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 FOR THE ARKANSAS STATE CHAMBER OF COMMERCE, THE MINNESOTA CHAMBER OF COMMERCE, THE NEW JERSEY CHAMBER OF COMMERCE, THE BUSINESS COUNCIL OF NEW YORK STATE, THE OHIO CHAMBER OF COMMERCE, THE STATE CHAMBER OF OKLAHOMA, THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, AND WISCONSIN MANUFACTURERS AND COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici curiae the Arkansas State Chamber of Commerce, the Minnesota Chamber of Commerce, the New Jersey State Chamber of Commerce, the Business Council of New York State, Inc., the Ohio Chamber of Commerce, the State Chamber of Oklahoma, the Pennsylvania Chamber of Business and Industry, and Wisconsin Manufacturers and Commerce, Inc. (the "Chambers") respectfully submit this brief in support of Petitioner, urging this Court to grant *certiorari* and clarify the scope of the internal consistency test.[1] The Chambers is comprised of leading statewide organizations dedicated to advancing the interests of large and small businesses within their respective states. *Amici* have an interest in this litigation because the decision below discourages businesses—particularly small businesses—from engaging in commerce outside of their home state. The Chambers submit this brief collectively because this chilling effect on free trade burdens not only each state's economy, but the national economy.

Businesses rely on the predictable application of laws. This is particularly true with respect to identifying government levies imposed on a business. Identifying these levies impacts basic business decisions, perhaps none more important than setting the price of a good or service. In 1983, this Court provided businesses with a useful tool for identifying valid levies: the internal consistency test. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983).

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties were notified of *amici*'s intention to file this brief 10 days prior to its filing and have consented to this filing.

By applying this simple test, a business could determine whether a levy passed constitutional muster and, if it did, the business could adjust its operations accordingly. For a business making sales throughout the United States, faced with hundreds (if not thousands) of state and local levies, this tool was invaluable.

Over the past three decades, the Court's application of the internal consistency test created substantial uncertainty regarding the test's vitality. This case presents the Court with the opportunity to clarify whether, and in what circumstances, the internal consistency test limits states' power to tax. This Court's guidance is urgently needed by small businesses, as they are newly exposed to the states' taxing power after this Court's holding in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018).

SUMMARY OF ARGUMENT

The Commerce Clause prohibits state laws that discriminate against or impose undue burdens on interstate commerce. U.S. Const., Art. I, § 8, cl. 3; *Wayfair*, 138 S. Ct. at 2091. This prohibition is absolute. It does not matter whether the law imposes a monetary levy or simply regulates conduct; if it discriminates against or burdens insterstate commerce this Court finds both laws equally offensive to the Commerce Clause.

Although both types of laws may offend the Commerce Clause equally, this Court applies the Commerce Clause to each law differently. On the one hand, monetary levies are historically analyzed using the "internal consistency" test. *Container*, 463 U.S. at 159. This test hypothetically assumes that every state imposes an identical levy to the one being challenged, then asks whether a person doing business in multiple states

would pay more than a person conducting the same business in only one state. If so, the levy is not "internally consistent" and runs afoul of the Commerce Clause. *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015).

On the other hand, regulatory laws historically are analyzed using the *Pike*-balancing test. *Pike v. Bruce Church, Inc.*, 347 U.S. 132 (1970). Under this test, state laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id* at 142.

Petitioner challenged New Jersey's annual levy on every partnership earning at least $1 dollar of income in New Jersey. N.J. Stat. Ann. 54A:8-6(b)(2)(A). The amount of the levy is computed based on the number of partners in the partnership: $150 for each partner, up to a maximum levy of $250,000. *Id.* Because it is a monetary levy, Petitioner argued that the levy failed the internal consistency test. In Petitioner's view, the levy failed the test because New Jersey law does not apportion the levy, meaning that if every state imposed the same levy, Petitioner would owe $250,000 to every state in which it earned a single dollar of income. Had Petitioner chosen to do business in only New Jersey, it would owe $250,000 to only one state.

