No. 21-641

IN THE

Supreme Court of the United States

FERRELLGAS PARTNERS, LP,

Petitioner,

v.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

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

BRIEF IN OPPOSITION

MATTHEW J. PLATKIN
Acting Attorney General
State of New Jersey
JEREMY M. FEIGENBAUM*
State Solicitor
ALEC SCHIERENBECK
Deputy State Solicitor
JEAN P. REILLY
Assistant Attorney General
MICHAEL J. DUFFY
Deputy Attorney General
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov
* *Counsel of Record*

Counsel for Respondent

February 28, 2022

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QUESTION PRESENTED

In *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005) ("*ATA-Michigan*"), this Court held that a flat levy "which does not seek to tax a share of interstate transactions, which focuses upon local activity, and which is assessed evenhandedly" does not violate the dormant Commerce Clause. *Id.*, at 438. The question presented is:

Whether a filing fee that seeks to recoup the State's local costs for processing and reviewing returns for partnerships that derive New Jersey sourced income falls within the rule of *ATA-Michigan*.

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INTRODUCTION

Petitioner has not come close to satisfying this Court's traditional certiorari criteria. As Petitioner acknowledges, in *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005), this Court concluded that a state may—consistent with the dormant Commerce Clause—impose a flat "regulatory fee" on a business entity "that is locally focused." Pet. 17. Below, the New Jersey Appellate Division—the intermediate state appellate court—applied that precedent, finding that New Jersey's partnership filing fee is a locally-focused fee based on the record before it. That conclusion makes sense: New Jersey's fee is not a levy on any income earned in interstate commerce, but a filing fee imposed on all partnerships with New Jersey sourced income. The filing fee accompanies an informational return required under state law, and it helps defray the costs incurred by New Jersey in tracking down the New Jersey sourced income of business organizations, like partnerships, that do not pay taxes but that distribute income to their owners, the eventual taxpayers.

Although Petitioner strains mightily to develop a split, it comes up empty. The best it can muster is a purported conflict between this state intermediate court decision and two decisions of California's intermediate appellate court. Even if there was such a disagreement, a dispute between two intermediate appellate courts—especially if one spoke only in an unpublished decision—cannot justify certiorari. But more importantly, Petitioner's alleged split is illusory. The California and New Jersey decisions recite and apply exactly the same legal standards set out by *ATA-Michigan* and simply apply them to different facts. The former looked at the validity of a California levy imposed

on a business's worldwide income; because California's scheme attempted to claim an unapportioned share of interstate business, it was unsurprisingly subject to the internal-consistency test and invalidated. New Jersey's law, by contrast, imposes a flat fee on purely local activity, and falls within the rule of *ATA-Michigan*. There is no dispute to resolve.

Without a split, Petitioner's remaining arguments for certiorari are unavailing. The Appellate Division decision is nonprecedential and is nonbinding on future state courts. The issue it addressed is narrow—whether, on this record, New Jersey's partnership filing fee is a locally-focused levy. And the fact that other states apply their own variety of unapportioned local levies hardly inflates the importance of this decision, as those state levies can be adjudicated on their particulars in due course. See *Kansas City Ft. S & M Railway Co. v. Botkin*, 240 U.S. 227, 233 (1916) (giving "caution that every case involving the validity of a tax must be decided upon its own facts"). Given this Court's explicit admonition that "nothing" in its cases "suggests that" the diverse array of "flat fees upon local businesses and service providers" are "inconsistent with the dormant Commerce Clause," *ATA-Michigan*, 545 U.S., at 434, this Petition is no occasion to invalidate them in one fell swoop.

As for Petitioner's claim that this is a rare opportunity to revisit the *ATA-Michigan* decision, this case is hardly unique. On the validity of New Jersey's own partnership filing fee, no fewer than *fifteen* separate cases involving the same levy and the same Commerce Clause allegations are winding through the courts. Any one of these cases could result in a precedential opinion, and others in New

Jersey or elsewhere could later give rise to a division of authority. Not only that, but Petitioner's own authorities demonstrate that other challenges to local levies readily find their way to this Court. Of the two California opinions that Petitioner cites (the only cases on the other side of the alleged split), one ultimately made it to this Court—where certiorari was denied. *Ventas Finance I, LLC v. Franchise Tax Board*, 165 Cal. App. 4th 1207 (Cal. Ct. App. 2008), *cert. denied*, 556 U.S. 1176 (2009). Moreover, Petitioner's own choices below deprived this Court of a fuller record to evaluate certain of the arguments on which it now relies.

Finally, the decision below correctly applied this Court's own precedents. The courts below appropriately found that New Jersey's filing fee is "purely intrastate activity" under *ATA-Michigan*. The state court then properly applied black letter principles in determining that New Jersey's filing fee worked no disparate impact or undue burden on interstate commerce. Indeed, according to the scholars that Petitioner repeatedly cites in its brief, the court's "thoughtful opinion provides an instructive overview of the contemporary state of the internal consistency doctrine." J. Hellerstein & W. Hellerstein, State Taxation, ¶ 4.16 [1][d][vi] (3d. ed. 2000 & Supp. 2022). Certiorari is not necessary.

