No.

In the Supreme Court of the United States

RICHARD CHAMBERLAIN AND MARTHA CRUM,
PETITIONERS

v.

NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state tax scheme that taxes the intangible income of individuals who are domiciled in the State and certain individuals not domiciled in the State, without offsetting credits for taxes paid to another State of domicile, violates the dormant Commerce Clause under this Court's decision in *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015).

PARTIES TO THE PROCEEDING

Petitioners are Richard Chamberlain and Martha Crum. Respondents are the New York State Department of Taxation and Finance and Michael R. Schmidt, the Commissioner of the New York State Department of Taxation and Finance.

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Richard Chamberlain and Martha Crum respectfully petition for a writ of certiorari to review the judgment of the New York Supreme Court, Appellate Division, Third Department in this case.

OPINIONS BELOW

The order of the New York Court of Appeals (App., *infra*, 1a) is reported at 32 N.Y.3d 1216. The opinion of the New York Supreme Court, Appellate Division, Third Department (App., *infra*, 2a-4a) is reported at 88 N.Y.S.3d 257. The trial court's opinion (App., *infra*, 5a-16a) is unreported.

JURISDICTION

The judgment of the New York Supreme Court, Appellate Division, Third Department, was entered on November 1, 2018 (App., *infra*, 2a-4a). The motion for leave to appeal to the Court of Appeals of New York was denied and the appeal was dismissed on March 26, 2019 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 8 of Article I of the United States Constitution provides in relevant part:

> The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]

STATEMENT

In this case, the New York courts have thumbed their noses at this Court's decision in *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015), in an effort to protect New York's aggressive double-taxation scheme from invalidation. In the decision under review, a New York court upheld the constitutionality of a scheme that subjects taxpayers who reside in another State but meet a statutory definition of "resident individual"—because they spend a certain number of days in New York and maintain real estate there—to double taxation of their intangible income. That holding is plainly inconsistent with this Court's decision in *Wynne*, which invalidated a scheme in which the State of Maryland taxed the income its residents earned both inside and outside the State without offering them a full credit against the income taxes they paid to other States.

Petitioners are a married couple who, during the tax years at issue, were domiciled in Connecticut. Like New

York and most other States, Connecticut taxes all income of those domiciled in the State, including intangible income. Petitioners also maintained a townhouse and worked in New York and thus were deemed statutory "resident[s]" subject to taxation of all of their income—including intangible income—under New York law. Accordingly, when petitioners sold interests in their business, both Connecticut and New York taxed their intangible income from the sale, and New York did not offer any credit for the tax paid to Connecticut.

Petitioners challenged New York's tax scheme under the dormant Commerce Clause. But the lower New York courts limited *Wynne* to its facts and instead adhered to a pre-*Wynne* decision that had upheld New York's tax scheme primarily on the ground that "dormant Commerce Clause analysis" was "inapplicab[le]" to "[s]tate resident income taxation." *Tamagni* v. *Tax Appeals Tribunal of State*, 695 N.E.2d 1125, 1134 (N.Y.), cert. denied, 525 U.S. 931 (1998). The New York courts thus allowed the State to discriminate against interstate commerce by subjecting taxpayers domiciled in other States who travel frequently to and maintain homes in New York to double taxation of intangible income.

Despite the significant dispute as to whether the tax scheme violates the dormant Commerce Clause under *Wynne*, the New York Court of Appeals declined to hear petitioners' case, dismissing the appeal on the astonishing ground that "no substantial constitutional question [was] directly involved." App., *infra*, 1a. The Court should grant review to enforce its decision in *Wynne* and make clear that state courts are not free to flout its dormant Commerce Clause jurisprudence. In fact, the decision below is so plainly inconsistent with *Wynne* that the Court may wish to consider the possibility of summary reversal.

A. Background

1. The Commerce Clause grants Congress power to "regulate Commerce * * * among the several States." Art. I, § 8, cl. 3. The Court "ha[s] consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). As is relevant here, the dormant Commerce Clause precludes a State from "tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984). It similarly prohibits "a [state] tax which discriminates against interstate commerce * * * by subjecting interstate commerce to the burden of multiple taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959) (internal quotation marks and citation omitted).

