No. 21-641

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

BRIEF OF *AMICUS CURIAE* THE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Institute for Professionals in Taxation (IPT) is a non-profit educational organization founded in 1976. IPT serves more than 6,000 members, representing approximately 1,200 corporations, firms, and taxpayers throughout the United States and Canada. IPT's membership includes small businesses as well as most of the Fortune 1000 companies, and represents the spectrum of business and industry sectors, including agriculture, manufacturing, retail, communications, finance, transportation, and oil and gas. IPT is dedicated to promoting the uniform and equitable administration of state and local taxation, minimizing the costs of tax administration and compliance, and promoting equitable and non-discriminatory taxation of multi-state businesses.

IPT files this brief to emphasize the lack of clarity regarding the proper standards lower courts must employ when evaluating the constitutionality of state taxes and fees that are imposed without apportionment—*i.e.*, without regard to the level of business activity conducted in the state by the tax- or fee-payer compared to its activity everywhere.[1] IPT recognizes the potential for widespread, negative consequences to flow from the decision below, which sanctioned New Jersey's imposition of an unapportioned levy on a business despite acknowledging that the business

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[1] Pursuant to Supreme Court Rule 37.6, IPT states that no counsel for a party authored this brief in whole or in part and that no person other than IPT or IPT's counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, IPT states that Petitioner has provided blanket consent to the filing of *amicus* briefs, and Respondent has consented in writing to IPT's filing of this *amicus* brief.

engages in interstate commerce. The court's decision signals significant confusion regarding this Court's Commerce Clause jurisprudence and specifically how it applies to state levies that are designed to defray regulatory costs incurred by the state.

IPT encourages the Court to grant review, reverse the decision below, and establish clear guidelines regarding the standards courts must follow when considering the constitutionality of unapportioned state levies.

SUMMARY OF THE ARGUMENT

A. The question presented in the petition—which asks how to determine the constitutionality of unapportioned flat state taxes or fees—is a recurring one of great practical importance, about which the courts are confused and that the court below got wrong.

That confusion, and the error below, stems primarily from this Court's decision in *American Trucking Associations, Inc.* v. *Michigan Public Service Commission*, 545 U.S. 429 (2005) (*ATA Michigan*), where the Court determined that a state may impose an unapportioned tax or fee as long as it is imposed on "purely local activity." 545 U.S. at 437. In that case, the Court reasoned that the *fee-payer*'s activity, the intrastate transportation of goods, was "local." But relying on that decision, the court below understood the relevant local activity in this case to be the New Jersey Division of Taxation's review of partnership returns, rather than Petitioner's sale of propane or its raising of capital through the sale of units in its publicly traded partnership. The court thus interpreted the phrase "purely local activity" from *ATA Michigan* to mean the *state's* activity for which funds

from a tax or fee are used, and not the activity of the business upon which the tax or fee is imposed.

Unlike the New Jersey court, IPT believes that the state's activity should not be relevant to this inquiry. If it were, state legislatures and revenue departments could sidestep the Commerce Clause at will when imposing flat fees because, absent a very unusual circumstance, a state will always use the revenue it raises from taxes or fees it imposes for its own, intrastate purposes. Accordingly, under the New Jersey court's interpretation of *ATA Michigan*, a tax or fee will never implicate interstate commerce and never require apportionment. The New Jersey court's reasoning provides a blueprint for state legislatures, revenue departments, and lower courts to circumvent the constraints established by the Commerce Clause.

B. The question whether the imposition at issue falls on "purely local activity" applies equally to any tax or fee imposed without apportionment. The circumstances in this case are, however, unusual in one respect: Petitioner, a partnership consisting of tens of thousands of partners, has enough at stake to make litigation of the issue worthwhile. Where the fee at issue is a flat, relatively low-dollar charge, that will almost never be true. In almost all such cases, challenging the fee would be a money-losing proposition for the fee-payer, notwithstanding the doubtful constitutionality of such unapportioned fees. The result is that such charges, although common in states across the country, have gone, and will continue to go, uncontested.