Petitioner's request for split-less and fact-bound error correction, of an unpublished state appellate court decision that faithfully follows this Court's ruling in *ATA-Michigan*, does not warrant review.

STATEMENT OF THE CASE

1. In New Jersey, a partnership is generally not subject to an entity-level tax. N.J. Stat. Ann. § 54A:2-2. Rather, its individual partners may be liable for New Jersey Gross Income Tax in their separate and individual capacities. *Id.* To assist the State in its efforts to track and collect the taxes owed by individual partners, state law requires any partnership that derives income from New Jersey sources or that has an owner who resides in the State to file an informational return showing all items of income and loss. N.J. Stat. Ann. § 54A:8-6(b)(1). That return must include, at a minimum, both the name and address of each partner, member, or owner of the entity. *Id.*

In 2002, the New Jersey Legislature enacted the Business Tax Reform Act, L. 2002, c. 40, a comprehensive effort aimed at reforming the State's business tax system. Pet. App. 29. Among other things, the Legislature aimed to enhance the State's ability to track "'the income of business organizations, like partnerships, that do not themselves pay taxes but that distribute income to their owners, the eventual taxpayers.'" *Id.* (quoting Assembly Budget Comm. Statement to A. 2501 1 (June 27, 2002)). And to realize that goal, the Legislature sought to "establish a revenue stream that captures enforcement and processing costs that New Jersey incurs from processing the vast network of limited liability companies and partnerships." *Id.* (quoting Statement to A. 2501 52 (June 6, 2002)).

That revenue source is challenged here. As a result of the Act, state law now provides that—subject to exceptions not at issue here—an entity classified as a

partnership for federal tax purposes that has any income derived from New Jersey sources must pay a flat filing fee of $150 for each partner, up to $250,000 in total (*i.e.*, up to 1,667 partners). Pet. App. 29-30. Specifically, New Jersey law states that:

> Each entity classified as a partnership for federal income tax purposes . . . having any income derived from New Jersey sources, including but not limited to a partnership, a limited liability partnership, or a limited liability company, that has more than two owners shall at the prescribed time for making the return required under this subsection make a payment of a filing fee of $150 for each owner of an interest in the entity, up to a maximum of $250,000.

N.J. Stat. Ann. § 54A:8-6(b)(2)(A).

2. Petitioner, Ferrellgas Partners, L.P. ("FGP"), "is a publicly traded limited partnership incorporated in Delaware and listed on the New York Stock Exchange." Pet. App. 37. Petitioner "is the 99% sole limited partner in an affiliated limited partnership Ferrellgas, L.P." (the "Operating Partnership"). Pet. App. 38. Petitioner, "as limited partner, facilitates investments by the investing public in the Operating Partnership." *Id.* "The Operating Partnership distributes propane on a nation-wide basis" and "has a storage facility in New Jersey, and three other locations to handle service/delivery calls." *Id.*

For the tax years at issue, the Operating Partnership filed its informational return, listing Petitioner as a limited

partner and claiming New Jersey sourced income. See *id*. Petitioner, as a partnership, was likewise required to file an informational return and paid the maximum filing fee of $250,000. Pet. App. 9. The Operating Partnership, which sells propane nation-wide, has not challenged the fee. Pet. App. 11. Instead, only Petitioner—the limited partnership that sells investment units in the Operating Partnership—challenges New Jersey's filing fee. Pet. App. 39.

3. Petitioner filed a refund claim with the New Jersey Division of Taxation. *Id.* After that claim was administratively denied, Petitioner filed a Complaint in the Tax Court of New Jersey, a trial-level court of limited jurisdiction. See N.J. Stat. Ann. § 2B:13-1, -2; N.J. Court R. 8-1. Petitioner's Complaint alleged that New Jersey's filing fee violates the dormant Commerce Clause under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), because it: (1) is not fairly apportioned; (2) discriminates against interstate commerce; and (3) is not fairly related to the services provided by the state. Pet. App. 40. As permitted under New Jersey law, see N.J. Stat. Ann. § 54:51A-22, Petitioner initially sought attorneys' fees, but later waived this claim. Pet. App. 19.

In an unpublished decision—which under New Jersey law does not "constitute precedent" and is not "binding on any court," N.J. Court R. 1:36-3—the tax court granted partial summary judgment to the State. Pet. App. 26-73. The tax court's decision is lengthy and addresses multiple issues not presented to this Court. But several parts of the tax court's analysis—none of which Petitioner cites—are relevant to the pending petition.