To determine whether a tax impermissibly discriminates against interstate commerce, this Court has applied the "internal consistency" test, which "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Wynne*, 135 S. Ct. at 1802 (citation omitted). To apply that test, a court "hypothetically assum[es] that every State has the same tax structure" and then determines whether interstate commerce would face the risk of higher taxation than intrastate commerce. *Ibid.* "[A]ny cross-border tax disadvantage that remains" after application of the test is "attributable to the taxing State's discriminatory policies." *Ibid.* (internal quotation marks and citation omitted). Thus, the test allows courts to distin-

guish unconstitutional "tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States" from constitutional schemes that "create disparate incentives to engage in interstate commerce * * * only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes." *Ibid.*

In *Wynne,* the Court applied the internal consistency test in considering a challenge to Maryland's income-tax scheme brought by Maryland residents who had been subject to double taxation. The Court held that Maryland's tax scheme failed the internal consistency test, and thereby violated the dormant Commerce Clause, because Maryland taxed the income its residents earned both inside and outside the State, as well as the income that nonresidents earned inside the State, without offering residents a full credit against the income taxes they paid to other States on the same income. See 135 S. Ct. at 1793-1795. If every State were to adopt that scheme, the Court reasoned, a taxpayer who earned interstate income would owe taxes both to the State where he lived and to the State where he earned the income. See *id.* at 1802-1804. A taxpayer who earned purely intrastate income, by contrast, would be taxed only once. See *ibid.*

2. Under New York's income-tax scheme, an individual's worldwide income is taxable in New York if he is considered a "resident individual." N.Y. Tax Law §§ 605(b)(1), 611, 612; see N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(a). New York's tax statute sets forth two alternative definitions of a "resident individual." *First,* an individual qualifies as a "resident" if he is domiciled in New York. See N.Y. Tax Law § 605(b)(1)(A). An individual is domiciled in "the place which [he] intends to be [his] permanent home," or, in other words, "the place to which [he] intends to return whenever [he] may be absent."

N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(1). For an individual who "has two or more homes," the domicile is "the one which [he] regards and uses as [his] permanent home." *Id.* § 105.20(d)(4).

Second, and of particular relevance here, an individual who is not domiciled in New York may nonetheless qualify as a "resident individual." Under a secondary definition, a "resident individual" is an individual who "maintains a permanent place of abode in [New York] and spends in the aggregate more than one hundred eighty-three days of the taxable year [there]." N.Y. Tax Law § 605(b)(1)(B); see N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(d)(4). For purposes of the residency test, "presence within New York State for any part of a calendar day constitutes a day spent within New York State," with certain limited exceptions. *Id.* § 105.20(c). Accordingly, an individual who commutes to and from his place of employment in New York on a weekday has spent a "day" in New York for residency purposes, as has an individual who takes a short trip across the bridge or tunnel into New York for shopping or dining. See, *e.g.*, *In re Klingenstein*, No. 815156, 1998 WL 477697, at *3, *6 (N.Y. Div. Tax App. Aug. 6, 1998). With similar expansiveness, New York law defines a "permanent place of abode" as a "dwelling place of a permanent nature maintained by the taxpayer, whether or not owned by such taxpayer." N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(e)(1).

3. Accordingly, New York taxes the worldwide income—including intangible income—not just of individuals who are domiciled in New York, but also of individuals domiciled elsewhere who maintain a dwelling place in New York and travel there frequently. N.Y. Tax Law §§ 605(b)(1), 611, 612; see N.Y. Comp. Codes R. & Regs. tit. 20, § 105.20(a). But New York offers credits only for

certain types of taxes by other States. Specifically, it offers a credit for taxes paid to another State on "income derived from sources within" the other State. *Id.* § 120.1(a)(2). The regulations provide that the credit is allowed for tax imposed by another State on income earned from "personal services performed" in the other State; "a business, trade or profession carried on" in the other State; and "real or tangible personal property situated" in the other State. *Id.* § 120.4(d).

Of critical importance here, however, New York does *not* offer such credits for tax imposed by other jurisdictions on income earned from "intangibles," except where the income is from "property employed in a business, trade or profession carried on" in the other State. N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4(d). Intangible income generally includes income from annuities, dividends, and interest, as well as gains from the disposition of intangible personal property (such as the sale of an interest in a business). See N.Y. Tax Law § 631(b)(2). Put simply, New York taxes the intangible income of *both* its domiciliary and non-domiciliary residents, and it does not offer any credit for taxes paid to another State on that same income—even if the other State is the individual's State of domicile.

