No. 21-641

In the Supreme Court of the United States

FERRELLGAS PARTNERS, L.P.,
Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

BRIEF OF THE ENERGY INFRASTRUCTURE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Energy Infrastructure Council ("EIC") is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure. It is also the nation's only trade association representing the publicly traded partnerships commonly known as master limited partnerships ("MLPs"). EIC currently has 117 members, including 40 MLPs. Its membership comprises traditional and renewable energy infrastructure companies, service providers, and other businesses and individuals that operate in and around the energy industry. Its core mission is to represent and promote the interests of energy infrastructure companies.

This case is critically important to EIC and its members because the question presented has serious ramifications for the economic interests of MLPs. New Jersey has singled out partnerships, including MLPs, to pay a special levy calculated based on the number of partners in each partnership. Because MLPs are publicly traded partnerships, anyone can become a partner by purchasing a partnership unit. MLPs often have partners residing in most or all of the 50 states, and commonly do business in numerous states—indeed, the MLP form is especially favored by businesses involved in the transportation and distribution of natural resources, a form of trade that is at the very heart

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties were given timely notice and consented to the filing of this brief.

of interstate commerce. The sheer number of limited partners in the majority of MLPs means that most MLPs will likely be required to pay the maximum amount under New Jersey's levy. And if other states were to adopt a levy like New Jersey's, each MLP would be subject to a *de facto* flat tax for every state in which it does business.

MLPs are therefore significantly burdened by the New Jersey levy, and similar levies that exist (or may be enacted) in other states. The extent of such burden is a disincentive against forming or continuing businesses through the MLP structure. That would diminish a valuable source of capital for a critical segment of our nation's energy sector, and would directly harm EIC's members. EIC therefore has a strong interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case raises the question whether the Commerce Clause permits New Jersey to charge an annual levy on any partnership that derives any income from the state, equal to $150 per partner up to a maximum of $250,000, with no statutory mechanism for apportionment. That question is critically important to master limited partnerships ("MLPs"), including many of EIC's members. MLPs are publicly traded partnerships, and often (as here) have many thousands of partners across the country. Thus, for practical purposes, New Jersey's per-partner levy will often operate as a flat $250,000 tax on MLPs that derive any income from New Jersey, as it has for Petitioner. See Pet. App. 3a. If other states adopted similar levies,

MLPs would be subject to large, unapportioned levies in multiple states—a significant financial burden, and one that competitors operating wholly intrastate would not have to bear. That untoward outcome is not only discordant with the purposes of the Commerce Clause, it has harmful practical effects, because the MLP structure is a preferred form for companies that develop and own energy transportation infrastructure. In other words, the kinds of levies assessed by New Jersey here and upheld by its courts strike at the heart of companies that design, construct, maintain, and operate some of the nation's most vital channels of interstate commerce.

2. New Jersey's levy is not just unfairly burdensome; it is flatly unconstitutional. The levy clearly violates this Court's well-established internal consistency test; if other states imposed similar levies, there would be disproportionate burdens on interstate commerce, particularly for energy-distribution MLPs like Petitioner and many of EIC's members. The New Jersey Tax Court (whose reasoning the state appellate court "substantially" adopted as its own, Pet. App. 23a-24a) largely ignored this constitutional flaw, all but declaring itself free to brush aside this Court's precedents, which have repeatedly affirmed the vitality of the internal consistency requirement. The decision below is wrong—and, worse still, significantly heightens the confusion in this area of the law, creating additional financial uncertainty for businesses engaged in interstate commerce, including MLPs. This Court should grant review to clarify that state courts must apply this Court's precedent as written—not selectively rely on the views of dissenting Justices when

it suits local policy preferences, as the Tax Court did below.

3. While New Jersey's levy in its current form violates the Commerce Clause, enforcing constitutional limits in this case would have no material adverse consequences for the state. New Jersey could remedy the constitutional flaw in its levy without abandoning the levy altogether, or materially impacting its revenues. One solution would be to employ a simple apportionment system based on formulas that both this Court and courts in New Jersey have long approved. Given the availability of that readily administrable, constitutionally sound alternative, there is no practical or financial reason why New Jersey should need to resort to Commerce Clause violations in order to meet its revenue needs.