It therefore is especially important that the Court take advantage of the rare opportunity presented by the petition in this case. The Court's re-

view would benefit all partnerships subject to the levy and all payers subject to similar charges in other states, many of which cannot practically challenge the impositions themselves. By granting review, the Court could provide much-needed clarity not just for Petitioner and other master limited partnerships, but for all individuals and small businesses subject to unapportioned state taxes and fees.

ARGUMENT

I. The Decision Below Undermines the Commerce Clause and Reveals Significant Uncertainty Regarding the Proper Standards for Evaluating the Constitutionality of Unapportioned Taxes and Fees.

In *ATA Michigan*, this Court considered the constitutionality of a flat, $100 fee Michigan imposed on trucks engaged in intrastate hauling—*i.e.*, point-to-point trips from one Michigan city to another. Michigan imposed the fee to defray its costs of regulating truck sizes and weights, administering insurance requirements, and applying safety standards. 545 U.S. at 435. The fee-payers in that case were engaged in both interstate and intrastate hauling. They argued that trucks carrying both interstate and intrastate loads engaged in less business in Michigan than did trucks that exclusively carried intrastate loads in the State, and thus that the flat fee effectively discriminated against trucks engaging in interstate commerce, in violation of the dormant Commerce Clause. *Id.* at 432.

This Court rejected the fee-payers' argument. It recognized that the fee violated the Court's so-called "'internal consistency' test" for complying with the dormant Commerce Clause. That test asks "'[w]hat

would happen if all States did the same'" as the taxing state, and generally invalidates state tax regimes that, if replicated in all states, would result in interstate businesses paying more than wholly intrastate businesses engaged in an equivalent amount of total activity. 545 U.S. at 434, 437–38. But the Court reasoned that the fee was still proper because it fell "only upon intrastate transactions—that is, upon activities taking place exclusively within the State's borders." *Id.* at 434. Thus, it did not "reflect an effort to tax activity that takes place, in whole or in part, outside the State," but rather taxed only "purely local activity." *Id.* at 434, 437. The Court concluded, "[i]n sum, petitioners have failed to show that Michigan's fee, which does not seek to tax a share of interstate transactions, which focuses upon local activity, and which is assessed evenhandedly, either burdens or discriminates against interstate commerce, or violates the Commerce Clause in any other relevant way." *Id.* at 438.

As Petitioners here correctly note, quoting the leading commentators in this area, *ATA Michigan*—and, in particular, the Court's sanctioning of Michigan's flat fee on the ground that it taxed purely "local" activity—has led to significant uncertainty regarding the application of the internal consistency test to unapportioned state taxes and fees and places "enormous pressure on the meaning of the word 'local.'" Pet. 2 (quoting 2 Jerome Hellerstein & Walter Hellerstein, State Taxation ¶ 4.16[1][a][vi] (3d ed. 2003 Supp. 2021–2)). As applied in that case, the "local activity" test inquired whether a particular *activity* was "local"—there, specific trips conducted entirely in one state, but engaged in by an interstate truck that made similar intrastate deliveries in all 50 states. The result of that inquiry, or even the ba-

sis on which it should be resolved, will often be unclear.

The decision below, however, adds an additional layer of uncertainty to this inquiry: it looks not only to the nature of the activity, but to *whose* activity constitutes the relevant local activity. Is it the activity of the business on which the tax or fee is levied, as this Court appeared to assume in *ATA Michigan*? Or can it be the activity *of the taxing state* in using the funds generated by the tax or fee?

Here, the New Jersey court deemed the state's activity to be the proper focus. It explained that the partnership filing fee "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." Pet. App. 24a.[2] Based on this determination, the court concluded that the fee "does not implicate or violate" the dormant Commerce Clause at all, "even though plaintiff is involved in interstate commerce." *Ibid.*

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[2] This Court has appeared to use the term "local" as synonymous with "intrastate," or conversely, as the opposite of "interstate." See *Am. Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 283 (1987) ("Payment of one registration fee enables a carrier to operate a vehicle either locally or in the interstate market."); see also *ATA Michigan*, 545 U.S. at 435 ("Although we have 'long since rejected any suggestion that a state tax . . . affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a "local" or intrastate activity.'") (quoting *Commonwealth Edison Co* v. *Montana*, 453 U.S. 609, 615 (1981)). The New Jersey court's reference to "purely intrastate activity" thus appears to be synonymous with this Court's reference in *ATA Michigan* to "purely local activity." See Pet. App. 24a.