The New Jersey Tax Court sustained the levy.[2] Pet.App. 26a. It did so not because it found the levy

[2] The New Jersey Tax Court, serving as the trial court, authored the substantive opinion in this case. 2018 N.J. Tax Unpub. LEXIS 65 (N.J. Tax Ct. Dec. 7, 2018). The New Jersey Superior Court affirmed the holding "substantially for the reasons" expressed by the Tax Court. *Ferrellgas Partners, L.P. v. Director, Division of Taxation, New Jersey*, 2021 N.J. Super. Unpub.

passed the internal consistency test. In fact, it did not apply the test at all, deriding it as a "resort to the mechanical application of . . . hypothetical math. . . ." Pet.App. 60a. Instead, relying on this Court's decision in *American Trucking Ass'ns v. Michigan Public Service Commission*, 545 U.S. 429 (2005) (*ATA–Michigan*), the court determined the levy was enacted for "purely intrastate" regulatory purposes and therefore was beyond the reach of the internal consistency test. Pet.App. 53a–55a. Even though the court characterized the levy as regulatory in nature, it did not confidently apply the *Pike*-balancing test because, in its view, "it is not even clear whether *Pike* should apply." Pet.App. 70a.

The Chambers urge this Court to grant *certiorari* for three reasons. First, there is widespread uncertainty regarding how, if at all, the internal consistency test applies to unapportioned levies. This uncertainty derives from *ATA–Michigan*'s exception for a "locally focused" levy; that is, a levy imposed upon "purely local activity." *ATA–Michigan*, 545 U.S. at 437–38. Some state courts apply the test to invalidate unapportioned levies, while others declare that the test does not apply. *Compare Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (1st Dist. Ct. App. 2008) (striking down a California levy on internal consistency grounds) *with American Trucking Ass'ns, Inc. v. State Dep't of Transp.*, 124 P.3d 1210, 1218 (Or. 2005) (reversing a lower-court decision that struck down a law on internal consistency grounds). These cases underscore the difficulty in applying the exception in *ATA–Michigan*. For example, does the

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LEXIS 64 (N.J. Super. Ct. App. Div. Jan. 13, 2021). This brief cites to these decisions by reference to the Petitioner's Appendix (Pet.App.).

exception apply to a levy measured by both in-state and out-of-state elements? In the present case, the levy is measured by the number of partners in a partnership, counting both in-state partners and out-of-state partners. By reaching out-of-state partners, does the levy fall outside the scope of the *ATA–Michigan* exception?

Second, there is meaningful uncertainty regarding whether the *Pike*-balancing test is relevant when analyzing unapportioned levies. Again, this uncertainty is attributable to *ATA–Michigan*; the Court cites *Pike* as one of the "principles and precedents" that upheld Michigan's unapportioned levy. *ATA–Michigan*, 545 U.S. at 433. This uncertainty was bolstered by two recent invocations of the *Pike*-balancing test by various courts. In the present case, the Tax Court acknowledged that it, too, was unsure of how *Pike* applies: "Here, it is not even clear whether *Pike* should apply." Pet.App. 70a. This Court should grant *certiorari* to clarify whether the *Pike*-balancing test is relevant when analyzing unapportioned levies.

Finally, *certiorari* is warranted because this case raises an issue of national importance. As a result of this Court's decision in *South Dakota v. Wayfair*, small businesses are now exposed to the taxing jurisdiction of numerous states—each of which may attempt to impose an unapportioned levy. 138 S. Ct. 2080 (2018). Perhaps anticipating these issues, the *Wayfair* Court alluded to "other aspects of the Court's Commerce Clause doctrine" that would consider "the small businesses, startups, or others who engage in commerce across state lines." *Id.* at 2098. Is the internal consistency test one of the "other aspects" that protects small businesses? If so, how should state courts apply

ATA–Michigan's exception for locally focused levies imposed on purely local activity? Alternatively, does the *Pike*-balancing test apply? Granting *certiorari* allows the Court to provide desperately needed guidance for small businesses regarding the constitutional limitations on unapportioned levies.