4. This case is an excellent and timely vehicle for deciding the question presented. The facts of this case provide a particularly stark illustration of the potential for unapportioned levies to burden interstate commerce. Here, Petitioner—an MLP that sells critical energy products in all 50 states—was required to pay a $250,000 unapportioned levy that, in some years, was greater than the amount of its entire New Jersey-source income. This case accordingly presents ideal facts for highlighting the severe impacts on interstate commerce that would occur if the internal consistency test is not applied to unapportioned flat fees and taxes. Moreover, given other developments in the law, the question presented is likely to grow in importance. This case comes at a particularly opportune time for this Court to resolve the growing confusion among state courts in this area.

The Court should grant the petition.

ARGUMENT

I. The Question Presented Is Critically Important To MLPs, Which Are In Turn Critically Important For The Energy Sector And The Broader Economy.

Petitioner, Ferrellgas Partners, L.P., is a master limited partnership ("MLP"), see Pet. 6, as are many of EIC's members. Although the decision below has implications for all businesses in interstate commerce, the question presented is especially important for MLPs—and thus, in turn, for energy infrastructure companies, and especially the midstream oil and gas sector. To see why, it is important to understand how MLPs work, their importance to the energy sector, and the reasons why New Jersey's levy operates to create serious, unfair, and disproportionate burdens on MLPs. If the decision below stands and other states feel emboldened to enact similar unconstitutional levies, the negative consequences for MLPs would be significant.

MLPs are publicly traded partnerships; instead of shares of stock, partnership "units" are bought and sold on public exchanges. See Energy Infrastructure Council, *MLP 101: The Basics*, https://eic.energy/mlp-101-the-basics (last visited Nov. 30, 2021). MLPs have been in existence since 1981, and they were first created to allow businesses to raise capital from individual investors who might not be able to afford the more sizeable investments often demanded by non-traded partnerships. The MLP structure is most commonly used for businesses with a steady rate of return, in industries that require considerable upfront capital but generate a reliable stream of revenue once their infrastructure is in place. This makes MLPs particularly attractive for entities doing business in the energy transportation and distribution sector. See John Goodgame, *Master Limited Partnership Governance*, 60 Bus. Law. 471, 481 (2005). Petitioner, which sells propane (including the familiar "Blue Rhino" brand of propane tanks), is one example. See Pet. App. 8a (describing business).

The key attribute for an MLP is its classification as a partnership for federal income taxation purposes. See Goodgame, 60 Bus. Law. at 471-472; see also Energy Infrastructure Council, *Basic Tax Principles*, https://eic.energy/basic-tax-principles (last visited Nov. 30, 2021) (describing MLP taxation principles). The purpose of the MLP structure is to avoid a "double taxation" that occurs when taxes are levied at both the entity (corporation) and equity-holder levels. See Goodgame, 60 Bus. Law. at 472. Instead of having to pay both of these taxes, in an MLP (as with other kinds of partnerships), a partnership's income is considered earned by all of the partners. *Ibid.* This income is then allocated among all the partners in proportion to their interests in the partnership, and each partner pays tax on his or her share of the partnership income. Therefore, MLPs are treated as "pass through" entities and need not pay the entity-level income tax that would otherwise result in double taxation. The MLP structure offers important benefits, combining favorable partnership tax rules, with access to a broad investor base through the public securities markets. The net result is a lower cost of capital than either a traditional public corporation, or private partnership—thus fostering investment in certain capital-intensive businesses. Essentially, MLPs are designed to provide typical retail investors with the opportunity to make investments in business activities in which they might not otherwise be able to invest.

MLPs are not the most common or familiar type of business organization, but they have considerable sector-specific importance. In particular, the MLP has been a common business structure in the midstream oil and gas sector, which develops, owns, and operates the infrastructure (e.g., pipeline, processing, and storage facilities) required to deliver reliable and affordable energy to American consumers and businesses. See, *e.g.*, Matthew DiLallo, *The 10 Biggest MLP Stocks*, Motley Fool (Aug. 23, 2019), https://bit.ly/3oBwVMB (describing the holdings and business operations of selected large MLPs). Historically, all MLPs were taxed in the manner described above, with all income "passing through" the partnership to the individual investors, who then paid tax on their share of the net income generated by the MLP. However, the Revenue Act of 1987 limited "pass-through" tax treatment to publicly traded partnerships engaging in certain types of activities, primarily in the natural resources sector. See Goodgame, 60 Bus. Law. at 471-472. These changes had a large impact on the MLP sector, and as a result, natural-resource and energy MLPs constitute roughly 80 percent of MLPs by market value, with 90 percent of those focused on the midstream oil and gas space. See DiLallo, *MLP Stocks*, https://bit.ly/3oBwVMB.

