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.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The New York Supreme Court, Appellate Division, First Judicial Department**

## BRIEF OF *AMICUS CURIAE* AMERICAN ACADEMY OF ATTORNEY-CERTIFIED PUBLIC ACCOUNTANTS, INC. SUPPORTING PETITIONERS

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## INTEREST OF *AMICUS CURIAE*[1]

*Amicus* is the American Academy of Attorney-Certified Public Accountants, Inc. ("AAA-CPA"), a not-for-profit corporation formed in 1964. The AAA-CPA has members located throughout the United States. Each regular member is or has been licensed as both an attorney and a certified public accountant.

AAA-CPA members, with both accounting and law backgrounds, have unique perspectives on business and taxes. A significant percentage of the AAA-CPA members have devoted their careers to the field of federal, state and local tax law, representing a wide variety of industries. As such, the AAA-CPA has a compelling interest in the issues presented in this case, namely how one state's income tax and credit structure affects individuals who reside in a different state, and the resulting policy considerations of double-taxation. If New York is permitted to double-tax intangible income, then more states will likely do it, leading to a nationwide scheme of double taxation on investment income.

[1] Counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties nor their counsel, nor any other person or entity other than *amicus*, its members, or its counsel have made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record provided timely notice of the intent to file this *amicus* brief pursuant to Rule 37 and all parties have consented to the filing.

## SUMMARY OF ARGUMENT

This case is important from a policy perspective because it presents a significant constitutional issue that needs to be resolved as to whether a state can impose a tax that is free of Commerce Clause restraints on a statutory resident recipient of investment income.

In New York, if an individual is domiciled in another state, yet also determined to be a "statutory resident" of New York, he or she will be subject to an undue tax burden. The individual is required to pay income tax to New York on intangible income even when his or her home state taxes that very same intangible income. New York does not care that the income was already taxed in the taxpayer's home state, or if the investment income is even earned in New York, because in New York's estimation the situs of investment income is generally unknown. The end result is that individuals who are statutory residents may be forced to pay double the tax on their investment income that a New York resident is required to pay. This burdens interstate commerce because the taxpayer's only solution is to limit his or her days in New York or avoid intangible investments. Where a state implements a law that leads to double taxation that burdens interstate commerce, the only outlet is the judicial branch of the government.

New York's determination that the Commerce Clause does not apply to its tax scheme is misguided, particularly after this Court's decision in *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787

(2015). The Commerce Clause demands that New York fairly apportion the income tax burden of its statutory residents to avoid discrimination against individuals that engage in interstate commerce.

## ARGUMENT

### I. A STATE'S AUTHORITY TO TAX THE INCOME OF ITS STATUTORY RESIDENTS IS SUBJECT TO COMMERCE CLAUSE LIMITATIONS

New York tax law is subject to Commerce Clause limitations because it creates an undue burden on interstate commerce by inherently discriminating against interstate commerce without regard to the tax policies of other states.

When an individual state's tax creates an undue burden on interstate commerce, the Commerce Clause creates an implicit restraint on that state's taxing power. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Although the Commerce Clause is framed as a positive power, this Court has "consistently held this language to contain a further, negative command, known as the Dormant Commerce Clause, that prohibits certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

When the Dormant Commerce Clause applies, courts use the four-part test articulated in *Complete*

*Auto Transit, Inc. v. Brady* to determine whether the challenged state tax violates the Dormant Commerce Clause by placing an undue burden on interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). The test requires that the tax (1) be applied to an activity with a substantial nexus to the taxing state, (2) be fairly apportioned to that activity, (3) is not discriminatory towards interstate or foreign commerce, and (4) is fairly related to services provided by the State. *Id.*

The second and third prong of the test apply here.