In *Tamagni*, *supra*, the New York Court of Appeals rejected a dormant Commerce Clause challenge to the New York income-tax scheme at issue here. See 695 N.E.2d at 1130, 1134. The court held that the tax scheme did not substantially implicate interstate commerce but in any event did not violate the dormant Commerce Clause because the tax at issue "d[id] not facially discriminate against interstate commerce," instead simply "tax[ing] residents based on their status as residents." *Id.* at 1127, 1131. The court reasoned that it need not apply the inter-

nal consistency test because that test was "not a free-standing constitutional requirement" but instead "merely a tool for assessing" discrimination. *Id.* at 1133.

In seeking this Court's review, the petitioner in *Wynne* expressly relied on the decision in *Tamagni*, arguing that it conflicted with the Maryland Court of Appeals' decision. See Pet. at 14, *Wynne*, *supra* (No. 13-485). In light of that conflict, this Court granted review and ultimately upheld the approach of the Maryland Court of Appeals. This case concerns whether, in the wake of this Court's decision in *Wynne*, the New York courts have improperly adhered to *Tamagni* in upholding New York's tax scheme.

B. Facts And Procedural History

1. a. From 2009 to 2011, the years relevant to this case, petitioners Richard Chamberlain and Martha Crum, a married couple, were domiciled in Connecticut but maintained a townhouse in New York City. Both commuted to New York for work—Mr. Chamberlain as the president of Chamberlain Communications Group, and Ms. Crum as an assistant professor at Hunter College. Because of those jobs, each was physically present in New York for more than 183 days in each of the relevant tax years. In 2007, the Chamberlains sold their interests in Chamberlain Communications Group; Mr. Chamberlain continued to serve as the company's president and then advisor. App., *infra*, 2a, 6a.

Petitioners filed joint Connecticut income-tax returns for the 2009, 2010, and 2011 tax years, and paid full taxes to Connecticut—their State of domicile—on their worldwide income, which included income from the sale of their interests in Mr. Chamberlain's company. They also filed joint nonresident income-tax returns in New York for those years. After an audit, respondents determined that

petitioners were statutory residents of New York (but not domiciliaries) and assessed a deficiency of over $2.7 million on the income from the sale of the interests in Mr. Chamberlain's company and other intangible income, without any credit for the taxes petitioners had already paid to Connecticut. Respondents contended that petitioners' intangible income was taxable in New York on the theory that, while it was derived from the *sale* of Mr. Chamberlain's business, it was not specifically derived from business carried on in another State. Petitioners paid the assessed amount of tax under protest. App., *infra*, 3a, 6a-7a.

b. On January 14, 2016, petitioners filed suit against respondents in New York state court, seeking a declaration that New York's tax scheme was invalid under the dormant Commerce Clause. App., *infra*, 5a-6a.

The trial court granted respondents' motion for summary judgment and denied petitioners' cross-motion. The court reasoned that this Court's decision in *Wynne* did "not in any respect provide meaningful or new guidance as to how [the court] should rule on the constitutionality of New York's statutory residency scheme" and that, "[r]egardless, *Tamagni* remain[ed] controlling authority." App., *infra*, 12a. The Court distinguished *Wynne* because the "Maryland residents were having income earned outside of Maryland taxed twice," whereas New York was "merely taxing the untraceable intangible income of two of its residents." *Ibid.* The court thus relied on *Tamagni* to conclude that "the double taxation that occurred * * * '[did] not fall on any identifiable interstate market' and '[did] not favor intrastate commerce over interstate commerce in a manner violative of the dormant Commerce Clause.'" *Ibid.* (quoting *Tamagni*, 695 N.E.2d

at 1132). The court further concluded, without elaborating, that New York's tax scheme was internally consistent. *Id.* at 13a.

c. The Appellate Division of the New York Supreme Court affirmed. App., *infra*, 2a-4a. The court relied on the Appellate Division's decision in another case, *Edelman* v. *New York State Department of Taxation & Finance*, in which a petition for a writ of certiorari is being filed simultaneously with this one. The court relied on the reasoning in *Edelman*, discussed in detail below, to distinguish *Wynne* and then to apply *Tamagni*. *Id.* at 3a-4a.

d. Petitioners sought to appeal to the New York Court of Appeals, asserting that the Appellate Division's decision conflicted with this Court's decision in *Wynne*. But the Court of Appeals dismissed the appeal, remarkably stating that "no substantial constitutional question [was] directly involved." App., *infra*, 1a.