At the outset, before examining whether the filing fee discriminates against interstate commerce, the court had to "determine the 'commerce' or the transaction or activity which is being allegedly discriminated by the [filing fee]." Pet. App. 51. As the court held, "the activity or transaction is not the sale of the propane tanks nationwide since that is the Operating Partnership's business, and the Operating Partnership has not challenged the fee as violating the [dormant Commerce Clause]." *Id.* Rather, "the 'commerce' being impacted is [Petitioner's] provision of capital, and its facilitation of the provision of capital by residents and nonresidents, to the Operating Partnership." *Id.* This fact finding both informed the tax court's ultimate ruling and narrowed the scope and applicability of its holding.

Next, the court reasoned that it needed to evaluate "the activity for which the [filing fee] is imposed." Pet. App. 52. The tax court found that New Jersey's filing fee is imposed "for a purely intrastate reason." Pet. App. 64. As the court observed, "the fee is imposed only if the partnership derives New Jersey source income," and "is imposed not for earning that income, but is instead a recovery of State costs for tracking that income." Pet. App. 54-55. "That the review of informational returns encompasses, and indeed requires, a review of a partnership's income earned everywhere, does not implicate the [dormant Commerce Clause], nor convert the [filing fee] into a levy violating the [dormant Commerce Clause]." *Id.* Indeed, each state has always been "obligated to determine the proper/reasonable amount of income/loss allocable to" it. Pet. App. 54. And such filing and processing of informational returns allows New Jersey to "track" pass-through income that would otherwise be "difficult to trace" and

helps it determine whether the ultimate recipients of that income—individuals or corporations owning stock in the partnership—owe a state tax. Pet. App. 53-54.

Further, the tax court considered whether the filing fee "discriminates against [Petitioner's] investment activity by improperly favoring investment activity (via direct/indirect capital contributions to a partnership) in a local business, operation, or activity, to the disadvantage of that same investment activity in an out-of-State business, operation or activity." Pet. App. 52. The court held that the filing fee "does not facially discriminate against [Petitioner] or [its] activity." Pet. App. 56. After all, New Jersey's filing fee does not "unduly favor[] in-State activities or transactions over those same activities or transactions conducted interstate." Pet. App. 57. Instead, it is imposed "regardless of whether" the partnership (1) is "domestic or foreign," (2) "derives income only from New Jersey or from all other States," (3) "engages in intrastate or interstate activities," (4) has partners that "are New Jersey residents or non-residents," or (5) has partners that do business "wholly intrastate or partially intrastate." Pet. App. 56. The filing fee also "does not incentivize or promote local business over out-of-State business." Pet. App. 57. "Nor is there any 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" Pet. App. 57 (*quoting Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). In short, "the Challenged Statute is facially neutral and regulates even-handedly." *Id.*

The court also found "no proof that the [partnership fee] causes a disparate impact on [Petitioner's] investment activity." *Id.* In doing so, the tax court rejected Petitioner's

"resort to the mechanical application of the . . . the internal consistency" test. Pet. App. 60. Citing this Court's decision in *ATA-Michigan*, the court explained that a "'neutral, locally focused [unapportioned] fee or tax'" does not run afoul of the dormant Commerce Clause. Pet. App. 48 (quoting *ATA-Michigan*, 545 U.S., at 434) (alterations in original). The court further noted "the internal consistency component of *Complete Auto* is not a substitute for [a plaintiff's] burden of proving, at least *prima facie*, that the [levy] results in a disparate impact on its interstate investment activity." Pet. App. 60; see also, *e.g.*, *id.* at 61 (noting that in *ATA-Michigan* this Court likewise "reject[ed] plaintiff's argument that it need not provide any 'empirical' evidence to show that the flat fee was burdensome or had a practical discriminatory effect on 'interstate trucking.'" (*quoting ATA-Michigan*, 545 U.S., at 414-17)). In short, "the Challenged Statute is neutral facially, and there is no proof of any disparate impact or undue burden on [Petitioner's] investment activity due to the [filing fee]." Pet. App. 64.

Finally, the tax court determined that, "with no proof of disparate impact on interstate commerce," there was "no need" to apply the so-called *Pike* balancing test, Pet. App. 70, which asks whether the "burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). But even were *Pike* applicable, Petitioner failed to show that the filing fee "imposes an excessive burden on its interstate commerce." Pet. App. 70. Although Petitioner "did provide information to show that the salaries paid" to workers were "about half of the revenues raised by the [filing fee]," this "does not prove that the [fee] is an 'excessive' burden on its

investment activity." *Id.* Instead, it was far from "clear" that the "salaries only" data was the complete measure of government costs. *Id.* That said, the court also found the record was inadequate to establish the State's filing fee was *not* excessive, given outstanding factual questions. Pet. App. 71. It thus denied *both* parties' motions for summary judgment on that issue. Pet App. 73. But trial never took place; after the tax court's overall decision, Petitioner elected to withdraw its remaining claims and appeal, barring the parties from entering any additional evidence into the record. Pet. App. 19.

