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 *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

FREDRICK NICELY
Counsel of Record
STEPHANIE DO
KARL FRIEDEN
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
fnicely@cost.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Council On State Taxation ("COST") is a nonprofit trade association based in Washington, D.C. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce.[1] Today COST has grown to an independent membership of over 500 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST members are extensively engaged in interstate commerce and its membership shares a vital interest in ensuring states do not impede the rights of all businesses to engage in commerce therein. To that end, it is important to COST members that states fairly apportion fees and taxes that are imposed on businesses when these businesses are subject to such fees and taxes in multiple jurisdictions within the United States. This priority extends to a state's imposition of a flat annual partnership levy.

The New Jersey Superior Court, Appellate Division, however, disavows the discriminatory nature of New Jersey's "fee" on partnerships and its clear violation of the "internal consistency" test required by the fair apportionment prong, as articulated by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). If the law is left to stand, it effectively penalizes the presence of multijurisdictional partnerships

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amicus*' intent to file this brief and written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

doing businesses in New Jersey because the fee calculation includes each owner of a partnership, without any apportionment. The lack of apportionment would result in duplicative levies of the "fee" if other states imposed a similar levy. *Amicus* believes no taxpayer should suffer malapportionment—be it by fee, tax, or other levy. This case provides the Court with a unique opportunity to address these issues and affirm the preeminence of the internal consistency test.

COST has a history of submitting *amicus* briefs to this Court when state and local tax issues are under consideration. COST has submitted *amicus* briefs in significant state tax cases recently decided by the Court: *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015); *Alabama Department of Revenue v. CSX Transportation, Inc.*, 575 U.S. 21 (2015); *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1 (2015); and *North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019). Most recently, COST filed an *amicus* brief in *Steiner v. Utah State Tax Commission*, 449 P.3d 189 (Utah 2019), *cert. denied*, 140 S. Ct. 1114 (2020). As a long-standing representative of large multijurisdictional taxpayers, COST is uniquely positioned to provide this Court with the analytical underpinnings for why the fair apportionment of multistate fee or tax levies on interstate commerce is a fundamental constitutional value.

STATEMENT OF THE CASE

This Court is being asked to determine whether a New Jersey partnership filing fee violates the dormant Commerce Clause because of unfair apportionment, discrimination against interstate commerce, and failure to satisfy the internal consistency standard.

Specifically at issue is New Jersey's Gross Income Tax Act, N.J. Stat. § 54A:8-6, under which New Jersey imposes a flat, annual levy on any partnership deriving any income from the State. The levy is calculated by multiplying the number of partners in the partnership by $150; the maximum levy is $250,000. N.J. Stat. § 54A:8-6(b)(2)(A). Enacted in 2002, the New Jersey Legislature sought to mitigate concerns that partnership income was escaping rightful taxation in New Jersey. Assembly Budget Committee Statement to A. 2501, 8 (L. 2002, c. 40) (June 27, 2002). The Legislature provided no statutory mechanism for apportioning the levy. N.J. Stat. § 54A:8-6(b)(2).

Petitioner, Ferrellgas, is a publicly traded limited partnership. Pet'r's Pet. for Writ of Cert., App. B at 8a. Petitioner is headquartered and commercially domiciled in Kansas and incorporated in Delaware. *Id.* During the tax years in question, it had over 66,000 partners. *Id.* In 2009, 2542 partners were residents of or had nexus with New Jersey; in 2010, 2423; in 2011, 2927. *Id.*

Petitioner sells propane in every state; approximately 1% of its sales occur in New Jersey. Pet'r's Pet. for Writ of Cert. 6. Despite deriving such a small portion of its source income from New Jersey sales, it paid the maximum $250,000 levy during each of the three years at issue. *Id.*

In its refund claim for the paid levy, Petitioner contended that the levy fails this Court's internal consistency test. *Id.* at 7. The Director of the New Jersey Division of Taxation denied the refund claim. *Id.* Petitioner appealed to the New Jersey Tax Court. *Id.* Both parties moved for summary judgment on the question of internal consistency, and the Tax Court granted summary judgment in favor of the Director.