Numerous MLPs are energy companies that do business across state lines and attract investors in multiple states.[2] Given the size of many MLPs and their publicly traded structure, they often have many more partners than is typical for other kinds of partnerships. For example, for tax year 2009, Petitioner had 67,019 partners; for tax year 2010, 66,835 partners; and for tax year 2011, 82,047 partners. See Pet. App. 8a.

Accordingly, MLPs are burdened to a unique extent by New Jersey's levy, and would also be uniquely burdened by any similar levies enacted in other states. New Jersey's $150-per-partner levy may be modest for a partnership with only a handful of partners, but the typical size of MLPs means that they will likely be subject to the maximum annual levy amount of $250,000—hardly a small sum. And because the levy applies regardless of how much money is earned in the state, if other states imposed similarly structured levies, MLPs (which, as noted, tend to do business across state lines and attract investors nationwide) would be paying the maximum levy for the same income in multiple states. By contrast, a partnership that derived its business entirely from intrastate activities would only pay that levy once. Thus, if New Jersey's tax scheme were adopted in other states, MLPs would be forced to pay a substantial, unapportioned levy in every state from which they derive business. That

[2] For a list of MLPs traded on U.S. exchanges, see Energy Infrastructure Council, *Publicly Traded Partnerships Trading on U.S. Exchanges* (Aug. 24, 2021), https://eic.energy/uploads/mlpsonexchanges_08242021.pdf.

would place a unique burden on MLPs compared to intrastate competitors—exactly the type of burden the Commerce Clause forbids.

This, in turn, would be harmful to virtually all consumers and businesses in the United States. Continued investment in MLPs is critical to our economy. Congress has allowed use of this favorable structure for certain types of businesses, to foster investment in specific areas—primarily, capital-intensive businesses such as those developing energy infrastructure. As noted, the MLP structure has been a cornerstone of the energy transportation and distribution sector for decades. Many "midstream assets" such as "pipelines carrying oil, natural gas, [natural gas liquids], or other petroleum products" are owned by MLPs. Goodgame, 60 Bus. Law. at 482. "MLPs own the pipelines, storage tanks, and processing facilities that bring energy from the wellhead to America's doorstep and increasingly to the coast for exports." Alerian, *MLP Primer* at 3 (May 2019), https://bit.ly/3noDUJy. Especially in an era where economically critical energy products often travel thousands of miles to destination markets, through interstate pipeline networks "similar to the interstate highway system,"[3] this sector is a paradigmatic example of the kind of interstate activity the Commerce Clause is intended to "regulate and protect"—to wit, building and operating "instrumentalities of interstate commerce," transporting "things in interstate commerce," and keeping "the channels of interstate commerce" open and efficient. *United States*

[3] Enbridge, *Transporting Natural Gas*, https://bit.ly/3oMYin4 (last visited Nov. 30, 2021).

v. *Lopez*, 514 U.S. 549, 558 (1995). It would be particularly discordant with the dormant Commerce Clause's purpose—preventing states from imposing unfair burdens on interstate commerce that, individually or in the aggregate, pose a "danger to the national market," *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 197 (1994)—to allow New Jersey's unconstitutional levy to stand, given that it *uniquely* burdens companies focused *specifically* on the business of transporting economically vital energy products across the country.

The consequences would be even more serious if other states adopted levies similar to New Jersey's. And there is a real risk that other states would follow New Jersey's example if this Court does not intervene. Although New Jersey *labeled* its levy as a fee to compensate the state for tax return processing and compliance enforcement, see Pet. App. 30a, there is no serious question that it is a tax (not a mere processing fee) in a substantive economic sense; the revenues are placed into the state's general fund, massively exceed real-world processing costs, and were created as part of a law designed to raise general fund revenue. See Pet. 5-6. New Jersey generates tens of millions of dollars from the levy in question, even after netting out the salaries of the employees involved in processing returns. See Pet. App. 10a-11a (comparing revenues from levy to return processing costs). If New Jersey's levy is allowed to stand, other states will have significant incentives—both financial and political—to impose similar "fees" on companies that primarily do business in other states, and that are not duly proportioned to those businesses' level of local activity, to generate additional state revenue while limiting impacts on local constituents. Cf. Truth in Accounting, *Financial State of the States 2021* at 6 (Sept. 2021), https://bit.ly/3ozQqoW (finding that "39 states d[o] not have enough money to pay all of their bills," with "total debt of the 50 states amount[ing] to $1.5 trillion"). This Court's review is urgently warranted to clarify that states cannot use large, unapportioned levies of this kind as an end-run around the dormant Commerce Clause.

