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

REPLY BRIEF FOR PETITIONER

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March 14, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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REPLY BRIEF FOR PETITIONER

Respondent argues this case is unsuitable for certiorari for five reasons: that there is no split; that the case arose from New Jersey's intermediate appellate court; that the decision below was unpublished; that this case is not important; and that this case is a poor vehicle. But an examination of respondent's arguments on each of these points actually confirms that the Court should grant certiorari.

I. Respondent's arguments highlight the split between New Jersey's courts and California's courts.

In our system of federalism, each State is free to enact its own tax legislation, and tax legislation often reflects a unique combination of policy choices. Thus one State's tax, even if it shares some similarities with other States' taxes, is usually different in one or more ways. Indeed, respondent acknowledges the diversity in state-tax law. Opp. 2. Therefore, splits on federal constitutional questions involving state-tax laws rarely involve identical statutes.

In its petition, petitioner pointed out a split that has emerged among various state courts' application of this Court's test for "internal consistency." Pet. 12–14. Petitioner noted the inconsistent application of this test by state courts in Oregon, California, and New Jersey. To obscure this split, respondent focuses on "radical[] differen[ces]" between New Jersey's statute and California's statute. Opp. 11–16. For example, respondent points out that New Jersey's statute imposes its levy on the quantity of an entity's partners around the country, while California's statute imposes its levy based on the quantity of the entity's receipts

around the country. Opp. 14–15. And while New Jersey's levy is imposed on partnerships, California's is imposed on limited liability companies. Opp. 13–16.

But these distinctions between the underlying tax statutes are irrelevant to the federal constitutional question. The constitutional question is whether a levy violates the Commerce Clause because it fails the internal consistency test. As relevant to that question, the statutes are substantially the same. They both are imposed on interstate activity—California's levy is imposed on earning receipts across the country (Opp. 13); New Jersey's levy is imposed on raising capital from partners around the country. Pet. App. ("App.") 51a. They both are unapportioned—that is, the levy payor pays the same levy regardless of the proportion of the relevant activity in the State. Pet. 5; Opp. 14. Both levies fail the test for internal consistency. Pet. 8–9; Opp. 14. Moreover, each State legislature justified its levy because of the special in-state burdens that it perceived related to the levy payor's choice-of-entity: New Jersey, the burdens associated with partnerships (Opp. 4, 7); California, the burdens associated with limited liability companies (Pet. 13). And finally, when challenged in litigation, both respondent and the California Franchise Tax Board attempted to defend the levies based on this Court's decision in *ATA–Michigan*. Pet. 13–14. The New Jersey courts resolved the question in the opposite manner as the California courts—and thus the split emerged.

Nevertheless, respondent attempts to distinguish the California cases from this case by claiming that while California's levy should be characterized as a "tax on interstate transactions" and "worldwide income," New Jersey's levy should be characterized as

"a mere state filing fee" that is "imposed to recover the costs of a purely intrastate or local activity." Opp. 15. But respondent's premise—that New Jersey's levy, computed with respect to the number of partners around the country, should nonetheless be characterized as a wholly local fee—assumes a favorable answer to the very question presented in this petition; namely, whether the New Jersey levy is a fee imposed on wholly local activity. Indeed, California's tax agency made the same argument in support of the California levy, but the California courts squarely rejected it. See, *e.g.*, *Northwest Energetic Servs., LLC v. Franchise Tax Bd.*, 159 Cal. App. 4th 841, 863 (Cal. Ct. App. 2008). By framing the cases this way, respondent actually highlights the courts' split on this question.

II. This Court often grants certiorari to state intermediate appellate courts in state-tax cases involving the Commerce Clause.