2. a. The separate petition for a writ of certiorari in *Edelman* presents the same question at issue here. In *Edelman*, the Appellate Division of a different department reached the same outcome in a case involving materially identical facts. The New York Court of Appeals dismissed the appeal on the same day, and with the same reasoning, as it did in this case.

The petitioners in that case, husband and wife Samuel and Louise Edelman, were domiciled in Connecticut and maintained a second residence in New York City during the relevant tax years from 2010 to 2013. The Edelmans had founded Edelman Shoe, a well-known women's shoemaker that does business inside and outside New York; they were the majority owners and worked in its offices in Manhattan. *Edelman* Pet. App. 7a-8a.

In 2010, Brown Shoe Company, a company with offices outside New York, purchased Edelman Shoe; the

Edelmans sold their shares as part of the transaction. After the sale, they worked in the New York office of Brown Shoe Company and continued to commute daily from Connecticut to New York, as they had done before the sale. During the relevant time period, they also maintained an apartment in New York City. *Edelman* Pet. App. 7a-8a.

The Edelmans filed joint Connecticut income-tax returns for the 2010 and 2013 tax years, and paid full taxes to Connecticut on their worldwide income. They also filed joint nonresident income-tax returns in New York for those years. *Edelman* Pet. App. 8a.

In 2014, respondents began an audit of the Edelmans' New York income-tax returns from 2010 to 2013. Respondents later determined that the Edelmans were statutory residents of New York and issued a notice of deficiency, assessing petitioners for over $6 million in back taxes. That amount included taxes on the Edelmans' intangible income from the sale of their interests in Edelman Shoe, even though they had already paid taxes in full to Connecticut on the sale. The notice of deficiency did not provide any credit for the Connecticut tax payment. The Edelmans paid the assessed amount of tax under protest. *Edelman* Pet. App. 8a-9a.

b. On August 8, 2016, the Edelmans filed suit against the same respondents in New York state court, seeking a declaration that New York's tax scheme was invalid under the dormant Commerce Clause. *Edelman* Pet. App. 9a.

The trial court granted respondents' motion to dismiss. *Edelman* Pet. App. 6a-15a. The court distinguished *Wynne* because the Edelmans "ha[d] conceded they [were] New York residents." *Id.* at 13a. The court also distinguished *Wynne* because "the intangible income being taxed * * * [was] not specifically derived from employment or business conducted out of state." *Ibid.* In-

stead, the court explained that the Edelmans' "circumstances [were] much more aligned with the facts" in *Tamagni*, the pre-*Wynne* decision of the New York Court of Appeals. *Ibid.* Relying on *Tamagni* despite this Court's intervening decision in *Wynne*, the trial court concluded that the tax scheme did not violate the dormant Commerce Clause because the "double taxation alleged [did] not apply to an identifiable interstate market[] or favor intrastate commerce." *Id.* at 14a.

c. The Appellate Division affirmed. *Edelman* Pet. App. 2a-5a. It concluded that *Tamagni*, rather than this Court's later decision in *Wynne*, drove the analysis. *Ibid.* The court first noted that *Wynne* did not involve the precise facts at issue here: namely, "individuals who faced double taxation on intangible investment income by virtue of being domiciliaries of one [S]tate and statutory residents of another." *Id.* at 3a. The court then emphasized that "the income subject to tax in *Wynne* was not intangible investment income, but business income, traceable to an out-of-state source." *Id.* at 3a-4a.

Notably, the Appellate Division recognized that the New York Court of Appeals' statement in *Tamagni* that the dormant Commerce Clause was "inapplicab[le]" to state resident income taxation was "inconsistent with *Wynne*." *Edelman* Pet. App. 4a (quoting *Tamagni*, 695 N.E.2d at 1134). The court nonetheless deferred to what it described as the *Tamagni* court's "thorough analysis." *Ibid.* Despite acknowledging that this Court "establish[ed] [in *Wynne*] that the internal consistency test must be applied wherever there is Commerce Clause scrutiny," the Appellate Division concluded that there was no need to apply the test because this Court had not "abrogate[d] *Tamagni*'s core holding" that the tax scheme did not "affect interstate commerce." *Id.* at 4a-5a (internal quotation marks omitted).

d. The Edelmans sought to appeal to the New York Court of Appeals. That court dismissed the appeal in an identical order on the same day as it did so in this case, stating that "no substantial constitutional question [was] directly involved." *Edelman* Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

In the decision under review, a New York court flouted this Court's dormant Commerce Clause jurisprudence, limiting this Court's recent decision in *Comptroller of Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015), to the facts of the precise tax scheme at issue in that case. The decision below is flatly inconsistent with *Wynne*, which made clear that a court must apply the internal consistency test to determine whether a challenged state tax scheme impermissibly discriminates against interstate commerce. New York's tax scheme plainly violates that test: if every State were to adopt New York's tax scheme, a taxpayer who earned income while traveling frequently across state lines would face a higher tax burden on intangible income than a taxpayer whose activities were largely confined to a single State.