II. New Jersey's Levy Is Unconstitutional, And The Decision Below Creates Harmful Legal Confusion For Interstate Businesses.

This case concerns nothing less than the ongoing vitality of one of the crucial pillars in this Court's dormant Commerce Clause jurisprudence: "the internal consistency test." *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 563 (2015). Just as the dormant Commerce Clause itself has "deep roots" in this Court's jurisprudence, so too does the internal consistency test—which, as this Court explained in 2015, was "formally introduced" four decades ago, and has been "invoked in no fewer than seven cases" in this Court (now eight), "invalidating the tax in three of those cases" (now four). *Id.* at 549, 563-564.

The internal consistency test, a requirement for fair apportionment, essentially asks: "What would happen if all States did the same?" *Am. Trucking Ass'ns, Inc.* v. *Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 437 (2005) (*ATA-Michigan*). If the answer is that interstate commerce would be "place[d] * * * at a disadvantage," the levy fails the test. *Okla. Tax Comm'n* v.

Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). The internal consistency test provides an intuitively sound measure of whether a state is "attempting to take more than its fair share of taxes" from interstate commercial activity. *Ibid.* In addition to its intuitive soundness, this test has the advantage of providing an easy-to-administer standard that does not depend on "the shifting complexities of the tax codes of 49 other States," *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984), or allow an individual state to justify an unfair tax on grounds that other states have refrained from adopting similarly unfair policies. There is no question that the internal consistency test remains vital; this Court confirmed as much less than seven years ago, even going to special lengths to emphasize the test's legal and economic "virtue[s]." *Wynne*, 575 U.S. at 562. Nor is there any question that New Jersey's levy flunks the internal consistency test. See Pet. 8-9.

In *ATA-Michigan*, this Court upheld a modest regulatory fee—$100 per truck, 545 U.S. at 431—that "focus[ed] upon local activity," even though it could not satisfy the internal consistency test. See *id.* at 438. While the precise scope of *ATA-Michigan*'s exception to the internal consistency requirement is unclear (and that itself is a major reason to grant the petition), see Pet. 12-14, New Jersey's levy falls outside any fair reading of *ATA-Michigan*'s rationale. There is no meaningful sense in which New Jersey's levy is "local" in its "focus"; unlike the per-truck fee in *ATA-Michigan*, New Jersey's levy bears not even a rough relationship to the business' degree of in-state economic activity, and record evidence shows that it is untethered to the state's costs in reviewing and processing partnership information returns. See Pet. App. 10a-11a, 40a-41a; accord Pet. 5-6.

Moreover, *ATA-Michigan* placed weight on the likelihood that an alternative to the $100-per-truck fee that did not violate the internal consistency test (such as a fee proportioned to miles traveled inside the state) would require complex "liability, billing, and auditing mechanisms" that would almost certainly not "be worth the candle" given the modest size of the fee. 545 U.S. at 436. That concern has no application here. New Jersey could restructure its levy to abide by the internal consistency test, an approach which would require no novel tracking or auditing mechanisms, and involve no substantial administrative burden. See *infra* Part III.

The decision below was wrong. But it has also exacerbated the confusion that already exists over *ATA-Michigan*'s scope. As Petitioner explains, the state courts are split on the nature and extent of *ATA-Michigan*'s exception to the internal consistency requirement. See Pet. 12-14. The decision below does more than just add another state judiciary into the split of authority; it highlights that at least some state courts do not feel bound by this Court's internal consistency case law *at all*.

In fact, the New Jersey Tax Court—whose opinion and reasoning the Appellate Division "substantially" adopted as its own, Pet. App. 23a-24a—came close to explicitly disclaiming and rejecting this Court's binding precedent on the internal consistency test. As Petitioner highlights, the Tax Court's opinion favorably cited dissenting opinions that criticized the internal consistency test and, indeed, treated those dissents as if they were binding precedent. See Pet. 2, 7, 9. Upon careful inspection, it is difficult to avoid the conclusion that the Tax Court all but declared its unwillingness to be bound by *this Court's* precedent (as opposed to the views of dissenting Justices).