Respondent argues that the fact that this case comes from New Jersey's intermediate appellate court should weigh against certiorari. Opp. 17. Regardless of its relevance in other areas of the law, whether a decision comes from a state intermediate appellate court carries little weight in whether a state-tax Commerce Clause case deserves certiorari. This Court often grants certiorari to review state intermediate appellate court decisions in state-tax cases involving the Commerce Clause. For example, in *ATA-Michigan*, which is at the core of petitioner's petition and respondent's brief in opposition, this Court granted certiorari to the Michigan Court of Appeals after the Michigan Supreme Court denied review. See *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 432 (2005). And this is far from an isolated occurrence; a substantial portion of this Court's recent state-tax

decisions have come from the state intermediate appellate courts. See, *e.g.*, *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 23 (2008) (reviewing decision from Appellate Court of Illinois); *Kentucky v. Davis*, 553 U.S. 328, 337 (2008) (reviewing decision from Court of Appeals of Kentucky); *Hunt-Wesson, Inc. v. Franchise Tax Bd.*, 528 U.S. 458, 463 (2000) (reviewing decision from California Court of Appeal); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (reviewing decision from California Court of Appeal). Indeed, in *Kentucky v. Davis* the Court granted certiorari to resolve a split in the state intermediate appellate courts over the application of the Commerce Clause, just like in this case. See *Davis*, 553 U.S. at 337.

This Court's review of state-tax cases, including cases from state intermediate appellate courts, is vital. Despite the important national interests at stake in interstate taxation, the Tax Injunction Act channels all state-tax cases into state court. See Council on State Tax'n Am. Br. 19. Unfortunately, state courts sometimes struggle to balance national interests of interstate commerce against the parochial interests of raising state revenue. See *id*. at 16–17. This Court thus serves as the main guardian of national interests in this area. If the Court were to limit its review of state-tax cases to decisions of state supreme courts, it would hinder this Court's ability to vindicate national interests since only a handful of States provide state high court review, as of right, in all state-tax cases. See 42 PA. CONS. STAT. § 723(b); OH. REV. CODE ANN. § 5717.04; DEL. CODE ANN. tit. 10 § 142. More commonly, state-tax cases are allowed only discretionary review, and discretionary review can be quite uncommon—for instance, only about 5% of cases are reviewed by the California Supreme

Court, and 10% by the Supreme Court of New Jersey. See Judicial Council of California, 2021 Court Statistics Report, at 16 (2021); Judicial Council of California, 2020 Court Statistics Report, at 16 (2020); New Jersey Courts, 2019 Annual Report, Court Year 2018–2019, at 11 (Sept. 2020); New Jersey Courts, 2018 Annual Report, Court Year 2017–2018, at 11 (Dec. 2018).

III. The nominal status of the opinion below as "unpublished" is irrelevant.

Respondent makes much of the fact that the decision of the court below is unpublished, as if that status reduces the impact of the decision in New Jersey and elsewhere. Opp. 3, 6, 10, 11, 16, 17. But that status should have little, if any, impact.

First, whether a case is published "carries no weight" in this Court's "decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). With the rise of online legal databases, unpublished decisions are widely available and constitute a significant body of law; as respondent points out, the unpublished decision below has been discussed in a major tax treatise. Opp. 3. If the publication status of a decision were determinative on certiorari, it would allow "nonpublication" to serve as "a convenient means to prevent review." *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., dissenting from denial of certiorari). Nonpublication would also encourage courts to bury suspect legal reasoning in unpublished decisions. See *Plumley v. Austin*, 574 U.S. 1127, 1132 (2015) (Thomas, J., dissenting from denial of certiorari). Accordingly, this Court "grants certiorari to review unpublished and summary decisions"—including unpublished state court decisions—"with some frequency." Stephen M. Shapiro et al., Supreme Court Practice § 4.11 (11th ed. 2019) (discussing

Court's tendency to review unpublished state court decisions); see also, *e.g.*, *Grady v. North Carolina*, 575 U.S. 306 (2015) (reviewing unpublished state court decision); *Miller v. Alabama*, 567 U.S. 460 (2012) (same); *Clark v. Arizona*, 548 U.S. 735 (2006) (same); *Hudson v. Michigan*, 547 U.S. 586 (2006) (same); *Illinois v. Fisher*, 540 U.S. 544 (2004) (same).