Put another way, the internal consistency test shows that New York's scheme is inherently discriminatory—not simply because it taxes non-domiciliary residents, but because it taxes both domiciliary and non-domiciliary residents on the same income without offering credits for taxes paid on all of that income to another State of domicile. Sealing the New York courts' rejection of this Court's dormant Commerce Clause jurisprudence, in the face of decisions from two different appellate courts resting on New York's pre-*Wynne* precedents, the New York Court of Appeals refused even to consider petitioners' challenge, absurdly concluding that the appeal did not present a substantial constitutional question.

This Court's intervention is necessary to enforce its decision in *Wynne* and to prevent lower courts from artificially limiting that decision's reach. The Court should grant the petition for a writ of certiorari. In fact, the decision below is so clearly inconsistent with *Wynne* that the Court may wish to consider the possibility of summary reversal.

A. The Decision Under Review Conflicts With This Court's Decision In *Comptroller of Treasury of Maryland* v. *Wynne*

New York's income-tax scheme violates the dormant Commerce Clause under any fair reading of this Court's decision in *Wynne*. The court below declined even to apply *Wynne*'s "internal consistency" test. And under that test, there is no doubt that New York's tax scheme discriminates against interstate commerce. Instead, in the decision under review, the New York court cabined *Wynne* to its facts and held that the method of analysis set out in *Wynne* did not apply to New York's tax scheme. That decision is plainly erroneous, and it warrants the Court's review.

1. In *Wynne*, this Court considered whether Maryland's income-tax scheme violated the dormant Commerce Clause. Under that scheme, Maryland taxed the income its residents earned both inside and outside the State, as well as the income that nonresidents earned inside the State, without offering residents a full credit against the income taxes they paid to other States. See 135 S. Ct. at 1792. To determine whether the scheme impermissibly discriminated against interstate commerce, the Court applied the internal consistency test, which "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared

with commerce intrastate." *Id.* at 1802 (citation omitted). The Court reaffirmed the importance of the test in evaluating tax schemes under the dormant Commerce Clause. See *id.* at 1802-1803. And the Court proceeded to determine that Maryland's scheme failed the internal consistency test. See *id.* at 1803. If every State were to adopt that scheme, the Court reasoned, a taxpayer who lived in one State and earned income in another would pay more income tax than a taxpayer who lived and worked in a single State. See *id.* at 1803-1804.

Similarly, New York taxes the worldwide income not only of its domiciliary residents, but also of its non-domiciliary residents who maintain a dwelling place in New York and spend more than 183 days of the year there. And it does not offer any credit for taxes paid to another State on intangible income. If every State were to adopt that scheme, a taxpayer who works and lives in a single State would be subject to a single tax on his intangible income. But a taxpayer who lives in one State but works and maintains property in another would be subject to double taxation on the same income. Put another way, the decision to own or rent a residence and work a certain number of days in a State other than one's State of domicile would trigger an additional tax obligation.

Plainly, then, New York's tax scheme imposes a "burden on interstate commerce," creating an "incentive" for taxpayers to "opt for intrastate rather than interstate economic activity." *Wynne*, 135 S. Ct. at 1792, 1805. Lest there be any doubt, leading commentators—including commentators on whom this Court relied in *Wynne* itself—have observed that New York's tax scheme flunks the internal consistency test. See Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 State Tax Notes 707, 715 (2017) (Knoll & Mason);

Walter Hellerstein, *Deciphering the Supreme Court's Opinion in* Wynne, 123 J. Tax'n 4, 15 (2015).

It bears emphasizing that the internal consistency test does not bar all double taxation, and it does not bar a State from collecting taxes on the income of its non-domiciliary residents. Instead, it bars a State from taxing certain income of non-domiciliary residents while taxing the same income of domiciliary residents and failing to "cure" the double taxation by "granting a credit for taxes paid to other States" or "comply[ing] with the Commerce Clause in some other way." *Wynne*, 135 S. Ct. at 1806. That is exactly what New York has done here.