Id. Petitioner subsequently appealed to the Superior Court of New Jersey, Appellate Division, where the Tax Court's decision was sustained without further analysis, and then to the Supreme Court of New Jersey, where review was declined. *Id.*

Petitioner now seeks this Court's review to affirm the applicability of the internal consistency test to New Jersey's flat partnership levy as a fundamental part of this Court's Commerce Clause jurisprudence. Petitioner also seeks to resolve the remaining ambiguity that has led to inconsistent application of this test by lower courts.

SUMMARY OF THE ARGUMENT

This Court's clarification of its Commerce Clause jurisprudence is needed. A uniform determination by this Court of when a "fee" is local and regulatory in nature versus when a "fee" is interstate in nature and subject to scrutiny under the Commerce Clause is necessary. It is also incumbent on this Court to affirm the vitality of the Commerce Clause protections afforded to multijurisdictional businesses subject to unapportioned fees, especially when the fee is not directly related to funding state operations. This is especially true in state tax cases such as this one, where this Court is the only federal recourse available.

ARGUMENT

I. CLARITY IS NEEDED WHEN A "FEE" IS LOCAL AND REGULATORY IN ITS APPLICATION VERSUS WHEN A "FEE" IMPACTS INTERSTATE COMMERCE.

Two decisions by this Court relating to "fees" imposed on the trucking industry have created confusion that this Court needs to address. Both of these cases—

American Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987) ("*ATA-Scheiner*") and *American Trucking Ass'ns v. Michigan Public Service Commission*, 545 U.S. 429 (2005) ("*ATA-Michigan*")—address whether protections from discriminatory fees or taxes on businesses engaged in interstate commerce are implicated under the Commerce Clause. In *ATA-Scheiner*, this Court found Pennsylvania's unapportioned lump-sum fee and tax, imposed on the operation of trucks in the Commonwealth, discriminated against some trucking companies engaged in interstate activities and violated the Commerce Clause. In contrast, this Court in *ATA-Michigan* upheld a Michigan flat $100 annual fee imposed on trucks that made deliveries in Michigan, but did not apply to trucks merely passing through the State. In reaching this conclusion, the Court stated that "[w]e must concede that here, as petitioners argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to 'top off' its business by carrying local loads in many (or even all) other States." *ATA-Michigan*, 545 U.S. at 438.[2] The fee was upheld because it "taxes purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning multiple States." *Id.* at 437. Based on the conflicting outcomes of these two decisions, state courts have come to differing conclusions on when a "fee" is local and regulatory in nature versus when a "fee" is subject to Commerce Clause protections.[3]

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[2] This Court subsequently clarified in *Comptroller of the Treasury v. Wynne* that *ATA-Michigan* is not a "concession that the tax violated the internal consistency test." *Wynne*, 575 U.S. at 564 n.7.

[3] *See* Pet'r's Pet. for Writ of Cert. 11.

This case provides this Court with an ideal opportunity to clarify when levies on a business (regardless of whether labeled a tax or a fee) are intrastate in nature or impact interstate commerce invoking Commerce Clause protections. As this Court noted in *National Federation on Independent Business v. Sebelius*, "[i]t is true that Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other." *Nat'l Fed'n on Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012). For example, "Congress may not [. . .] expand its power under the Taxing Clause, or escape the Double Jeopardy Clause's constraint on criminal sanctions, by labeling a severe financial punishment a 'tax.'" *Id.* Similarly, regardless of the label a state uses to impose an exaction on an entity to raise revenue, this Court needs to provide guidance for distinguishing between a state using the label of a "fee" that is truly regulatory and imposed on local activity versus a "fee" that is interstate in nature and requires scrutiny under the Commerce Clause.

