for the Director, Division of Taxation

* * *

[49] THE COURT: So what was the issue? And there—that's why the back and forth as Mr. Sollie pointed out was if there was an apportionment, how was it still unfair? At most it would be unfair to the resident taxpayers—

MR. DUFFY: I understand the argument, Your Honor.

THE COURT: —who don't get an apportionment.

MR. DUFFY: Understand the argument.

THE COURT: Yes.

MR. DUFFY: Again, I—I am simply trying to protect the regulation that from this litigation today is not being contested.

THE COURT: No, it's not.

MR. DUFFY: And I—I don't know if it was contested by Targa. I apologize for my earlier [50] interruptions.

Your Honor, I heard plaintiff's argument, and to me it—it boils down really to two things. I got a lot more to say than just two things, but they're second guessing the legislative dollar amount of $150 per partner. That's legislative fiat. I—I—I don't believe it's the taxpayer's position to—to question the dollar amount. They—they gave examples of other cases where the Department had the authority or ability to set the rate by looking at costs. I don't know if there's any fault on my client not having done that in this case 'cause the legislature said it's $150 per partner—

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