IPT believes that the proper focus should instead be on Petitioner's activity, *i.e.,* the activity of the business upon which the tax or fee is levied. Focusing on the taxpayers' activities is what the Court required in *ATA Michigan*. There, the "activities taking place exclusively within" Michigan, upon which the Court focused, were the point-to-point trips of the truckers, not the state's use of the revenue from the fees to regulate vehicle weights, administer insurance requirements, and apply safety standards. See 545 U.S. at 437 ("The present fee, as we have said, taxes purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States.").

The levy here is imposed not on physical activity, like trucking, but on the act of filing a tax return with a state revenue department. Nevertheless, the focus of the "local activity" inquiry must remain on the activity of the business upon which the tax or fee is levied. If it were otherwise, it is hard to imagine how a fee imposed by a state would implicate interstate commerce, because the revenue a state generates from its taxes and fees will, absent unusual circumstances, *always* be used by the state for its own, intrastate purposes.

The New Jersey court's reasoning therefore creates a loophole that allows states to circumvent the Commerce Clause simply by deeming the activity for which it charges a fee to be an act that is performed within the state, even though the payer engages in that conduct as part of its engagement in interstate commerce. Here, for example, the filing fee purportedly compensates New Jersey for the processing of

partnership returns.[3] But that understanding—and the focus of the "local activity" inquiry on the state's use of the fee revenue—would make Commerce Clause limits largely unenforceable as a practical matter.

Although it is clear from the New Jersey court's decision that its conclusion rested on its view that the relevant activity was that of the state, the New Jersey Division of Taxation has at times suggested that the partnership filing fee is imposed for the *partnership's* activity of filing returns with the Division. Brief for Director, Division of Taxation at 16, *Ferrellgas Partners, L.P. v. Director, Division of Taxation*, No. A-003904-18T1 (N.J. Super. Ct. App. Div. Jan. 3, 2020) ("Similar to the fee imposed on trucks that undertook point-to-point hauls between Michigan cities, here, the partnership filing fee is only imposed on entities required to file a return under the statute."); *id.* at 21 ("The fee is a 'filing fee' (i.e., triggering event) imposed on a per-partner basis to defray tax return processing costs."). But this reasoning is no less problematic than is the court's focus on the state's action.

The relevant activity for Commerce Clause purposes logically should be the payer's conduct of an interstate business, not its filing of returns in states where it conducts its interstate business. Otherwise, every state could deem an interstate business's activity to be intrastate simply by focusing on the filing of a return that memorializes the fee-payer's activities in that state, rather than on the activities them-

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[3] IPT notes that Petitioner has raised compelling arguments that the partnership filing fee is not properly targeted to that purported purpose. See Pet. 17–18.

selves. This would create the same loophole as does treating the state's processing of partnership returns as the relevant act. A taxpayer's filing of a return with a state will always be deemed to be activity confined to that state, even if the return reflects income generated from the taxpayer's interstate business. In either instance, focusing on portions of the taxpayer's business in isolation would result in deeming the tax or fee constitutional—an outcome that improperly substitutes form for substance. See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 615 (1981) ("The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity."); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 332 n.12 (1977) ("Because of the discrimination inherent in [the challenged tax], we also reject the Commission's argument that the tax should be sustained because it is imposed on a local event at the end of interstate commerce.").

II. The Court Should Provide Much-Needed Clarity for All Businesses Subject to Unapportioned State Taxes and Fees, Many of Which Have No Realistic Access to Court Review.

It is a matter of considerable importance that the constitutionality of flat levies like the one challenged here be settled, and this case presents uniquely favorable circumstances for resolution of the issue.

First, the issue arises with great frequency and affects innumerable tax- and fee-payers across the country. As Petitioner demonstrates, at least twelve states impose unapportioned taxes or fees, ranging

from $100 to $2,000. Pet. 14, n.3. There is every reason to expect that this number will grow, as additional states see the revenue-generating possibilities of New Jersey's Commerce Clause-free approach.