Fortunately, there is guidance that can be used on levies labeled as a "fee" to determine whether they are truly regulatory and local in nature or are more akin to the imposition of a tax which invokes Commerce Clause protections. California courts addressed whether a "fee" applied to a foreign limited liability company ("LLC") was truly a regulatory fee or a tax. *Northwest Energetic Serv., LLC v. Cal. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (Cal. Ct. App. 2008). The Court of Appeals of California noted "we must turn to the legislative history" to determine if "the Levy is a tax or fee." *Id.* at 855. The court found the purpose of the "fee" was to raise revenue to make up for lost income taxes from entities not taxed as corporations. *Id.* Addressing arguments that the "fee" was regulatory in scope, the court noted that there was no regulatory program mentioned in the legislation. *Id.* at 857. The court also noted that there was no connection between the imposition of the "fee" and the expenses related to any regulatory program of an LLC, stating "[a] regulatory fee may be imposed under the police power when the fee constitutes an amount necessary to carry out the purposes and provisions of the regulation." *Id.* at 858 (citing *California Ass'n of Prof'l Scientists v. Dep't of Fish & Game*, 79 Cal. App. 4th 935, 945 (Cal. Ct. App. 2000)).

The California LLC "fee", similar to New Jersey's partnership fee, was deposited into California's general fund; it was not directly associated with the California Franchise Tax Board's or other agencies' costs to regulate the LLCs. *Id.* at 860. The California courts ultimately held the "fee" violated the Commerce Clause.

Decisions from other states such as Minnesota and Washington are also instructive. The Minnesota Supreme Court addressed whether fees and charges for 911 services were fees or taxes for purposes of determining if the State's false claim act applied, which barred actions related to taxes. *Phone Recovery Servs., LLC v. Qwest Corp.*, 919 N.W.2d 315 (Minn. 2018). The fees and charges were held to be taxes, not regulatory fees, because there was no direct connection between paying the fees and charges and such persons receiving goods or services from a governmental entity. *Id.* at 324. The Supreme Court of Washington also addressed the issue of whether a levy for street-lighting was a tax or a fee. *Okeson v. City of Seattle*, 150 Wn.2d 540 (Wash. 2003). Using a three-part test, the court noted that, since "the charges for street lighting serve no regulatory purpose, [the ordinance] cannot impose a fee just by putting those costs into the Light Fund," and further acknowledged there was no direct relationship between the fee charged and the service received by the fee payers. *Id.* at 553-54. The streetlighting levy was held to be a tax to raise revenue for the city and not a means of regulating street lighting usage. *Id.* at 554.

Here, New Jersey's courts found that the State's annual partnership fee does not implicate or violate the Commerce Clause because the fee compensates the State for its processing and reviewing costs—seen purely as an intrastate activity. Pet'r's Pet. for Writ of Cert., App. B at 24a. This myopic perspective ignores: (1) the revenues derived from the "fee" far exceed the State's Division of Revenue's salaries for all its employees (*i.e.*, not just those processing and reviewing partnership returns); and (2) the partnership returns were only about 5% of all returns.[4] This discrepancy clearly shows the "fee" is not regulatory in its application and the lower courts failed to adequately address the impact of the "fee" on the Petitioner's interstate activities.

This case is ripe for the Court to address the extent any state can assert a "fee" is regulatory and local in nature or whether the "fee" is imposed on interstate commerce akin to a tax and thus subject to Commerce Clause scrutiny.

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[4] *See* Pet'r's Pet. for Writ of Cert., App. B at 10a, noting the partnership filing fee revenue for tax years 2009-2011 was $44.7 million, $47.1 million, and $47.5 million, respectively; however, salaries paid to employees of the Division of Revenue for those years was $22.9 million, $18.4 million, and $20.1 million, respectively.

II. IT IS CRITICAL FOR THIS COURT TO ADDRESS THE APPLICATION OF COMMERCE CLAUSE JURISPRUDENCE IN THIS CASE.

This Court has affirmed the vitality of the Commerce Clause and the use of an "internal consistency" test when evaluating whether a state or local tax is unduly burdensome on interstate commerce. *See generally Wynne*, 575 U.S. 542 (2015). Commerce Clause jurisprudence and preventing states from imposing discriminatory taxes that inequitably impede the free flow of commerce are of increasing importance. This Court's precedents make it incumbent on this Court to address the uncertainties and economic inefficiencies the state court decision in this case could place on multijurisdictional businesses by imposing unapportioned fees on interstate (and international) business operations, especially when the application of the "fee" is not directly related to funding a specific regulatory operation of a state.