4. Petitioner instead took the claims that it did lose to the New Jersey Appellate Division, the intermediate state appellate court. In an unpublished and nonprecedential decision that incorporated the tax court's opinion and—as Petitioner itself concedes—added no "significant additional analysis," Pet. 7, the two-judge panel affirmed. Pet. App. 2-25 (summarizing tax court opinion and agreeing the "record demonstrates" that this fee "funds the cost of the Division's processing and reviewing partnership and partner returns … to track their New Jersey source income, which is a purely intrastate activity"). Petitioner sought certification from the state Supreme Court, which denied the petition. Pet. App. 1. This petition for certiorari followed.

REASONS FOR DENYING THE PETITION

This case presents the narrow question of whether New Jersey's partnership filing fee constitutes a locally-focused regulatory levy exempt from the internal-consistency test under *ATA-Michigan*. The New Jersey Appellate Division's resolution of that question in an unpublished

decision did not generate a split among state courts, let alone state high courts; is of limited consequence; and is a straightforward application of this Court's caselaw. Nor does this Petition represent an unusual opportunity to examine this Court's holding in *ATA-Michigan*. The Petition should be denied.

I. The Alleged Split Cannot Justify Certiorari And, In Any Event, Is Illusory.

According to Petitioner, the unpublished decision below created a split with two 14-year old intermediate appellate court decisions from California. See Pet. 13 (arguing, as its basis for certiorari, that "[t]he New Jersey courts' decision . . . mark a distinct split from the approach of the California Court of Appeal"). That runs into two problems. First, even were there any tension between the state courts' decisions, a disagreement between two state intermediate appellate courts hardly demands this Court's review—especially if, as here, one side of the split involves only an unpublished opinion. See R. 10 (noting that certiorari may be warranted if the published decision of a state court of last resort splits with the decision of another state high court, not where an alleged split involves intermediate appellate courts). That makes sense: there is no reason for this Court to weigh in on an issue when the state high courts themselves can still adopt a different view—or, in the case of any unpublished decision, where the intermediate court may change course too. But second, and most importantly, Petitioner's claimed split is plainly illusory. Both the New Jersey and California intermediate appellate courts applied the same standard from *ATA-Michigan* to radically different state levies: one a filing fee to aid the State in tracking taxes owed, the other a state

tax on worldwide income. The alleged split is simply the unremarkable scenario of two state intermediate courts applying the same body of law to distinct facts.

1. Begin with the basic legal principles that underlay the decisions of the New Jersey and California state courts. To withstand dormant Commerce Clause scrutiny, a state levy must typically be fairly apportioned. *Complete Auto*, 430 U.S., at 279; see also *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (explaining that to be fairly apportioned, a tax must be internally consistent, meaning it is "structured so that if every State were to impose an identical tax, no multiple taxation would result"). But while that is the test "typically used where taxation of interstate transactions is at issue," *ATA-Michigan*, 545 U.S., at 437, this Court in *ATA-Michigan* identified an exception to that rule. If the levy is "locally focused," it will withstand dormant Commerce Clause scrutiny. *Id.*, at 437-38.

This Court also provided significant guidance regarding what levies would be "locally focused." In *ATA-Michigan*, this Court examined the validity of a $100 flat fee imposed on all trucks that undertook intrastate commercial hauls. 545 U.S., at 434. As the Court explained, the fee in question applied only to "activities taking place exclusively within the State's borders." *Id.* The Michigan fee did not "facially discriminate against interstate or out-of-state activities or enterprises," but rather applied "evenhandedly" to in-state and out-of-state business. *Id.* And "[i]t d[id] not reflect an effort to tax activity that takes place, in whole in in part, outside the State." As a result, the Court concluded that "[n]othing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause." *Id.*

This was so, this Court held, even though the challengers in that case argued that Michigan's fee would "fail[] the 'internal consistency' test." *Id.*, at 437. The Court recognized that, under that test, an interstate hauler would be subject to multiple fees if every state enacted a similar fee. *Id.*, at 438. But as the Court noted, that result flows not from discrimination against interstate commerce, but the fact that an "interstate firm with local outlets" will logically "pay local fees that are uniformly assessed upon all those who engage in local businesses, interstate and domestic firms alike." *Id.* Thus, as courts have found—and as Petitioner concedes—*ATA-Michigan* "made clear that a levy need not be internally consistent if it is a regulatory fee that is locally focused." Pet. 17.

2. Both sides of Petitioner's alleged split understood and applied the rule from *ATA-Michigan*. The difference in their results is not due to any legal disagreement about the appropriate standard under *ATA-Michigan*, but rather an application of that standard to different facts.