For example, as support for its assertion that Petitioner's "reliance on the hypothetical" analysis at the heart of the internal consistency test "certainly [is] not the law," the Tax Court's principal authority was Justice O'Connor's view, expressed in dissent in *American Trucking Ass'ns, Inc.* v. *Scheiner* (*ATA-Scheiner*), that "'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' [dormant Commerce Clause]." Pet. App. 62a (quoting *ATA-Scheiner*, 483 U.S. 266, 303 (1987) (O'Connor, J., dissenting)). But the Tax Court's selective quotation obscures the gravity of what it was implying: what Justice O'Connor actually said was that establishing "an 'internal consistency' rule of general application" was an "enterprise that *the Court undertakes for the first time in this case*." *ATA-Scheiner*, 483 U.S. at 303 (O'Connor, J., dissenting) (emphasis added). In other words, Justice O'Connor was *acknowledging* that *this Court* had in fact "[c]reat[ed] an 'internal consistency' rule of general application." *Ibid.*

Dissenting from a majority decision of this Court on a question of federal constitutional law was Justice O'Connor's prerogative, but it is not the prerogative of any New Jersey court to do so—long after *ATA-*

Scheiner was decided, and despite this Court's emphatic subsequent affirmation of the internal consistency rule's vitality. Compare *Wynne*, 575 U.S. at 561-562 (reaffirming the vitality of "the 'internal consistency' test" and the "virtue" of its "hypothetical[]" analysis), and *id.* at 555 (finding dissent's "reliance on * * * dictum particularly inappropriate" where dissenting Justices "do not find themselves similarly bound by the rule of th[e] [cited] case, which applied the internal consistency test"), with Pet. App. 62a (attacking internal consistency test's "hypothetical" analysis as "not the law," and relying on dicta from "dissents" while rejecting the rule this Court adopted in the cited case).

Tacitly acknowledging that it was resisting both *ATA-Scheiner* and *Wynne*, the Tax Court cited other dissenting Justices' purported "critici[sm] [of] the internal consistency requirement as 'a judicial fraud.'" Pet. App. 61a n.15 (quoting *Wynne*, 575 U.S. at 572-577 (Scalia, J., dissenting)). But even beyond the Tax Court's problematic focus on dissents rather than majority decisions, the purported "judicial fraud" identified in that dissent was not just the internal consistency test, but *the entire dormant Commerce Clause*. *Wynne*, 575 U.S. at 572 (Scalia, J., dissenting). As this Court noted, that view is inconsistent with 200 years of precedent. *Id.* at 569 (majority opinion). Respectfully, the Tax Court's favorable reliance on a dissent rejecting 200 years of consistent precedent indicates that whatever analysis the Tax Court was engaged in, it was not an attempt to fairly apply this Court's binding case law.

Businesses, including MLPs and other partnerships, rely on consistent and evenhanded application of this Court's Commerce Clause jurisprudence in making investment decisions and in planning for the future. By reaching the wrong outcome and all but declaring itself unbound by this Court's precedent, the Tax Court struck a serious blow to those investment-backed expectations. The uncertainty engendered by this decision will be especially acute for MLPs, including EIC members, as the decision below charts a path for other states to adopt similar levies—which, particularly in the aggregate, would constitute a burden of potentially enormous proportions. This Court should grant review not only to clarify the proper scope of its decisions in this area, see Pet. 12-14, but also to underscore that state courts are not free to disagree with this Court's binding precedent, or decide to follow the opinions of dissenting Justices rather than majority decisions.

III. Simple, Widely Used, And Constitutional Systems Of Fair Apportionment Are Available To New Jersey.

Although New Jersey's levy violates the Commerce Clause in its current form, enforcing constitutional limits in this case would not have material adverse consequences for the state. In fact, there are readily available, reasonable ways in which the levy could be apportioned in a manner consistent with the internal consistency test. Thus, there simply is no basis for New Jersey to resist changing its levy to meet constitutional muster. (And there *certainly* is no need for New Jersey to resort to unconstitutional means to meet its ostensible primary goal of covering processing costs: as noted, the sums currently collected vastly exceed any conceivable estimate of the relevant processing costs. See Pet. App. 10a-11a, 40a-41a.)