ARGUMENT

For decades, this Court wrestled with the proper role of the internal consistency test in adjudicating claims under the Commerce Clause. At times, the internal consistency test reigned supreme: it essentially functioned as a condition-precedent for a levy to pass constitutional muster. *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (striking down a West Virginia law on internal consistency grounds). That supremacy ended in 2005, with this Court's decision not to apply the test to "locally focused fees" imposed upon "purely local activity." *ATA–Michigan*, 545 U.S. at 437-38. In 2015, however, the internal consistency test was the principal basis for finding Maryland's personal income tax regime constitutionally defective. *Comptroller of the Treasury v. Wynne*, 575 U.S. 542 (2015). While this made clear the internal consistency test still applies in some circumstances, substantial uncertainty remains with respect to how it applies to an unapportioned levy—even more so when the levy includes both intrastate and interstate elements in its computation.

Separately, this Court developed a parallel jurisprudence applying the Commerce Clause to regulatory laws. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945). Under this line of cases, regulatory laws are analyzed using the *Pike*-balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). For years, courts generally observed a boundary between the two

tests: internal consistency applied to monetary levies, while *Pike* applied to regulatory laws. *See, e.g., Gov't Suppliers Consol. Servs., Inc. v. Bayh*, 975 F.2d 1267 (7th Cir. 1992) (applying *Pike* to analyze regulatory provisions of an Indiana law, while applying the internal consistency test to analyze fee provisions of the same law); *Carpenter v. Commonwealth*, 831 S.W.2d 188, 193 (Ky. App. 1992) ("a state tax measure such as the license fee at issue here is not subjected to the *Pike* analysis. . . ."). This created a period of relative certainty for litigants and courts, alike: litigants knew what arguments to make, and courts knew what tests to apply.

Over time, the line between the two tests blurred. *See, e.g., Franks & Son, Inc. v. Washington*, 966 P.2d 1232, 1238 (Wa. 1998) (applying both internal consistency and *Pike* under a hybrid approach because, in the court's view, "a regulatory fee is different from a tax"). As the line blurred, the certainty enjoyed by litigants and courts eroded. The erosion culminated in the same case that cast the internal consistency test into a state of uncertainty: *ATA–Michigan*, 545 U.S. 429 (2005). In upholding Michigan's levy, this Court cited *Pike* as one of the "principles and precedents" commanding such a result. *Id*. at 433. After *ATA–Michigan*, state courts and litigants are understandably uncertain of *Pike*'s role when analyzing unapportioned levies. This uncertainty continues to fester, aided by recent invocations of *Pike* by this Court and the United States Court of Appeals for the Tenth Circuit.

The present case allows the Court to resolve these doctrinal dilemmas by squarely addressing (i) whether, and if so how, *ATA–Michigan* applies to a levy computed based on interstate elements; and (ii) whether the *Pike*-balancing test applies to monetary levies. The

need for this Court's guidance is particularly urgent, as countless small businesses face new liabilities across the country as a result of this Court's holding in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018).

I. When is a levy imposed on "purely local activity" and "locally focused"?

The primary issue in this case is whether the internal consistency test applies to an unapportioned levy. This Court held that the test did not apply to an unapportioned levy that is imposed upon "purely local activity" and "locally focused" *ATA–Michigan*, 545 U.S. at 437–38.

When is a levy imposed upon "purely local activity?" In *ATA–Michigan*, the levy was imposed on point-to-point deliveries within the state. If an out-of-state driver entered the state, made one delivery, then left the state, the levy did not apply. This feature of Michigan's law made clear that the triggering event for the levy was an "activit[y] taking place exclusively within the State's borders." *Id.* at 434. Should the Court's exception for levies upon "purely local activity" be understood in this way? That is, should courts look to the triggering event for a levy and ask whether it captures only in-state activities?

