NO. 18-1570

In the Supreme Court of the United States

SAMUEL EDELMAN AND LOUISE EDELMAN,
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, First Department

BRIEF OF PROFESSOR DONALD T. WILLIAMSON, THE KOGOD TAX POLICY CENTER, AND THE NATIONAL SOCIETY OF TAX PROFESSIONALS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com

Counsel for Amici Curiae

Nina Tross
NATIONAL SOCIETY OF TAX PROFESSIONALS
11700 NE 95th Street, Ste 100
Vancouver, Washington 98682

Donald T. Williamson
KOGOD SCHOOL OF BUSINESS
AMERICAN UNIVERSITY
4400 Massachusetts Ave., NW
Washington, D.C. 20016

Counsel for the Kogod Tax Policy Center

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STATEMENT OF INTEREST[1]

Donald T. Williamson is the Eminent Professor of Taxation and the Howard S. Dvorkin Faculty Fellow at the

[1] Counsel for all parties received notice of amicus curiae's intent to file this brief 10 days before its due date. Petitioners have lodged a blanket amicus consent letter with the Court, and Respondents have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief 's preparation or submission.

Kogod School of Business at American University, where he serves as Chair of the Department of Accounting and Taxation and as Director of the University's Graduate Tax Program. Professor Williamson's research and teaching interests include issues of federal income taxation, with a special focus on the tax implications of cross-border commerce.

The Kogod Tax Policy Center, housed in the Kogod School of Business at American University, is a nonpartisan research institute that promotes independent investigation of tax policy, tax planning, and tax compliance for small businesses, entrepreneurs and middle-income taxpayers. The Center seeks to increase public understanding of our nation's tax laws and to encourage a balanced, productive dialogue on the challenges average Americans often confront in complying with these laws. The Center also offers suggestions to policymakers on the changes that must be made to tax laws to facilitate the growth of small business and the interests of middle-class entrepreneurs.

The National Society of Tax Professionals is a nonprofit, nonpartisan organization of over 4,000 members that was founded in 1985 to provide a voice for the tax-return preparation community before the Internal Revenue Service as well as state and local tax authorities and offers suggestions to these agencies for improving the filing of tax returns.

Amici are organizations and experts that share an extensive experience in the Nation's tax laws, a devotion to the sound development of tax policy, and a concern for the thousands of small businesses and individuals currently paying taxes in New York and other States based on the same income, simply because of New York's overlapping

and inconsistent definitions of residency, and the arbitrary, inconsistent, and incomplete nature of the credits it provides to taxpayers, which fail to effectively prevent this risk of multiplicative taxation. Amici write to share their considerable expertise on the "'practical effect'" of New York's tax law concerning intangible property, and to show how these effects amount to a plain discrimination against interstate commerce under any fair application of the principles announced in this Court's decision in *Comptroller of the Treasury of Maryland* v. *Wynne*, 135 S. Ct. 1787 (2015). *Id.* at 1795 (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the future of *Wynne* and the future of state income-taxation laws that will follow in its wake. *Wynne* demonstrated the Court's renewed attention to tax laws that impose multiplicative taxes because of their interactions with overlapping tax jurisdictions of other States and reinvigorated the internal consistency test as a means to discover whether that duplicative taxation burden amounts to discrimination against interstate commerce. But questions have arisen in statehouses, courts, and universities around the country whether the decision will have any real teeth. See, e.g., Edward A. Zelinsky, *Comparing* Wayfair *to* Wynne: *Lessons for the Future of the Dormant Commerce Clause* (Cardozo Legal Studies Research Paper No. 563, Sept. 17, 2018).

Would *Wynne* lead to the broad harmonization of the States' tax laws that the decision's broad terms seem to demand. Would States finally be forced to reckon with the interstate effects of their tax laws, and reconstitute them so they may serve as mutually compatible partners of the

tax laws in their sister States? Or would things revert to a Balkanized mean? Would *Wynne* be reserved to its narrow facts that state courts could distinguish essentially out of existence? And would state legislatures exploit the exceptions fostered by these narrow readings of *Wynne* to create new tax laws that would elevate parochial interests above the needs of interstate commerce?

One way or another, this case will answer all of these questions, because the New York tax regime at issue, and the decision under review upholding its constitutionality, both present direct challenges to the breadth and strength of *Wynne*. New York's tax treatment of intangible property presents as blatant a violation of the dormant Commerce Clause and the Court's internal consistency test as one can possibly find. It allows the intangible income of dual residents of New York and another State to be subject to a risk of multiple taxation that New York-only residents never experience, presenting a straightforward discrimination against taxpayers engaged in interstate commerce—one that punishes them on several different fronts. It punishes them for crossing state borders for long enough to become dual residents. It (ironically) punishes them for crossing borders to purchase or rent New York properties. And it punishes them for investing in intangible property and thereby contributing to nationwide capital markets. The court below offered no sound reason that this blatant discrimination should be immunized from dormant Commerce Clause scrutiny, and no sound reason how *Wynne*'s relevance could be dismissed. But it did so anyway.