As in *Wynne* itself, an economic analysis confirms that New York's tax scheme creates an impermissible "incentive" to avoid interstate commerce. See 135 S. Ct. at 1792. That scheme (1) discourages individuals from engaging in the cross-border commerce of purchasing or renting residential property in a State other than their State of domicile; (2) discourages individuals from working in or traveling frequently to a State other than their State of domicile; and (3) discourages individuals who are domiciled in one State and travel frequently to and maintain a home in another State from making investment decisions that will lead them to earn intangible income, thus discouraging participation in national and international capital markets. See Knoll & Mason 707, 713-714.

2. If the court below had properly applied the internal consistency test, it would have determined that New York's tax scheme failed that test. But instead, it narrowed the applicability of *Wynne*'s analysis to the precise facts of that case. Specifically, the court distinguished *Wynne* (1) because it involved "taxpayers who were residents of only one [S]tate" as opposed to taxpayers who were domiciliaries of one State and statutory residents of

another and (2) because it did not involve "intangible investment income." App., *infra*, 4a. But the *Wynne* Court expressly rejected that sort of "formalism" and arbitrary limitation on the scope of the dormant Commerce Clause. See 135 S. Ct. at 1796.

As to the distinction that this case involves statutory residents: the *Wynne* Court refused to draw exactly such a distinction. It held that the same analysis that applies to corporate taxpayers under the dormant Commerce Clause also applies to individual resident taxpayers. See *Wynne*, 135 S. Ct. at 1796-1798. In so holding, the Court squarely rejected the "dictum" in *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989)—relied on by the *Tamagni* court, see 695 N.E.2d at 1134—that "it is not the purpose of the dormant Commerce Clause to protect state residents from their own state taxes." *Wynne*, 135 S. Ct. at 1798 (internal quotation marks and citations omitted). Accordingly, just as this Court analyzed a state tax on Maryland residents in *Wynne*, the court below should have applied *Wynne*'s analysis to a state tax on individuals who are not domiciled in New York but nonetheless meet the statutory definition of "resident."

As to the distinction that this case involves a tax on intangible income: the *Wynne* Court also refused to draw lines between different types of taxes. The Court rejected the principal dissent's attempt to distinguish the earlier dormant Commerce Clause cases on which it was relying on the ground that they involved gross receipts rather than net income; the Court explained that it had abandoned the "formal distinction" between different types of taxes, instead focusing on a tax scheme's "practical effect." *Wynne*, 135 S. Ct. at 1795-1796 (citation omitted). The Court added that its dormant Commerce Clause

precedent was concerned not with the type of income involved, but "instead" with "the threat of multiple taxation." *Id.* at 1796.

So too here. The effect of New York's tax scheme is clear: it creates a powerful incentive for non-domiciliaries to curtail their travel across state lines, avoid participation in out-of-state real-estate markets, and limit involvement in the national and international investment markets. Thus, there is no valid conceptual basis for treating intangible income differently from the tax in *Wynne*, and other decisions of this Court confirm that the dormant Commerce Clause applies to intangible income with equal force. See, *e.g.*, *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 333 (1996).

More broadly, courts cannot avoid this Court's dormant Commerce Clause precedent by drawing arbitrary distinctions regarding types of taxpayer or income. After all, "[i]f state labels controlled, a State would always be free to tax * * * at discriminatory rates simply by attaching different labels." *Wynne*, 135 S. Ct. at 1803 n.8; see *id.* at 1792. Under the reasoning of the decision below, a State could avoid *Wynne* by writing its tax code simply to define employment income as having no geographic source (like intangible income), with the result that the State would not offer credits for another State's taxes on that income. *Wynne* confirms that the dormant Commerce Clause analysis does not depend on such formalities.