Start with the California decisions cited by Petitioner. In *Northwest Energetic Services, LLC v. Franchise Tax Board*, 159 Cal. App. 4th 841 (Cal. Ct. App. 2008), the California Court of Appeals, First Appellate District, held that a state levy that collected a share of worldwide income was unconstitutional as applied to the plaintiff, Northwest. As that court explained, the plaintiff was a limited liability company "under the laws of the State of Washington, with business locations in Washington and Oregon." *Id.* at 849. Northwest maintained "no operations, property, inventory, employees, agents, independent contractors or place of business in California." *Id.* Still more, Northwest did not "solicit customers in California or make any

deliveries to customers in California." *Id.* Nevertheless, solely because Northwest was *registered* in California, a provision of the California Revenue and Taxation Code required Northwest to pay a California levy based on its "total income from all sources reportable to this state for the taxable year." *Id.* The parties agreed that the State's levy was imposed on a registered LLC's "'total income,' wherever earned, without apportionment according to the percentage of business or income attributable to activities in California." *Id.,* at 850. As a result, California's tax failed the internal-consistency test, because if California's rule "were replicated in every state, an LLC engaging in business in multiple states with the same total income . . . would pay" the same tax multiple times, whereas "an LLC operating only in one state would pay the [levy] only once." *Id.,* at 862.

In holding that California's law violated the dormant Commerce Clause, the state intermediate appellate court understood and considered the rule in *ATA-Michigan*, but held that it did not apply on the facts before it. The court observed that *ATA-Michigan* "held that the [Michigan] fee did not violate the dormant Commerce Clause, because it was imposed upon only activities taking place exclusively within the state's borders, did not facially discriminate against interstate or out-of-state activities or enterprises, and applied evenhandedly to all carriers making domestic journeys." *Id.*, at 863 (*citing ATA-Michigan*, 545 U.S., at 434). But California's levy was "not a flat fee imposed on all LLCs for the privilege of doing business locally in California, but a percentage of the LLC's total *worldwide* income, which therefore *does* tax a share of interstate transactions." *Id.* Strikingly, an LLC incurs that state levy "based on its total *worldwide* income merely by

registering with the state, even if it does no business there," and even if it has no California-sourced income at all. *Id.* As such, the levy "as applied to Northwest violated the Commerce Clause." *Id.,* at 864.

Ventas Finance, the other California intermediate court decision on which Petitioner relies, was decided soon after *Northwest* and involved the same levy. See *Ventas Finance I, LLC v. Franchise Tax Board*, 165 Cal. App. 4th 1207 (Cal. Ct. App. 2008), *cert. denied*, 556 U.S. 1176 (2009). And on the question whether California's levy fell within *ATA-Michigan*, the Court of Appeals adopted the reasoning of *Northwest*—including its treatment of *ATA-Michigan*—in its entirety. *See Ventas Finance*, 165 Cal. App. 4th at 1220 (quoting *Northwest*, 159 Cal. App. 4th at 863).

Unlike the California levy examined in *Northwest* and *Ventas Finance*, New Jersey's levy is not an unapportioned tax on interstate transactions or on worldwide income, but rather a mere state filing fee. In New Jersey, partnerships with New Jersey sourced income must pay a fee of $150 for each partner, up to a maximum of $250,000. N.J. Stat. Ann. § 54A:8-6(b)(2)(A). The "filing fee is imposed not for earning income in New Jersey, but is instead a recovery of State costs from tracking that income." Pet. App. 55. Indeed, both the "plain language and legislative history" of the Act prove that the fee was specifically enacted to recover the costs the State incurs in processing or reviewing the returns of both partnerships and their partners with New Jersey sourced income. Pet. App. at 27; 29-31. And as the court reasoned, because the fee is imposed to recover the costs of "a purely intrastate or local activity, which is tracking of New Jersey source income

via filed returns . . . it does not implicate the [dormant Commerce Clause] under *ATA-Michigan*." Pet. App. 55.[1]

Nothing about the unpublished decision below indicates any disagreement with the reasoning of the intermediate appellate courts of California. To the contrary, the tax court expressly *contrasted* New Jersey's locally-focused filing fee with California's unconstitutional "'fee imposed'" on "'a percentage of the LLC's *worldwide* income.'" Pet. App. 55 (citing *Northwest*, 159 Cal. App. 4th at 863). As the court explained below, unlike the California law, the New Jersey "filing fee is imposed not for earning that income, but is instead a recovery of State costs for tracking that income." *Id.* Thus, even assuming this Court would grant certiorari to resolve a disagreement between two state intermediate appellate courts, including where one of the decisions was unpublished, there is no such disagreement to resolve.

1. To the extent Petitioner contends (Pet. 12) that the Oregon Supreme Court's decision in *Am. Trucking Ass'ns, Inc. v. Dep't of Transp.*, 124 P.3d 1210 (Or. 2005), adds to the alleged split, that claim is mistaken. That decision, issued shortly after ATA-Michigan, considered a similar flat fee on heavy trucks. *Id.*, at 557. Because the Oregon fee was a "locally focused flat fee[]" under *ATA-Michigan*, the court simply applied this Court's opinion to the analogous facts presented. *Id.*, at 572. In any event, even were Petitioner correct about *all* the cases it included in its split, at most it would have the California Court of Appeals on one side and the Oregon Supreme Court on the other—with this unpublished decision in New Jersey joining the latter.