Second, the unpublished status of the decision below will likely have little practical effect in New Jersey. As respondent points out, there are numerous cases presently pending in state court that challenge New Jersey's partnership levy on Commerce Clause grounds. Opp. 20. The cases are all pending before the same state-court judge who decided petitioner's case, and have been held in abeyance pending the outcome of this petition. Although New Jersey law technically prohibits a court from citing unpublished decisions, see N.J. Ct. R. 1:36-3, the Tax Court of New Jersey has in previous cases avoided this prohibition by "quot[ing]" prior unpublished decisions "at length" and "fully adopt[ing]" their reasoning. *30 Journal Square Partners, LLC v. Jersey City*, 32 N.J. Tax 91, 99–100 n.8 (N.J. Tax Ct. 2020); see also *James Const. Co., Inc. v. Director, Div. of Taxation*, 18 N.J. Tax 224, 229 n.1 (N.J. Tax Ct. 1999). It is difficult to believe that the New Jersey courts will not follow this same cut-and-paste approach in any future challenges to New Jersey's partnership levy or other internal consistency cases, especially since New Jersey's intermediate appellate court has already endorsed the Tax Court's decision as "well-reasoned and comprehensive." App. 23.

IV. Respondent's focus on other cases and other state taxes highlights the importance of this case.

In this case, New Jersey has imposed an unapportioned, flat-dollar levy on partnerships doing any amount of business in the State. Thus, the impact of this levy in New Jersey goes far beyond petitioner itself. Indeed, respondent recognizes the broad impact of this case; as respondent points out, there are "fourteen cases pending in the New Jersey Tax Court" challenging New Jersey's levy. Opp. 20 n.3. Of course, this undercounts the number of partnerships impacted, by several orders of magnitude, because it only includes the very largest, publicly traded partnerships with the resources to mount a constitutional challenge to the levy. The record below demonstrated that there are over 150,000 partnerships that file in New Jersey every year.

Yet as important as this case is to partnerships that do business in New Jersey, the impact goes far beyond New Jersey's borders. Respondent acknowledges that there are at least twelve other States that impose levies on interstate commerce that are computed without apportionment, but criticizes petitioner for "offer[ing] no analysis of the substance of those levies . . . ." Opp. 19–20. But no analysis is necessary—the relevant feature of each of these levies is simply that each of them is imposed on interstate commerce without apportionment. Thus it is the very "flatness" of these levies that makes them relevant. Cf. Opp. 20. Respondent suggests that each of these "flat" or "unapportioned" levies may be wholly local fees, thus falling within the protection of *ATA-Michigan*. Opp. 20. But again, that very argument highlights the fact that there remains a lingering question regarding

unapportioned levies: some flat levies were invalidated in *ATA–Scheiner*, while another flat levy was upheld in *ATA–Michigan*. Is New Jersey's $250,000 partnership levy more like the levies in *ATA-Scheiner* or the levy in *ATA-Michigan*—and, more importantly, why?

Indeed, the national importance of the question to tens of thousands of businesses is the reason why eight chambers of commerce from States as diverse as Arkansas, Oklahoma, Minnesota, Ohio, Pennsylvania, Wisconsin, New York, and New Jersey filed an amicus brief to this Court, asking this Court to hear this case. Unapportioned levies impose a meaningful burden on interstate businesses, especially now that States can impose levies on businesses that do not have physical presence in the state. See Ark. State Chamber of Commerce, et al. Am. Br. 12–14. And if New Jersey's levy is permitted to stand, even more States may be emboldened to enact unapportioned levies similar to New Jersey's. See Steven N.J. Wlodychak, *The Difference Between a Fee and a Tax and Why it Matters*, 102 Tax Notes State 1027, 1028 (Dec. 6, 2021) (suggesting that other States will "readily follow" New Jersey in enacting unapportioned levies if this case is not reviewed).