A. Additional Clarity Is Needed To Address The Commerce Clause Jurisprudence.

A four-prong test to determine if a state or local tax regime creates an undue burden on interstate commerce in violation of the Commerce Clause is used by this Court to evaluate the impact of state or local taxes on interstate commerce. *Complete Auto*, 430 U.S. at 279. A levy "does not discriminate against interstate commerce, and is fairly related to the services provided by the State" if "[t]he tax 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." *Id*.

Two of the four prongs—the "substantial nexus" prong and the "fairly related" prong—have subsided in weight since their pronouncement. The significance of the substantial nexus prong was tempered by this Court in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), with the repudiation of the physical presence rule established in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). It is doubtful now that this prong will generate the amount of controversy it once historically did.[5]

The weakening of the substantial nexus prong has an impact in this case because New Jersey now has an enhanced ability (as do other states) to require taxpayers (including owners of a partnership) not physically present in the State to be subject to its jurisdiction to levy taxes and fees. Accordingly, beyond a $150 fee imposed on the Petitioner for each of its owners' investment in the Petitioner's partnership, the owners in the partnership are potentially subject to New Jersey's income tax on some of the Petitioner's income without having a physical presence in the State.

For the "fairly related" prong, courts, including this Court, have routinely declined to find that a tax violates the Commerce Clause based on fair relation analysis alone. This is because the fairly related prong

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[5] *See L.L. Bean, Inc. v. Dep't of Revenue*, 516 A.2d 820 (Pa. Cmwlth. 1986); *Falcone v. Dir., Div. of Taxation*, 12 N.J. Tax 75 (N.J. Tax Court 1991); *Rowe-Genereux, Inc. v. Dep't of Taxes*, 411 A.2d 1345 (Vt. 1980); *Ariz. Dep't of Revenue v. Care Comput. Sys., Inc.*, 197 Ariz. 414 (Ariz. Ct. App. 2000); *Buehner Block Co. v. Wyo. Dep't of Revenue*, 139 P.3d 1150 (Wyo. 2006); *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788 (Wash. 2011), *cert. denied*, 565 U.S. 816 (2011).

has been "emasculate[d]" by this Court. *Commonwealth Edison, Co. v. Montana*, 453 U.S. 609, 645 (1981) (Blackmun, J., dissenting).[6]

What is left of the four-prong test to protect multistate taxpayers against undue burdens on interstate commerce are the fair apportionment prong and the discrimination prong of this Court's *Complete Auto* Commerce Clause jurisprudence. These two prongs are now the focal points for modern-day Commerce Clause challenges of state or local taxes.

While this case puts fair apportionment and its internal consistency test front and center, a tax or fee treated as discriminatory is intertwined with fair apportionment. This Court has used the discrimination prong to strike down fees that unfairly impede the free flow of interstate commerce. The same reasoning should apply to unapportioned "fees" imposed on certain business entities that have no true regulatory purpose and therefore clearly discriminate against interstate businesses. Prior decisions from this Court are instructive. For example, discriminatory waste disposal fees imposed on out-of-state businesses were held by this Court to violate the Commerce Clause in *Chemical Waste Management v. Hunt*, 504 U.S. 334 (1992) and

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[6] This prong is now met by asking simply "whether the measure of the tax [is] reasonably related to the extent of the contact," not whether the amount of the tax imposed on an activity relates to the "value of the benefits allegedly bestowed" by the state. *Commonwealth Edison, Co. v. Montana*, 453 U.S. at 625-26; *see* 2 J. Hellerstein & W. Hellerstein, State Taxation ¶ 4.18[2][d] (3d ed. 2003, Supp. 2021-22) ("the 'fairly related' test adds nothing to the pre-existing Commerce Clause restraints on state taxation").

Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93 (1994).[7]

Addressing the fair apportionment prong of *Complete Auto*, the internal consistency test arose as a "component of fairness in an apportionment formula" to determine fair apportionment. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). Further, this Court has extended this test beyond the scope of determining fair apportionment to help "identify tax schemes that discriminate against interstate commerce." *Wynne*, 575 U.S. at 562.