Indeed, this Court has itself recognized that *Wynne* applies to a broad range of tax schemes. The Court granted certiorari, vacated, and remanded in light of *Wynne* in a case challenging a Massachusetts tax scheme that assigned an institution's securitized student loans to Massachusetts, the State of the institution's commercial domicile, for the purpose of calculating an excise tax. See

First Marblehead Corp. v. *Massachusetts Commissioner of Revenue*, 136 S. Ct. 317 (2015). On remand, the Massachusetts Supreme Judicial Court acknowledged the remand order as a "directive" to "consider further whether the Massachusetts [tax], as applied to [the taxpayer], fails the internal consistency test discussed and affirmed in *Wynne*, and thereby contravenes the dormant [C]ommerce [C]lause." *First Marblehead Corp.* v. *Commissioner of Revenue*, 56 N.E.3d 132, 134 (Mass. 2016), cert. denied, 137 S. Ct. 1092 (2017). Likewise, rather than narrowing *Wynne* to its facts, the Appellate Division should have adhered to *Wynne* and applied the internal consistency test to evaluate the constitutionality of New York's tax scheme.

3. Instead of applying *Wynne,* the court below made the remarkable decision to apply *Tamagni* v. *Tax Appeals Tribunal of State*, 695 N.E.2d 1125 (N.Y.), cert. denied, 525 U.S. 931 (1998), a pre-*Wynne* case that was expressly cited in the petition for a writ of certiorari in *Wynne* as producing the conflict that triggered the Court's review. The court below held that *Wynne* did not abrogate *Tamagni*'s core holding that, even if Commerce Clause scrutiny was necessary, there was no reason to apply the internal consistency test because the tax scheme at issue did not "affect interstate commerce." App., *infra*, 4a.

But that gets it exactly backwards. This Court recognized in *Wynne* that the way to *determine* whether a tax has an impermissible effect on interstate commerce, and thereby violates the dormant Commerce Clause, is to apply the internal consistency test. See 135 S. Ct. at 1802-1804. In other words, where a state tax scheme exposes taxpayers to double taxation, as New York's scheme does, a court must apply the internal consistency test to "isolate the effect" of that scheme and "identify" whether the

scheme is one that discriminates against interstate commerce. *Id.* at 1802. Any scheme that creates an incentive to engage in intrastate rather than interstate commerce affects interstate commerce in the relevant way. See *id.* at 1792, 1801-1802. The Court did not impose any prerequisite to the application of the internal consistency test; to the contrary, it expressly noted that "the fact that the tax might have the advantage of appearing nondiscriminatory does not save it from invalidation." *Id.* at 1804-1805 (internal quotation marks and citation omitted).

It is thus clear under *Wynne* that a court must apply the internal consistency test to determine whether a challenged State tax scheme "inherently discriminate[s] against interstate commerce," and that it should do so "without regard to the tax policies of other States." 135 S. Ct. at 1802; see Knoll & Mason 707, 715. And as discussed above, application of the internal consistency test dooms the New York scheme. See pp. 15-16, *supra*.

For the foregoing reasons, the decision under review is flagrantly inconsistent with this Court's decision in *Wynne*. New York's tax scheme "create[s] a powerful incentive to engage in intrastate rather than interstate economic activity," and it thus violates the dormant Commerce Clause. *Wynne*, 135 S. Ct. at 1801-1802. The court below erred by continuing to adhere to the reasoning of *Tamagni* even after it was effectively abrogated by this Court in *Wynne*—and, in so doing, ignoring the dormant Commerce Clause's limitations on state taxation of residents.

4. The decision below stands in stark contrast to other decisions in cases involving challenges to state income-tax schemes after *Wynne*. Unlike the New York courts, the courts in those cases faithfully applied *Wynne* to a variety of different schemes, correctly interpreting it to have force beyond its particular facts. See, *e.g.*, *Smith*

v. *Robinson*, 265 So. 3d 740, 754 (La. 2018); *Mississippi Department of Revenue* v. *AT&T Corp.*, 202 So. 3d 1207, 1220, 1226 (Miss. 2016). The decision below, together with the decision in *Edelman*, thus stands as an extraordinary outlier. This Court should grant review in this case and in *Edelman* and reverse the lower courts' profoundly erroneous judgments, which protect the New York fisc at the expense of this Court's dormant Commerce Clause jurisprudence.[*]

B. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review In This Case

1. This case implicates the fundamental limits that the dormant Commerce Clause places on a State's ability to tax interstate commerce. The Commerce Clause "reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention": that a successful Union must avoid the "tendencies toward economic Balkanization that had plagued" relationships among the colonies and then the States. *Wynne*, 135 S. Ct. at 1794 (citation omitted). Because the dormant Commerce Clause "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burden[] interstate commerce," *ibid.*, it is vital that state courts follow Supreme Court precedent in this area. The New York courts' flagrant disregard for the strictures of the dormant Commerce Clause and this Court's binding precedent should not be tolerated. The Court's review is urgently needed to prevent

[*] New York City's tax scheme—which employs a definition of "resident individual" that parallels the State's definition and fails to offer credits for taxes paid to other States—was also challenged below and violates the dormant Commerce Clause for the same reasons as the state scheme. See N.Y. City Admin. Code §§ 11-1701, 11-1705(b)(1).

state courts from flouting the Constitution's limits on state taxation.