Similarly, when is a levy "locally focused?" In *ATA–Michigan*, the levy was a flat-dollar fee. The fee did not vary based on miles driven in the state, vehicular weight, or other similar criteria. Importantly, it did not vary based on any out-of-state variable. If a driver triggered the levy by making a point-to-point delivery in the state, the driver paid $100. If the driver made deliveries in other states, the fee was still $100. Does this indicate that the proper focus is on how the levy is measured or computed? If so, how does this apply to

levies that are not flat-dollar amounts? For example, is a levy computed by a percentage of the fee-payors' worldwide income "locally focused?" At least one state court concluded such a regime was not locally focused. *See Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (1st Dist. Ct. App. 2008). In that case, California imposed a levy on limited liability companies registered with the state. The amount of the levy was computed by taking a percentage of the LLC's worldwide income. The state argued the levy was authorized by *ATA–Michigan*. The California Court of Appeals disagreed, holding that the levy violated the internal consistency test because, by computing the levy based on the LLC's worldwide income, the levy reached outside of the state. *Id.*

Granting *certiorari* provides this Court with the opportunity to provide meaningful guidance on when a levy is imposed upon a "purely local activity" and is "locally focused." New Jersey's levy is imposed on any partnership that earns a single dollar of income within the state; in other words, the triggering event is earning New Jersey-source income. Is that a "purely local activity" that places the levy beyond the reach of the internal consistency test? New Jersey computes the levy based on the number of partners in the partnership, irrespective of whether the partner is domiciled in New Jersey or otherwise has nexus with the state. Is this method of computing the levy "locally focused"? Does the answer change if New Jersey computed the levy based solely on the number of New Jersey-based partners?

II. Are unapportioned levies subject to the *Pike*-balancing test?

The secondary issue in this case is whether the *Pike*-balancing test applies to an unapportioned levy.

Traditionally, courts rarely invoked *Pike*-balancing in state tax cases, including cases reviewing monetary levies not labeled as a "tax." This Court broke from that tradition in *ATA–Michigan* by specifically citing *Pike* as one of the "principles and precedents" persuading the Court to uphold the Michigan Court of Appeals' decision below. *ATA–Michigan*, 545 U.S. 429, 433 (2005). Importantly, the Michigan Court of Appeals applied the *Pike*-balancing test to the levy. *Westlake Transp., Inc. v. Michigan Public Service Commission*, 662 N.W.2d 784 (Mich. App. 2003). In a footnote, the court rejected the plaintiffs' argument that the internal consistency test should apply because, according to the court, "this test is used to analyze the constitutionality of state-taxation statutes . . . not regulatory statutes." *Id.* at 803 n.8. This Court did not specifically address this footnote, thus leaving a critical question unanswered: does *Pike* apply to unapportioned monetary levies that are enacted for regulatory purposes?

The uncertainty created by *ATA–Michigan* continues today, aided by two recent invocations of *Pike* by federal courts. First, in *Direct Marketing Association v. Brohl*, 814 F.3d 1129 (10th Cir. 2016), the United States Court of Appeals for the Tenth Circuit addressed whether Colorado's use tax reporting regime was subject to the physical presence rule in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). It concluded that the physical presence rule did not apply because the "reporting requirements are regulatory and are not subject to the bright-line rule of *Quill*." *Direct Marketing*, 814 F.3d at 1147. Instead, the reporting regime is properly assessed by "a balancing analysis under *Pike*." *Id.* at 1146. In sum, the Tenth Circuit reaffirmed that regulatory laws are subject to *Pike*-balancing, but tax laws are not. How does this principle apply to

monetary levies that are characterized as regulatory in nature? In *ATA–Michigan*, the lower court determined that *Pike* applied. *Westlake Transp., Inc. v. Michigan Public Service Commission*, 662 N.W.2d 784 (Mich. App. 2003). But in *Northwest Energetic Services v. California Franchise Tax Board*, 159 Cal. App. 4th 841 (1st Dist. Ct. App. 2008), the California Court of Appeals held that *Pike* did not apply.