Even in *Wayfair*, this Court noted that the fair apportionment prong and the discrimination prong were key remaining "aspects of the Court's Commerce Clause doctrine [that] can protect against any undue burden on interstate commerce" resulting from the removal of the physical presence rule that previously relieved out-of-state sellers of state use tax collection and remittance requirements. *Wayfair*, 138 S. Ct. at 2099. Although not at issue in *Wayfair*, this Court suggested that protection against undue burdens could be analyzed under the balancing test found in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), "apportionment

[7] State courts have also consistently struck down fees based on them discriminating against interstate commerce. "[A] Florida impact fee does in fact result in discrimination against out-of-state economic interest in contravention of the Commerce Clause." *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 724 (Fla. 1994). "[A] combination of the service fee and the tipping fee [was] discriminatory in its effect." *Sanifill, Inc. v. Kandiyohi*, 559 N.W.2d 111, 116 (Minn. 1997). Even the New Jersey Supreme Court has struck down hazard waste transporter fees, holding that the "fees fail the internal consistency test; they discriminate against interstate commerce; and they impose an undue burden on interstate commerce." *Am. Trucking Ass'ns v. State*, 180 N.J. 377, 410 (N.J. 2004).

jurisprudence," reviewing the risk of discrimination, and "other theories." *Wayfair*, 138 S. Ct. at 2099.

With the Court's Commerce Clause jurisprudence relying more heavily on the fair apportionment and discrimination prongs, the internal consistency test becomes the crux of this Court's analysis. Preserving and refining the fair apportionment and discrimination prongs' jurisprudence is of utmost importance for multijurisdictional businesses. It would behoove this Court to resolve *ATA-Michigan*'s lingering ambiguities, especially in light of its application to the increasingly global and digital modern economy. This case serves as a sound vehicle to evaluate and dispel those remaining uncertainties.

B. The "Internal Consistency" Of Fees Not Directly Related To Funding Specific Regulatory Operations In A State Needs Commerce Clause Scrutiny.

Under this Court's Commerce Clause jurisprudence, a state may not impose a levy on interstate commerce if it fails to pass the "internal consistency" test, which requires that "a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'" *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995); *ATA-Scheiner*, 483 U.S. at 284 (citing *Armco Inc. v. Hardesty*, 467 U.S. 638, 644 (1984)).

But application of the internal consistency test to flat fees and taxes requires this Court's attention and guidance as a result of the conflict between *ATA-Scheiner* and *ATA-Michigan*. As noted above, in *ATA-Michigan*, this Court places abundant weight on what is considered "local" without providing a clear framework to determine when a levy only engages in "local business." *ATA-Michigan*, 545 U.S. at 438. This Court appears to distinguish the applicability of the internal consistency test based on whether a flat fee is on local and regulatory activities versus non-local and non-regulatory activities, with the former not warranting scrutiny by the internal consistency test. *Id.* This distinction has caused significant confusion due to the lack of guidelines to determine what is local and regulatory.

Additionally, in *Wynne* this Court explained that an "empirical showing" was required by the petitioners in *ATA-Michigan* to support their claim. This Court stated, "[w]hether the Michigan trucking tax had such an effect depended on an *empirical* showing . . . that the challenged tax imposed a heavier burden on interstate truckers in general than it did on intrastate truckers" – a task the petitioners in *ATA-Michigan* failed to accomplish. *Wynne*, 575 U.S. at 564 n.7. This "empirical showing" requirement is unclear. Is it only for "local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike"? *ATA-Michigan*, 545 U.S. at 438. Alternatively, as *amicus* suggests, this requirement is part of the fair apportionment prong's "internal consistency" test, which has been understood to "*hypothetically* assum[e] that every State has the same tax structure." *Wynne*, 575 U.S. at 562 (emphasis added). Clearly, the lack of apportionment with the "fee" New Jersey imposes on partnerships would result in duplicative levying of the "fee" if other states imposed a similar "fee" on the partnership conducting business in their state.