As noted, the internal consistency test looks to whether a levy's "identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185. As currently structured, New Jersey's levy clearly fails that test: if it were adopted by every state, an MLP that does business in all 50 states, like Petitioner, would be subject to a $12,500,000 aggregate levy ($250,000 times 50), whereas a competitor doing business only in New Jersey would pay $250,000. Accord Pet. 8-9. The basic problem is that New Jersey's levy does not account for the portion of a partnership's business in New Jersey, as opposed to other states.

The most straightforward solution is to apportion the levy in an appropriate manner. One readily administrable option would be to use a formula similar to the three-factor apportionment formula this Court considered and approved in *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 183-184 (1983). That formula is based, in equal parts, on the proportion of a business' "total payroll, property, and sales which are located in the taxing State." *Id.* at 170. Variations of this formula have become "something of a benchmark against which other apportionment formulas are judged," *ibid.*, and have met with widespread approval and uptake, including in New Jersey. See, *e.g.*, *Mayer & Schweitzer, Inc.* v. *Director, Div. of Tax'n*, 20 N.J.

Tax 217, 224-225 (2002); *Hess Realty Corp.* v. *Director, Div. of Tax'n*, 10 N.J. Tax 63, 85-86 (1988).

An apportionment system of this kind would ensure that partnerships, such as MLPs, that are large and geographically diverse would not be disfavored relative to partnerships that operate entirely intrastate, even if other jurisdictions adopted similar levies. Moreover, this approach is practical and administrable. Companies doing business in multiple states are already familiar with variations of this formula and routinely prepare the necessary documentation, and tax authorities (including in New Jersey) are familiar with applying such rules. The entities subject to the partnership levy challenged here are already required to submit informational returns containing information on their items of income and loss. See Pet. App. 28a-29a. The incremental administrative burdens on New Jersey would almost certainly be minor.

To be sure, this type of formula may be "imperfect," *Container Corp.*, 463 U.S. at 182, but the constitutional standard in this area is "fairness," not perfection. *Id.* at 169. Nor would this type of formula be the only option. Within constitutional limits, states have "discretion to structure their tax systems." *N.C. Dep't of Revenue* v. *Kimberly Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2226 (2019) (Alito, J., concurring). But whatever the details of the apportionment formula or method New Jersey might select, there is no doubt that New Jersey can achieve internal consistency for its levy, and compliance with the Commerce Clause, while preserving the challenged levy in an appropriately modified form. Given the ready availability of constitutional alternatives, there is no basis to distort this Court's internal consistency test out of concern for state treasuries.

IV. This Case Is An Excellent And Timely Vehicle.

Given the disarray in lower courts, see Pet. 9-17, this Court needs to resolve promptly the scope of *ATA-Michigan*'s exception to the internal consistency requirement; this case is an excellent and timely vehicle for doing so. As Petitioner explains, this case presents a clear opportunity to define the scope of both elements of *ATA-Michigan*'s rule (the "fee-versus-tax" distinction, and the relevant concept of "local" focus). *Id.* at 17-19. Moreover, it may be a rare opportunity to address the issue, for practical and procedural reasons that should not be viewed as diminishing the importance of the question presented. *Id.* at 19-21. EIC adds the following points.

First, the facts of this case provide a particularly stark illustration of how unapportioned levies can severely burden interstate commerce. This case involves a large levy that imposes a sizeable, disproportionate financial burden on a class of businesses (MLPs) that are not only heavily involved in, but tend to specialize in, interstate commerce in the most direct, physical sense. See generally *supra* Part I. And, unlike in cases involving smaller levies, the burden on those businesses is vividly apparent. Indeed, in some years the levy was greater than the amount of Petitioner's *entire New Jersey-source income*. Pet. 6.

Second, this uniquely well-suited vehicle comes at an especially opportune time, given other developments in the law. As Petitioner notes, this Court's decision in *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018), combined with the growth of online commerce, means that more and more businesses (including many smaller businesses) will be subjected to the taxing authority of numerous states, and therefore will face significant aggregate burdens from unapportioned levies. The question presented in this case will accordingly grow in importance—not just for MLPs, but for many businesses. Given the likelihood that other (and often smaller) businesses will lack feasible opportunities to litigate the issue, this Court's review in this case is urgently warranted.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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