This decision below therefore cannot be allowed to stand, because if it does, then *Wynne* means far less than it says. It is therefore incumbent upon the Court to take

this case to protect the valuable project it began in *Wynne*, which is only the latest chapter in a story that traces back to the Framers' design of the Commerce Clause itself—one that stands for the economic integration of the Union and against the "economic Balkanization that had plagued relations among the Colonies and later among the States" since "the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326 (1979).

ARGUMENT

I. The decision under review conflicts with this Court's decision in *Comptroller of Treasury of Maryland* v. *Wynne*.

This case presents an important test for measuring the health of dormant Commerce Clause jurisprudence after *Wynne*, because New York's regime for the taxation of intangible income ought to fall under any fair application of *Wynne*'s plain terms. The constitutional concern with New York's law arises from the risk that income on intangibles may be subjected to double taxation (or worse) for New York residents who are also considered residents of other States. This risk arises because of the confluence of two features of New York's tax law: its broad definition of residence, and its narrow, arbitrary rules for determining whether residents get credit for taxes paid in other States.

1. New York requires its residents to pay tax on all their worldwide income. N.Y. Tax Law §§ 611, 612. And New York provides multiple ways individuals can be considered residents. The first is if New York is their domicile; the second is if New York considers them "resident individuals."

A taxpayer's "domicile" is the place where he lives—his "permanent home." N.Y. Comp. Codes R. & Regs. tit.

20, § 105.20(d)(1). By contrast, a "resident individual" is anyone who is not domiciled in the State yet maintains a permanent abode in New York and spends more than 183 days there. N.Y. Tax. Law § 605(b)(1)(B). This broad definition of New York residence makes it likely that many New Yorkers will also be considered residents of other States and thereby become subject to residence-based taxation on the same income in multiple States.

Such potential for double taxation is normally mitigated by rules in the taxing State that give credit for taxes paid in other States. And indeed, New York does so, offering a credit against income for any tax paid to another State on "income derived from sources within the other state." N.Y. Comp. Codes. R. & Regs. tit. 20, § 120.1(a)(2). But New York specifically declines to offer any credit on taxes paid to other States for income earned on "intangibles"—on the theory that these intangibles cannot be sourced to a particular State. N.Y. Tax Law § 631(b)(2). And New York defines "intangibles" broadly to include "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)." *Ibid.* Accordingly, in New York, income from intangibles is uniquely vulnerable to double taxation.

That is how the Edelmans and the Chamberlains came to be double taxed. They are domiciled in Connecticut, and are thus subject to taxation on all their income in Connecticut. Pet. 3. They are also considered statutory residents of New York, and therefore have to pay tax on all their worldwide income in New York. *Ibid.* So when Samuel Edelman sold his business, he had to pay tax on the income from that sale once to Connecticut, because Connecticut

requires it, and again in New York, because New York refuses to grant a credit for the tax paid to Connecticut.

2. That violates the dormant Commerce Clause, but not simply because New York is taxing sales of businesses across state lines. In today's cross-border, interdependent world, virtually all state tax laws will have both interstate and intra-state implications. Nor does the dormant Commerce Clause violation necessarily arise simply because the Edelmans are taxed twice—as odious and unfair as that might be. Such multiple taxation is inevitable when there are so many overlapping jurisdictions possessing the authority to tax. A risk of multiple taxation only becomes a constitutional problem when the double-taxation burden is assessed discriminatorily—distorting and discouraging cross-border transactions relative to intrastate transactions by "placing burdens on the flow of commerce across [state] borders that commerce wholly within the borders would not bear." *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995). And there is little question that New York's tax treatment of intangibles does exactly that—because dual-residents of New York and some other State may be subject to dual taxation under circumstances where domiciliary of New York alone will not.

3. Determining whether the apparent discrimination the Edelmans (and the Chamberlains) have suffered amounts to a dormant Commerce Clause violation requires application of this Court's "internal consistency" test. *Wynne*, 135 S. Ct. at 1802. That test "looks to the structure of the tax at issue to see whether its identical application in every state in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Ibid.* (quoting *Jefferson Lines*, 514 U.S.

at 185). This hypothetical serves as a convenient way to test whether a State's law impermissibly discriminates against interstate commerce in its interaction with other State's laws, because it eliminates the potential for the results to be polluted by features of other States' laws. *Ibid.* The internal consistency test thus assures that any interstate commerce problems arising in this case from the interaction of New York and Connecticut taxation laws are New York's fault, not Connecticut's.