For example, a partnership with business operations in ten states has ten partners. Based on how New Jersey imposes its partnership fee, if every state imposed the same type of fee, each state would assert a $1500 ($150 x 10 partners) fee, totaling $15,000 ($1500 x 10 states) owed by the partnership. Now assume for simplicity that the partnership has $100,000 in sales and five states have $5000 in sales (5% sales factor ($5000/ $100,000)), and the five other states have $15,000 in sales (15% sales factor ($15,000/ $100,000)). If the fee was apportioned based on the partnership's sales, the five states with $5000 in sales would each impose a $75 fee (5% x $1500) and the five states with $15,000 in sales would each impose a fee of $225 (15% x $1500), for a ten state fee total of $1500. This would prevent the duplicative taxation (assuming each state imposed the same "fee") that New Jersey's partnership fee currently imposes, a total fee obligation of $15,000 to the partnership if each state asserted an unapportioned $1500 partnership fee was owed.

This Court should review this case as a vehicle to clarify the relevant activity that is local and regulatory versus levies that need fair apportionment and are subject to the "internal consistency" test to prevent duplicative impositions of taxes or fees on businesses operating in interstate commerce.

III. STATE COURTS' FAILURE TO APPLY THE COMMERCE CLAUSE IS PARTICULARLY TROUBLING IN STATE TAX CASES WHERE ACCESS TO FEDERAL COURTS IS EXTREMELY LIMITED.

The New Jersey Superior Court, Appellate Division, failed to adequately apply the Commerce Clause of the United States Constitution as interpreted by this Court. It is not only a circumvention of this Court's precedents but constitutes an unacceptably narrow approach given the unique procedural requirements imposed upon state tax controversies that are decided almost exclusively by state courts.

There are two constraints that severely limit lower federal courts in adjudicating state and local tax matters: the Tax Injunction Act and the comity doctrine. 28 U.S.C. § 1341 (2018). The Tax Injunction Act, which is jurisdictional, bars suit in federal court to "enjoin, suspend or restrain" the "assessment, levy or collection" of state taxes, except where no "plain, speedy and efficient remedy" is available in state court. *Id*. Under a similar but distinct limitation, the comity doctrine, "federal courts refrain from 'interfer[ing] . . . with the fiscal operations of the state governments . . . in all cases where the Federal rights of the persons could otherwise be preserved unimpaired.'" *Brohl*, 575 U.S. at 15 (citing *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 422 (2010)).

Both the Tax Injunction Act and the comity doctrine constrain taxpayers' access to lower federal courts in state tax litigation. Such jurisdictional restrictions are relatively unique to state tax controversies. Other statutory or constitutional disputes involving environmental, health care, voting rights, or educational issues generally have no comparable impediment. As a result, state taxpayers must rely almost exclusively on state courts to arbitrate potential federal constitutional challenges of state taxes. In the same vein, state courts are singly responsible for upholding their constitutional obligation to enforce federal law, and giving this Court's precedents full effect.

Unfortunately, there are many previous instances where state courts have resisted deciding cases or issuing orders that would burden a state's interests—even if doing so is essential to vindicating the national economic interest underscored by the Commerce Clause and this Court's jurisprudence. For example, in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, this Court was required to order Florida to remedy a discrimination against out-of-state taxpayers because the Florida Supreme Court had decided that "equitable considerations" of Florida government trumped the national interest of discrimination-free commerce. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 44 (1990). In *South Central Bell Telephone Co. v. State*, the Alabama Supreme Court refused to hear the taxpayer's Commerce Clause complaint. *S. Cent. Bell Tel. Co. v. State*, 711 So. 2d 1005 (Ala. 1998). On certiorari, all nine justices of this Court voted to reverse that judgment, characterizing the appealed decision as an "'extreme' application of state-law preclusion [. . .] principles" that themselves violated due process. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 167 (1999).