The second invocation comes from this Court's decision in *South Dakota v. Wayfair*, which alluded to "other aspects of the Court's Commerce Clause doctrine" that protect small businesses from undue burdens. 138 S. Ct. 2080, 2093 (2018). The Court recounts the United States (contributing to the case as *amicus curiae*) suggesting the Court apply the *Pike*-balancing test to analyze South Dakota's law. Although the Court did not consider this suggestion (as the issue was "not before the Court in the instant case"), it recognized this issue's "potential to arise in some later case. . . ." *Id.* at 2099.

Granting *certiorari* allows this Court to address the question head on: does *Pike*-balancing apply to a monetary levy when the levy is imposed pursuant to a state's regulatory power (as opposed to its taxing power)? In the present case, the Tax Court lamented the lack of a clear answer to this question: "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 context of a challenged fee or tax." Pet.App. 70a. Both state courts and prospective fee-payors would benefit from this Court addressing the role of *Pike*-balancing when analyzing monetary levies.

III. This case raises an issue of national importance because, in light of this Court's decision in *South Dakota v. Wayfair*, countless small businesses are now subject to unapportioned levies in every location where it makes sales.

While this case directly implicates a New Jersey levy on partnerships, it also implicates countless small businesses of every legal form. This is a direct result of the Court's holding in *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), which removed the "physical presence" rule as a potential barrier to a state exercising jurisdiction over a business. Before *Wayfair*, a small business located in a single state was generally unconcerned by the array of state and local levies imposed in other states. After *Wayfair*, that small business is now confronted with potential liability for choosing to engage in interstate commerce.

This concern is not hypothetical. As Petitioner points out in its brief, at least twelve states impose unapportioned levies that fail the internal consistency test. Some of the levies are flat-dollar amounts, while others are structured like the New Jersey levy: measured by the number of owners of a legal entity. To illustrate the importance of this Court granting *certiorari*, consider the dilemma faced by a small business when deciding whether to comply with Tennessee's unapportioned tax on limited liability companies. Tenn. Code Ann. § 48-247-103(d) (2021). Like New Jersey's levy on partnerships, Tennessee's levy is imposed at the rate of $50 per member. *Id.* If this Court does not grant *certiorari*, that small business—faced with the decision whether to pay Tennessee's levy or risk defending an enforcement action—will have two state court decisions to consider: one

that found an analogous regime unconstitutional, *Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841 (Cal. Ct. App. 2008), and another that found an analogous regime constitutional, *Ferrellgas Partners, LP v. Director, Division of Taxation, New Jersey*, 2021 N.J. Super. Unpub. LEXIS 64 (N.J. Super. Ct. App. Div. Jan. 13, 2021).

This concern is also not surprising. Indeed, this Court recognized that "small businesses, startups, or others who engage in commerce across state lines" may invoke "other aspects of the Court's Commerce Clause doctrine" to "protect against any undue burden on interstate commerce. . . ." *Wayfair*, 138 S. Ct. at 2098. Is the internal consistency test one of the "other aspects of the Court's Commerce Clause doctrine"? If so, what constitutes a levy on "purely local activity" that would fall outside of the test's protection? Relatedly, is *Pike* one of the "other aspects" that applies, particularly when the levy is enacted for regulatory purposes? If neither internal consistency nor *Pike* apply, what "other aspects" of the doctrine offer protection to a small business?

This concern is worthy of the Court's immediate consideration for two reasons. First, some small businesses will ultimately decide to stop engaging in business in certain states, and others may forgo interstate commerce altogether. They will conclude that the cost of compliance is too high, and the risks associated with relying on the internal consistency test are too great. Regrettably, this result is precisely what the Framers sought to avoid: "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 548 (2015).

Second, a case brought by a small business directly challenging an unapportioned levy is unlikely to come before this Court. As a practical matter, the amount of most unapportioned levies is low, typically a few hundred dollars. Alternatively, the costs associated with challenging a levy through the state court system are significant. Simply put, a small business is unlikely to spend tens of thousands of dollars litigating whether it is required to pay a levy of a few hundred dollars. Accordingly, this case is the ideal vehicle for the Court to address the questions it foreshadowed in *Wayfair*.

CONCLUSION

The Court should grant Petitioner's petition for a writ of *certiorari*.

Respectfully submitted,

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