II. Absent A Split, This Case Does Not Otherwise Warrant Certiorari.

Without a split, this Petition is not certworthy for three reasons. First, Petitioner drastically overstates the impact of the decision below. Second, this case does not present a rare opportunity to reevaluate this Court's opinion in *ATA-Michigan*. Third and finally, the unpublished decision was correctly decided on its facts.

A. Petitioner Overstates The Consequences Of The Decision Below.

Perhaps because Petitioner cannot rely on a true split to justify certiorari, Petitioner dramatically overstates the consequences of the decision below, which decided a narrow question solely on the record before it, and is not otherwise binding on any other case or on any other record.

First, as a threshold matter, the Appellate Division's decision is unpublished and has no precedential value. In New Jersey, as explained, "[n]o unpublished opinion shall constitute precedent or be binding upon any court." N.J. Court R. 1:36-3. Because the decision below has no effect on anyone aside from the parties, the consequences of that decision are as cabined as they come.

Second, the decision below examined a granular issue: whether—on this record—New Jersey's partnership filing fee ran afoul of the dormant Commerce Clause. This Court has "emphasize[d] the necessary caution that every case involving the validity of a tax must be decided upon its own facts." *Kansas City*, 240 U.S., at 233. This case is a perfect example. Among other things, the decision

below turned, in part, on the tax court's determination that—on this record, and given Petitioner's particular business model—the interstate commerce is Petitioner's "investment activity in partnerships." Pet. App. 27, 54-5. The court also concluded that, on this record, Petitioner failed to submit evidence showing that the revenue collected by the fee exceeds that necessary to defray the costs of processing the returns and tracking New Jersey partnership sourced income. Pet App. 70; see also *ATA-Michigan*, 545 U.S., at 435 (approving a local fee designed "to defray costs" attributed to trucking regulation). And aside from those record-specific problems, the tax court's analysis turned on the specific features of New Jersey's law, as well as the specific legislative history behind the fee's enactment. Pet App. 27. This is the stuff of alleged error correction, not a question of law warranting this Court's exercise of discretionary review.

Against that backdrop, Petitioner's suggestion (at Pet. 17-19) that this case is an opportunity to clarify a laundry-list of abstract questions concerning *ATA-Michigan* is wish casting. To take one example, while Petitioner claims that this case "provides a good vehicle" to "clarify whether, for purposes of the vitality of the internal-consistency test, it is relevant to distinguish between a regulatory *fee* and a *tax*," Pet. 17, nothing in the decision below or this Court's cases suggests that distinction would be pertinent. See Pet App. 69, 70 (tax court using "fee or tax" interchangeably); see also *ATA-Michigan*, 545 U.S., at 434 ("Nothing in our case law suggests that such a neutral, locally focused *fee or tax* is inconsistent with the dormant Commerce Clause"); *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 282–287 (1987) (drawing no distinction between a tax and a fee,

but rather invalidating both a flat "identification marker fee" and a flat "axle tax" under the internal-consistency test). And even assuming they might bear on the validity of New Jersey's fee, Petitioner fails to point to any actual division of authority on these various questions.

Third, the fact that states maintain a host of other flat fees—from truck hauling fees, to licensing fees, to business registration fees—does not render this particular challenge important. In *ATA-Michigan*, this Court already noted that "States impose numerous flat fees upon local businesses and service providers" that, because they are "neutral" and "locally focused" do not run afoul of the dormant Commerce Clause. 545 U.S., at 434. And just like New Jersey's filing fee and California's levy, which led to different outcomes, those other levies will rise or fall on their own particulars. See *West Lynn Creamery, Inc. v. Healy*, 512 U. S. 186, 201 (1994) (noting that this Court's dormant Commerce Clause jurisprudence "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects").

Petitioner's bald assertion that "at least twelve States impose unapportioned levies that fail internal consistency" is particularly puzzling. *See* Pet. 14 & n.3. Petitioner offers no analysis of the substance of those levies, and cites no cases—pending or decided—concerning their validity.[2] To

2. Even a cursory examination of Petitioner's list of levies reveals that at least six are distinguishable as taxes on *income*, as opposed to filing fees. *See, e.g.*, Ala. Code § 40-14A-22(c) ($100 minimum tax); Cal. Rev. & Tax Code § 23153(d) ($800 minimum tax); D.C. Code § 47-1807.02(b) ($250 minimum tax); N.J. Stat. Ann. § 54:10A-5(e) ($2,000 minimum tax); R.I. Gen. Law § 44-11-2(e) ($400 minimum tax); Utah Code Ann. § 59-7-104(3) ($100 minimum tax).

the extent Petitioner claims that the mere "flatness" of the levies renders them all unconstitutional, Petitioner is flat wrong. See *ATA-Michigan*, 545 U.S. at 434. As the very tax scholar on whom Petitioner elsewhere relies noted, "many" unapportioned levies "will fall comfortably within the U.S. Supreme Court's exclusion from the [internal consistency] doctrine for 'local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic alike.'" J. Hellerstein & W. Hellerstein, State Taxation, ¶ 4.16 [1][d][vi] (3d. ed. 2000 & Supp. 2022) (cited at Pet. 2, 12, 18). Each of those fees will rise or fall on their particulars, and if any split does arise, this Court can surely review at that time. There is no basis to invalidate them all here.