Similarly, in *Reich v. Collins*, the Georgia Supreme Court dismissed a taxpayer's challenge against a discriminatory State tax that violated federal law, reasoning that a taxpayer was not justified in relying on Georgia's statutory post-deprivation refund process. *Reich v. Collins*, 513 U.S. 106, 108-09 (1994). This Court unanimously reversed that decision—calling it a "bait and switch"—deciding that it violated due process. *Id.* at 108. In *Newsweek, Inc. v. Florida Department of Revenue*, the Florida courts refused to allow the taxpayer to use Florida's statutory refund process to vindicate Commerce Clause interests. *Newsweek, Inc. v. Dep't of Revenue*, 689 So. 2d 361 (Fla. Dist. Ct. App. 1997), *review denied*, 697 So. 2d 1217 (Fla. 1997). Upon review, this Court pointed out that the Florida courts simply failed to even consider the *Reich* precedent. *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442, 443 (1998). Because of that, this Court ordered a per curiam granting the writ of certiorari, vacating the judgment, and remanding for a proper consideration of the authorities. *Id.* at 445.

The New Jersey courts' reaction to the arguments raised by Petitioner fits into this pattern of hesitancy by state courts to vindicate the national interest in Commerce Clause cases. For example, the New Jersey Tax Court determined that, under the "fee," the "'commerce' being impacted is the [Petitioner's] provision of capital, and its facilitation of the provision of capital by residents and nonresidents[.]" Pet'r's Pet. for Writ of Cert., App. B at 13a. Clearly, the Tax Court understood that interstate commerce is impacted in this case. Despite that, the court concluded the "fee" "does not implicate . . . the [dormant Commerce Clause]." *Id.* at 15a.

Instead, the Tax Court cited as its authority for not applying the internal consistency test several dissenting opinions of this Court. Pet'r's Pet. for Writ of Cert., App. B at 62a (citing *ATA-Scheiner*, 483 U.S. at 303 ((O'Connor, J., dissenting)) (citing *Armco Inc.*, 467 U.S. 638 (1984)) (citing *ATA-Scheiner*, 483 U.S. at 303-04 ((Scalia, J., dissenting)). Similarly, the Tax Court favorably cited a dissenting opinion of this Court in *Wynne*, calling this Court's internal consistency test "a judicial fraud." *Id.* at 61a n.15. This citation by the Tax Court is telling, given that the majority opinion of this Court in *Wynne* confirmed the vitality of the internal consistency test. *Wynne*, 575 U.S. at 561-62. Thus, the Tax Court—whose opinion was adopted without additional analysis by the New Jersey Superior Court, Appellate Division—openly disparaged this Court's internal consistency test and sidestepped the applicability of the Commerce Clause.

As discussed above, federal district courts are largely unavailable to vindicate the national interest inherent in the Commerce Clause because of the Tax Injunction Act, the Eleventh Amendment, and principles of comity. *See generally Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (under principles of comity, federal district courts may abstain from hearing cases involving state revenues, even if the case is not technically governed by the Tax Injunction Act).

Because of these restrictions on the jurisdiction of the federal district courts over state taxes and fees, this Court is the only federal recourse available "[t]o secure state-court compliance with and national uniformity of federal law. . ." *McKesson Corp.*, 496 U.S. at 29. Therefore, it is especially important for this Court to exercise its certiorari jurisdiction in this case to increase public confidence that state fees and taxes impacting interstate commerce are fairly imposed and administered.

We urge this Court to accept certiorari to correct the lower courts' significant missteps, and to forestall any future damage lower court precedent might cause by encouraging other states to adopt similar tax and fee schemes.

CONCLUSION

This case presents the Court with the opportunity to clarify its Commerce Clause jurisprudence, reinforce the renunciation of discriminatory levies, and hold the application of *Wynne*'s "internal consistency" test protections still stand to protect entities engaged in interstate commerce, regardless of whether a levy is labeled as a "fee" or a "tax." Without review of the lower court's decision against the Petitioner, state taxing authorities, state legislatures, and state courts will undermine the importance of the Commerce Clause and its consistent application.

Respectfully submitted,

FREDRICK NICELY
Counsel of Record
STEPHANIE DO
KARL FRIEDEN
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5222
fnicely@cost.org

Counsel for Amicus Curiae

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