V. This case is a good vehicle to clarify the constitutionality of unapportioned levies.

Finally, respondent argues that this case is not a good vehicle. Respondent first suggests that this case is an inferior candidate for review because petitioner did not develop a sufficiently detailed record comparing the revenue raised from the $250,000 annual levy with various State expenses. Opp. 22. But this is a feature, not a bug. Petitioner does not rely on factual nuances regarding the exact amount of revenue generated by the levy, or the particulars regarding

how the State spent it. Cf. Opp. 22. Indeed, these facts would only distract from the question presented and make this case less suitable as a vehicle.

Furthermore, respondent's argument on this point is inconsistent with the procedural history of this case. In this case, the New Jersey courts granted partial summary judgment in favor of New Jersey and held that New Jersey's levy is a fee imposed on a locally-focused activity, and thus protected by *ATA–Michigan*.[1] As a matter of New Jersey law, a court can only grant summary judgment if there is "no genuine issue as to any material fact" and "the moving party is entitled to a judgment or order as a matter of law." N.J. Ct. R. 4:46-2(c); see also *Brill v. Guardian Life Ins. Co. of Am.*, 666 A.2d 146 (N.J. 1995). This means that no additional facts would have changed the result on the question presented to this Court.

Respondent next argues that this case is a "dime a dozen," speculating that another litigant may at some future time present a more suitable case to this Court. Opp. 20–22. In support of this speculation, respondent points to the various cases held in abeyance pending the outcome of this litigation. Opp. 20 n.3. But if this Court denies this petition, there is no guarantee that any of these litigants will have an appetite to relitigate the exact same question and file another petition with this Court in hopes that this Court would believe its case was more worthy than petitioner's case. Cf. *Sykes v. United States*, 564 U.S. 1, 28 (2011) (Scalia, J.,

[1] The Tax Court of New Jersey did not grant summary judgment regarding whether New Jersey's levy imposes an undue burden on interstate commerce, which is a separate question than whether New Jersey's levy is fairly apportioned. Petitioner withdrew its claim regarding undue burden in order to expedite appellate review.

dissenting) ("Insanity, it has been said, is doing the same thing over and over again, but expecting different results.").[2]

Further, regarding levies imposed by other States, respondent highlights the fact that of the dozen unapportioned levies imposed by other states there are "no cases—pending or decided—concerning their validity." Opp. 19. This lack of litigation is not the result of lack of interest in the issue (as the diversity in the identity of the amici proves), but lack of financial incentive to mount state-by-state, taxpayer-by-taxpayer challenges to the various unapportioned levies of between $100 and $2,000 cited by respondent. Opp. 19 n.2.

On this point, it is true that New Jersey allows for attorney's fees. Opp. 21. But those fees are awardable at $75 per hour and are capped at $15,000. N.J. STAT. ANN. § 54:51A-22.[3] A lawyer's hope of possibly receiving a fee award of $15,000 is insufficient to incentivize years of litigation over a complicated constitutional issue. And although respondent points out the litigation activity of the American Trucking Associations challenging various unapportioned levies over the years, that organization has been willing to do so only for levies that are directly targeted at the industry it represents. Opp. 21. California allows for fee awards,

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[2] Although a challenge to New Jersey's levy is pending in federal court, Opp. 20, respondent has asserted that the federal court lacks jurisdiction over that challenge. See Answer, Ninth Affirmative Defense, *Energy Transfer L.P. v. Ficara*, No. 21-3185 (D.N.J. 2022) (Dkt. No. 22).

[3] Petitioner did not pursue this award because of its relative insignificance and because it was not the prevailing party, which is required to receive a fee award. See N.J. STAT. ANN. § 54:51A-22.

which explains why litigation against California's levy on LLCs was possible. Opp. 21. But most other States do not allow fee awards or class action status in state-tax litigation. Pet. 19–20.

For the unapportioned levies imposed by most States, the burden is disaggregated and diffused to such a degree that no single business or lawyer has had enough incentive to bring a challenge. Pet. 19–20. By contrast, New Jersey's unapportioned partnership levy is unusual in that it imposes an unapportioned annual levy that is sufficiently large to justify traditional litigation by a single litigant through the state court system and to this Court. This challenge to New Jersey's levy thus presents the Court with a rare opportunity to clarify the constitutionality of unapportioned levies.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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