B. This Case Is Not The "Rare Opportunity" To Revisit *ATA-Michigan*.

According to Petitioner, certiorari is essential because this case presents a "rare opportunity" to reexamine this Court's decision in *ATA-Michigan*. Pet. 20. That is wrong. If anything, this case is a poor vehicle to do so.

First, even on the particular question of the validity of New Jersey's partnership filing fee, this case is a dime a dozen. At the time of filing, there are at least fifteen cases presently pending in federal and state court that raise the question whether New Jersey's own partnership filing fee violates the dormant Commerce Clause.[3] There is nothing

3. *Energy Transfer L.P. v. Ficara*, No. 21-3185 (D.N.J. 2022), presenting the same issue, is presently pending in the District of New Jersey. And there at least fourteen cases pending in the New Jersey Tax Court. See *Energy Transfer Equity, L.P. v. Director, Div. of Taxation*, No. 008241-2018, 008244-2018; *Energy Transfer*

about this case in particular, or the unpublished decision that resulted, that makes it a good vehicle for considering the continued vitality of a 2005 decision.

Second, experience refutes Petitioner's repeated claim that certiorari must be granted because other fee cases will involve smaller levies and the parties will lack incentive to litigate. Pet. 19-21. *ATA-Michigan* itself involved a party's challenge to a $100 flat fee. 545 U.S. at 431. *ATA-Scheiner*, which was also decided by this Court, likewise involved a challenge to a $25 flat annual fee. 483 U.S., at 271. And in *Ventas Finance*, one of the cases Petitioner cites for a split, the taxpayer was contesting a $29,540 refund denial, 165 Cal. App. 4th at 1211, yet stayed the course through an unsuccessful petition for certiorari. 556 U.S., 1176.

Petitioner's suggestion that an absence of attorney's fees is a barrier to similar petitions returning to this Court is especially inapt. See Pet. 20 (arguing that like challenges are "not economically feasible" because "[a]ttorney's fees are unavailable"). In reality, although attorney's fees are admittedly capped, Petitioner sought attorney's fees *in this very case*, as it is authorized to do under New Jersey law, N.J. Stat. Ann. § 54:51A-22, but later waived this claim. Pet. App. 19. Nor is it fair to say that "[a]ttorney's fees are categorically unavailable" elsewhere. Pet. App.

Partner, L.P. v. Director, Div. of Taxation, 008246-2018, 008250-2018; *Sunoco, L.P. v. Director, Div. of Taxation*, 008243-2018, 008251-2018; *Sunoco Logistic Partners, L.P. v. Director, Div. of Taxation*, 008248-2018, 008249-2018, 008255-2018; *AmeriGas Partners, L.P. v. Director, Div. of Taxation*, 008239-2018, 008240-2018, 008258-2018; and *Williams Partners, L.P. v. Director, Div. of Taxation*, 008188-2018, 008189-2018.

20. In the *Northwest* case, on which Petitioner relies to claim a split, the plaintiff was awarded attorney's fees too. 159 Cal. App. 4th at 850; *see also Ventas Finance*, 165 Cal. App. 4th at 1214 (attorneys "accepted" the case "on a contingency fee basis"—another incentive structure to support litigation on this issue). In other words, because attorney's fees could be available in such challenges—in New Jersey, and in other states—they offer an inducement to challenge even modest state levies. Petitioner's bald claim that this case *must* be granted given the size of the levy falls short.

Third, not only does this case fall short of being a "rare opportunity" to reconsider this Court's cases, but it offers a particular poor vehicle in which to do so. The tax court in this case reasoned that one of the key questions before it was whether the revenue collected by New Jersey's filing fee in fact exceeds that money necessary to defray the costs of processing returns and tracking New Jersey partnership sourced income. Pet App. 70; see *ATA-Michigan*, 545 U.S., at 435 (approving fee designed "to defray costs" attributed to state regulation). But the tax court concluded that the record was insufficient to grant summary judgment on this score. Rather than adduce more evidence in support of its contention that the fees exceed the costs, however, Petitioner withdrew its remaining claims—barring the parties from entering additional information into the record. Pet. App. 19. That decision deprived this Court of a potentially more detailed record relating to the expenses the filing fee covers. A future case, with more fulsome evidence on this issue, would be a more suitable vehicle.