2. The burden on interstate commerce here is especially intolerable because the State at issue is New York, which is both "the world's preeminent financial center," Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 Fordham L. Rev. 225, 256 (2016), and a State that employs an especially high proportion of out-of-state residents, see Brian McKenzie, *Out-of-State and Long Commutes: 2011*, U.S. Census Bureau (Feb. 2013) <tinyurl.com/y2ftyn3w>. Indeed, the earning of intangible income, secondary home ownership, and frequent travel across state lines are all common in New York. With respect to intangible income, New York ranked second nationally in 2016 in both the number of federal tax returns that reported ordinary dividends and the amount of ordinary dividends reported. See Internal Revenue Service, *SOI Tax Stats – Historic Table* 2 (2016) <tinyurl.com/soitaxstats> (*IRS Tax Stats*). Ownership of a second home in New York is also common: as of 2016, half of the nation's second homes could be found in eight States, one of which was New York. See Na Zhao, *Nation's Stock of Second Homes*, Nat'l Ass'n of Home Builders (Dec. 6, 2018) <tinyurl.com/secondhomes>.

It is thus hard to imagine a State where a tax scheme such as the one at issue here is likely to have more of a practical effect than New York. This Court should intervene to prevent the impermissible double taxation resulting from New York's scheme—a tax scheme that, if allowed to stand, would give rise to the very "economic Balkanization" that this Court denounced in *Wynne*. 135 S. Ct. at 1794.

3. If this Court permits the decision below to stand, it could also have implications for other States with similar

tax schemes that result in the double taxation of intangible income. The Minnesota Supreme Court upheld the constitutionality of a similar scheme pre-*Wynne* and has not considered the issue again since. See *Luther* v. *Commissioner of Revenue*, 588 N.W.2d 502, 505 (Minn.), cert. denied, 528 U.S. 821 (1999). Unless the Court makes clear that it meant what it said in *Wynne*, state courts may continue to rely on pre-*Wynne* decisions (as the lower courts did here) to uphold similar schemes and thereby evade this Court's dormant Commerce Clause jurisprudence.

4. Finally, by concluding that this Court's decision in *Wynne* is inapplicable to state taxation of intangible income, the decision below dangerously narrows the concept of interstate commerce in a way that threatens the national and international capital markets. If allowed to stand, the decision below risks the proliferation of state laws, like the one at issue here, that unduly burden interstate commerce involving intangible income. Such income is extraordinarily pervasive in the modern economy: over 18% of federal returns report ordinary dividends. See *IRS Tax Stats, supra.*

Under New York's scheme, virtually any taxpayer who owns stock or accrues interest on a bank account earns intangible income and is at risk of double taxation if he meets New York's definition of "resident individual" while domiciled in another State. See N.Y. Tax Law §§ 605(b)(1), 631(b)(2). That is especially concerning because returns from investments in intangible property represent a "growing percentage of capital income," Deborah H. Schenk, *The Income Tax at 100*, 66 Tax L. Rev. 357, 365 (2014), in part because of changes in the economy related to the advancement of technology, see *Introduction to Measuring Capital in the New Economy* 1, 1-2 (Carol Corrado et al. eds., 2005).

The decision below therefore cannot be allowed to stand. When a state court issues a decision that is so plainly inconsistent with one of this Court's decisions, especially on a question of constitutional law, the Court has not hesitated to grant review—and, indeed, to reverse summarily. See, *e.g.*, *Bosse* v. *Oklahoma*, 137 S. Ct. 1 (2016); *Caetano* v. *Massachusetts*, 136 S. Ct. 1027 (2016); *Grady* v. *North Carolina*, 135 S. Ct. 1368 (2015). The same outcome is warranted here. The Court should intervene to correct the lower courts' profoundly erroneous judgments in these cases and to deter other state courts from refusing to apply the Court's dormant Commerce Clause jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should grant plenary review and set the case for briefing and oral argument.

Respectfully submitted.

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