4. There is no real question that New York's taxation regime for intangible property violates the internal consistency test. If every State were to adopt New York's scheme, then a taxpayer who 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 spends time and maintains property in another would be subject to double taxation of the same income. That is about as plain a violation of the internal consistency test that anyone could imagine, and an obvious discrimination against taxpayers who reside in multiple States.

5. That discrimination clearly impacts interstate commerce, because of the impermissible "incentives" it creates for New York taxpayers to avoid transactions that cross state lines. *Wynne*, 135 S. Ct. at 1802. First, New York's discriminatory treatment of the income from intangible property discourages people from owning or renting another home in another State, because owning or renting property in New York is one of the triggers for New York to consider someone a statutory resident of the State. This is explicit discrimination against people who are engaging in interstate transactions.

In a similar vein, New York's discrimination against statutory residents based on their intangible income also

discourages people from traveling to New York from their home State, since that another trigger that would make them statutory residents occurs if their travel brought them into New York more than 183 days a year. This Court's cases are legion stating that interstate travel constitutes a form of commerce regulated under the dormant Commerce Clause. *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison, Me.*, 520 U.S. 564 (1997) (holding that a property tax that discouraged out-of-state campers from attending a camp in Maine violated the dormant Commerce Clause); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964) (observing that interstate travel, including a private individual traveling on his or her own account, was a form of interstate commerce); *Katzenbach* v. *McClung*, 379 U.S. 294, 382 (1964) (upholding federal regulation barring restaurants from discriminating against racial minorities after congressional findings that such discrimination "obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating" (citations omitted)).

Finally, New York's discriminatory rules discourage people from investing in intangible property. All things being equal, investors like the Edelmans (or the Chamberlains) who live in Connecticut but are at risk of being considered a statutory resident of New York would rather commit funds to a Connecticut brick-and-mortar business opportunity than purchase a publicly traded stock. This is because the identifiable situs of the brick-and-mortar business means New York will provide a credit for any tax paid on income from the business, preventing it from being double-taxed. But the stock's "intangible" nature will mean it will receive no such credit and will be double taxed. This gives potential New York statutory residents

an incentive to shift their investments away from assets like stocks and bonds to assets like rental real estate or owning and operating a business—things that generate income that, in New York's view at least, has a specific situs. That distorts the entire national market for intangible investments—and does so in the financial capital of the world. There is simply no denying that this negatively impacts interstate commerce.

6. There is also no reason why this blatant violation ought to be immunized from *Wynne*'s broad rule, or from dormant Commerce Clause scrutiny. The New York court distinguished *Wynne*, and expressed preference for New York's own pre-*Wynne* precedent, *Tamagni* v. *Tax Appeals Tribunal of State*, 695 N.E.2d 1125 (N.Y.), cert. denied, 525 U.S. 931 (1998), on the basis that the double taxation in *Wynne* involved multi-state income, while the Edelmans' double taxation resulted from their multi-State residence. The lower court emphasized that *Wynne* involved "Maryland residents" who were "having income earned outside of Maryland taxed twice," whereas New York's "double taxation" was merely "taxing the untraceable intangible income of two of its residents." *Chamberlain* Pet. App. 12a.

But there is no reason that double taxation based on dual-State residency, as opposed to dual-State income, ought to fall outside of the rule in *Wynne*. The *Wynne* majority went out of its way to reject any notion that its result would have been different if the taxpayers' residence had been different. When addressing the principal dissent's contention that the dormant Commerce Clause is not intended "'to protect state residents from their own taxes,'" *Wynne*, 135 S. Ct. at 1814 (Ginsburg, J., dissenting) (quot-

ing *Goldberg* v. *Sweet*, 488 US. 252, 266 (1989)), the majority emphasized that "if a State's tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter"—like the Wynnes—or a "nonresident of the State" like the Edelmans and Chamberlains. *Wynne*, 135 S. Ct. at 1797. And in any event, it is hard to see how state laws like New York's that punish taxpayers for *actually physically* crossing state lines present less of a dormant Commerce Clause concern than the Maryland law that punished taxpayers simply because their incomes did.

The lower court was likewise incorrect to conclude that New York's refusal to extend credits for taxes earned on intangible property in other States has no impact on any "identifiable interstate market" Pet. App. 14a, or that the Edelman's tax liability for income on intangible property was not "derived from employment or business conducted out of state," *id.* at 13a, solely because New York regards intangible property as having no geographic situs.