C. The Decision Below Correctly Applied This Court's Precedents.

Not only is Petitioner requesting error correction of one unpublished decision by an intermediate appellate court, but the challenged decision involves a faithful application of *ATA-Michigan* to these facts. Under *ATA-Michigan*, a state "fee, which does not seek to tax a share of interstate transactions, which focuses upon local activity, and which is assessed evenhandedly," and neither "burdens" nor "discriminates against interstate commerce," withstands dormant Commerce Clause scrutiny. 545 U.S., at 438. The New Jersey courts correctly found that the partnership filing fee satisfies *ATA-Michigan*'s test.

The filing fee at issue is imposed "for a purely intrastate reason": the collection of taxes owed to New Jersey. Pet. App. 64. It "is imposed only if the partnership derives New Jersey source income," and "is imposed not for earning that income, but is instead a recovery of State costs for tracking that [New Jersey source] income." Pet. App. 54-55. "That the review of informational returns encompasses, and indeed requires, a review of a partnership's income earned everywhere, does not implicate the [dormant Commerce Clause], nor convert the [filing fee] into a levy violating the [dormant Commerce Clause." *Id.* After all, the State has every right to determine the revenue it is owed. The filing and processing of informational returns allows it to "track" pass-through income that is otherwise "difficult to trace," and conducting tracking in this manner helps the State to determine whether the ultimate recipients of that income—namely, the individuals or corporations owning stock in the partnership—owe a state tax. Pet. App. 53-54.

New Jersey's fee also operates evenhandedly and does not burden or discriminate against interstate commerce. The fee is imposed "regardless of whether" the partnership (1) is "domestic or foreign," (2) "derives income only from New Jersey or from all other States," (3) "engages in intrastate or interstate activities," (4) has partners that "are New Jersey residents or non-residents," or (5) has partners that do business "wholly intrastate or partially intrastate." Pet. App. 56. As a result, it does not incentivize or promote local business over out-of-state business.

The tax court also rightly found that "there is no proof that the [partnership fee] causes a disparate impact on [Petitioner's] investment activity." Pet. App. 57. In doing so, the court rejected Petitioner's "resort to the mechanical application of the . . . the internal consistency" test given the locally-focused nature of New Jersey's fee. Pet. App. 60.[4] As in *ATA-Michigan*, if Petitioner would be subject to multiple local fees if every State maintained a similar standard, it would only be because Petitioner "engages in *local* business in all those States." 545 U.S., at 438. And

4. In an effort to paint the tax court as hostile to this Court's precedent, Petitioner distorts the decision below. To be clear, the tax court did *not* imply that the internal consistency test is a "judicial fraud." Pet. 2. Instead, in the course of explaining the scope and application of the internal-consistency test, the court simply and correctly observed, in a footnote, that "[t]wo Justices have consistently and strongly criticized the internal consistency requirement as a 'judicial fraud.'" Pet. App. 61 n.15 (quoting *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 572 (2015) (Scalia and Thomas, JJ., dissenting)). And in any event, the Appellate Division panel—which agreed wholly with the decision of the tax court—made no such observation.

"[a]n interstate firm with local outlets normally expects to pay local fees that are uniformly assessed upon all those who engage in local business, interstate and domestic firms alike." *Id.*

Nor is *ATA-Michigan* the only decision from this Court supporting the tax court's conclusions. As the U.S. Solicitor General explained in its brief in *ATA-Michigan,* this Court in fact "repeatedly sustained, against Commerce Clause challenge, nondiscriminatory state licensing requirements (including flat fees) imposed as a condition of engaging in local business, even when the licensees were also engaged in interstate commerce." Brief for the United States at 20, *ATA-Michigan*, No. 03-1230 (April 4, 2005); see, *e.g.*, *W. Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."); *Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537, 539-542 (1969); *Eli Lilly v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 278-284 (1961); *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 119-121 (1941); *Wagner v. City of Covington*, 251 U.S. 95, 100-104 (1919).

The rule could hardly be different. "If the only test for a levy was whether it passed the hypothetical internal consistency test, then any flat levy would necessarily fail simply by virtue of the arithmetic." Pet. App. 63. "If so, the presumptive constitutionality of any statute imposing any flat levy would be easily overcome, and thus, the burden imposed upon a challenger would become almost illusory." *Id.* Given the multitude of flat fees imposed across the country, the result would upend the States' longstanding

and established authority to issue neutral, locally-focused levies. *ATA-Michigan*, 545 U.S., at 434. This Petition offers no basis to reach a contrary conclusion.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

MATTHEW J. PLATKIN
Acting Attorney General
State of New Jersey
JEREMY M. FEIGENBAUM*
State Solicitor
ALEC SCHIERENBECK
Deputy State Solicitor
JEAN P. REILLY
Assistant Attorney General
MICHAEL J. DUFFY
Deputy Attorney General
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov
* *Counsel of Record*

Counsel for Respondent

February 28, 2022