But *second*, challenging a tax or fee like the one at issue here is impracticable for most individuals or businesses subject to such levies. When a flat tax or fee is imposed at a low amount, like the $150 per-partner levy at issue, the costs of a challenge will almost always exceed the amount at issue. In New Jersey, a partnership with two partners would incur liability of only $300 in a given year. To file a complaint with the New Jersey Tax Court to contest this imposition, the partnership would have to pay a court filing fee of $250. N.J. Ct. R. 8:12(a).[4] It would incur an additional $50 fee for each motion it filed. *Id.* Merely commencing a challenge would account for five-sixths of the amount at issue, and the filing of a single, routine discovery motion would consume the rest. Even if the unconstitutionality of the levy were readily apparent, the partnership would be better off paying the levy than challenging it.

[4] The fee for proceeding in the New Jersey Tax Court's Small Claims Division, which is available for issues involving $5,000 or less, is only $50. N.J. Ct. R. 8:12(b). The Small Claims Division, however, resolves cases on the basis of the complaint and answer, with no supplemental pleadings. N.J. Ct. R. 8:3-2(c). Although the amount at issue in this hypothetical would allow the case to proceed in the Small Claims Division, the weighty constitutional issues presented would make the resolution in Small Claims Division impractical. Further, even the Small Claims Division fee alone would reduce the partnership's potential recovery by one-sixth from the start.

And this does not even account for attorney's fees.[5] Even one or two hours of an attorney's time could easily surpass the amount at issue.[6] Costs for proceeding through the Tax Court plus two levels of appellate review (as is the case in New Jersey) to even have an opportunity to petition this Court would dwarf the amount at issue many times over, even for a partnership with well over two partners.

The same procedural hurdles exist in other states that have levies of similar amounts. A court challenge for the vast majority of those affected will be a practical impossibility. And these practical hurdles will embolden state legislatures to enact unapportioned taxes and fees even when their constitutionality is questionable.

Realistically, the only way meaningful review of these fees can occur is in cases like the present one, when unique facts, organizational backing, or deep pockets give a litigant sufficient interest to challenge a state's levy, maintain that challenge through several layers of appellate review, and petition this Court. This case presents extraordinary circumstances that explain Petitioner's willingness to pursue the constitutional challenge. Because Petitioner engages in an atypical form of business—the master

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[5] Except in limited circumstances, partnerships in New Jersey are required to appear and file papers through an attorney. N.J. Ct. R. 1:21-1(c).

[6] Jeff Goldman, *N.J. lawyers among the most expensive in the country*, NJ.com (Oct. 12, 2017) (describing a report of legal trends, which found that New Jersey firms charge an average of $272 per hour for legal services). Although the partnership could recover attorney's fees if it were to prevail, such recovery would be capped at $75 per hour. N.J. Stat. Ann. § 54:51A-22(a)(3).

limited partnership, which involves tens of thousands of partners—it must pay New Jersey an unusually large fee of $250,000 per year, even though the per-partner amount is only $150. Unlike the vast majority of partnerships upon which the fee is imposed, Petitioner has sufficient interest to justify litigation.[7]

This case is therefore an especially suitable one for review. The amount at stake has no bearing on the substance of the legal issue or the constitutionally dubious nature of New Jersey's rule. And the discriminatory effects of the levy at issue here are not unique to Petitioner, to master limited partnerships, to the energy industry, or to New Jersey. But Petitioner's form of doing business does give it the practical incentive to seek review of the constitutionality of New Jersey's fee—an incentive that most payers of flat fees will lack, notwithstanding such fees' vulnerability to challenge under the Commerce Clause. Because the question presented is a recurring one of great practical and doctrinal importance, the Court should take advantage of the opportunity presented by the petition and grant review.

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[7] Even when review is feasible, such review is typically confined to the courts of the state imposing the levy, due to the Tax Injunction Act, 28 U.S.C. 1341 ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."). Thus, the first opportunity for federal court review of a case involving state taxation often does not occur until a case reaches this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 1, 2021