That notion is incompatible with *Wynne* itself. Just as *Wynne* rejected attempts to cabin its rule to specific residents, it likewise rejected the parties' attempts in that case to artificially restrict the dormant Commerce Clause principles it announced to specific kinds of income, namely "gross receipts and net income taxes," or specific kinds of taxpayers, namely corporations rather than individuals. 135 S. Ct. 1796-1797. *Wynne* recognized that the interstate commercial impacts of double-taxation discrimination cannot be reduced to formalities, including whether the property taxed can be physically located or moved in interstate commerce. Instead, the Court in *Wynne* emphasized that the focus in any dormant Commerce Clause should remain on the tax statute's "practical effect." *Id.* at

1795 (quoting *Complete Auto*, 430 U.S. at 297). That is because the interstate impacts of the discrimination from those statutes turn not on formalities, but on practicalities: the problematic "incentives" for taxpayers fostered by discriminatory dual taxation—incentives that in no way rely on the physical situs of the property being taxed.

Distinguishing *Wynne* because it did not deal with "intangible" property also ignores hard economic reality. The idea that income from intangible property has a less definite situs than a traditional business or income source is based on anachronistic fiction. Gone are the days when a local business's income could always be traced to local products that were sold to local customers from a single geographically identifiable business location. These days, a business incorporated in Connecticut could easily be selling goods exclusively over the internet from a factory located in China. Those goods could just as easily be going to customers in Bangladesh or Bangalore as in Bloomfield, with the money earned on the transaction deposited in a bank located in the Cayman Islands not any in Connecticut. Sourcing income from businesses to a particular location will therefore always involve some rough approximation and indulgence in fiction, whether the income comes from a business conglomerate issuing publicly traded stock or a dentist's office. And New York cannot demonstrate how it is any harder to identify the situs of income derived from a business's stock than to identify the situs of the income derived directly from that business's gross receipts. Indeed, federal tax law frequently assigns situs to income from sources New York declares to be situs-free, such as stocks or bonds, to a particular location—whether that assigned location is the corporate headquarters of the company that issued the stock or the debtor's residence

where a dividend or a distribution is received. Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 State Tax Notes 707, 708 (2017). And States other than New York commonly source the same sorts of intangibles that New York declares to be unsourceable, by tracing them to the taxpayer's residence. *Ibid.* The mere fact that property is intangible therefore does not necessarily mean it is geographically unidentifiable. And that means New York cannot avoid the dictates of the dormant Commerce Clause simply by arbitrarily categorizing property as uncategorizable.

There is therefore no sound reason to countenance New York's refusal to follow this Court's precedent. And that error is necessary to correct.

II. The question presented is of utmost importance.

The question presented in this case is also important because this case has the potential to shape dormant Commerce Clause jurisprudence for years to come, even if—perhaps *especially* if—the Court declines review. Before *Wynne*, the Court had not invalidated a tax for violating the internal consistency test in decades. See *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984). The Court's absence from the field during that period left the States free to experiment with state taxes, and left state courts free to experiment with dormant Commerce Clause jurisprudence, which is why problematic decisions like *Tamagni* came into being in the first place.

Wynne's reinvigoration of the internal inconsistency test after decades of dormancy is now forcing state legislatures to reassess the constitutionality of their tax laws, and causing courts to reassess the dormant Commerce Clause rules under which they have been operating. This

case will largely determine how both of these processes proceed.

Before this case, the incentives were clearly driving legislatures toward harmony. *Wynne*'s rationale and decision seemed clear and universal enough, and the risk for nine-digit refunds like those at issue in *Wynne* provided legislatures a powerful incentive to take a hard look at their laws and do the trimming necessary to ensure compliance with the dictates of the dormant Commerce Clause. But legislatures are watching this petition, and if the Court denies review here, the winds will shift. Legislatures will reverse course and take this Court's implicit invitation to make tax law more Balkanized on a different front—by aggressively expanding their rules regarding taxation of residents, and arbitrarily declaring certain kinds of property to be intangible, without situs, and therefore outside of dormant Commerce Clause concerns.

Courts will be similarly ill-incentivized if the Court declines review. They will be encouraged to ignore *Wynne*'s specific admonitions, and to revert to their pre-*Wynne* ways, excusing the kinds of blatantly discriminatory laws like New York's for increasingly untenable reasons. That will be bad for the development of constitutional law, bad for the development of sound tax policy, and most of all, bad for the taxpayers in many States who are forced to pay discriminatory and onerous multiplicative tax burdens. The Court should therefore grant the petition, to make sure that things go the way of harmony and integration, not renewed Balkanization.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,
Nina Tross
NATIONAL SOCIETY OF TAX PROFESSIONALS
11700 NE 95th Street, Ste 100
Vancouver, Washington 98682

Donald T. Williamson
KOGOD SCHOOL OF BUSINESS
AMERICAN UNIVERSITY
4400 Massachusetts Ave., NW
Washington, D.C. 20016

Counsel for the Kogod Tax Policy Center

J. Carl Cecere
Counsel of Record
CECERE PC
6035 McCommas Blvd.
Dallas, Texas 75206
(469) 600-9455
ccecere@cecerepc.com

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