### A. NEW YORK'S TAX SCHEME IS NOT FAIRLY APPORTIONED

With regard to the second prong of the *Complete Auto* test, the law requires fair apportionment to "ensure that each State taxes only its fair share of an interstate transaction." *Jefferson Lines*, 514 U.S. at 184. The fair apportionment assessment has evolved into tests of "internal consistency" and "external consistency." These tests safeguard residents of a state with multiple taxation schemes stemming from interstate commerce. *Goldberg v. Sweet*, 488 U.S. 252, 262 (1995). Here, the internal consistency test is at issue. The internal consistency test requires that a state's tax scheme not burden interstate commerce any more than intrastate commerce, and that result must be the same if every state were to impose a tax identical to the tax being called into question. *Jefferson Lines*, 514 U.S. at 185. The requirement "asks nothing about the degree of economic reality reflected by the

tax, but simply 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.* Thus, the analysis of whether the tax complies with the Commerce Clause requirements is the fairness of the tax on a national scale.

The Supreme Court addressed this issue recently in *Comptroller of Treasury of Maryland v. Wynne*, where the state of Maryland argued that the limitations of the Commerce Clause should not apply for county tax collected from Marylanders because Maryland has a right to collect taxes for the services it provides. *Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015). Marylanders argued that the tax, as applied, negatively impacted interstate commerce because it encouraged them to keep their business endeavors within the state and penalized those who did not. *Id.* They further argued that this was exactly the type of disproportionate tax treatment that the Commerce Clause is designed to prevent. *Id.* The *Wynne* Court agreed and found that the Maryland county tax violated the Dormant Commerce Clause because the unequal burden amounted to facial discrimination subject to Dormant Commerce Clause scrutiny. *Id.* at 1804. The Court held that the Maryland tax scheme failed the internal consistency test and explained that "[b]y hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme. This is a virtue of the test

because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other states, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes . . . [t]he first category of taxes is typically unconstitutional; the second is not." *Id.* at 1802.

In New York, any person who maintains a permanent place of abode in New York and spends in excess of 183 days in the state is deemed a statutory resident for state income tax purposes. N.Y. Tax Law § 605(b)(1)(B). The classification is important because New York nonresidents are taxed only upon their New York source income; whereas residents and statutory residents, on the other hand, are taxed upon their worldwide income. *Id.* §§ 631, 612.

New York provides a credit to residents and statutory residents for income taxes paid on income derived specifically from out of state sources. N.Y. Comp. Codes R. & Regs. § 120.1(a)(2). The New York statutory resident credit against ordinary tax is allowable "for income tax imposed by another jurisdiction upon compensation for personal services performed in the other jurisdiction, income from a business, trade or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction. Conversely, the resident credit is not allowed for tax imposed by another jurisdiction upon

income from intangibles, except where such income is from property employed in a business, trade or profession carried on in the other jurisdiction. Thus, for example, no resident credit is allowable for an income tax of another jurisdiction on dividend income not derived from property employed in a business, trade or profession carried on in such jurisdiction." N.Y. Comp. Codes R. & Regs. tit. 20, § 120.4.

Thus, a taxpayer who owns investments such as stocks or bonds is at risk for double taxation if he or she meets the definition of a resident individual and is domiciled in a separate state. N.Y. Tax Law §§ 605(b)(1), 631(b)(2).

Accordingly, New York's intangible income tax scheme for statutory residents fails the internal consistency test applied in *Wynne* and thereby fails part two of the *Complete Auto* test. The tax is not fairly apportioned to the intangible income activity since it inherently discriminates against interstate commerce without regard to the tax policies of other states. New York does not care if an individual already paid tax on the same intangible income to another state. New York taxes the statutory resident without any regard to the resident's home state tax obligations. This burdens interstate commerce more than intrastate commerce by requiring statutory residents who pay tax to their domicile state to pay double the tax that a resident engaging in the same intangible income activity would have to pay.

Imagined across all fifty states as the internal consistency test requires, any individual domiciled in one state and operating in another is subject to tax on 100% of his or her investment income in each state. This creates a duplicate burden for those operating in interstate commerce that does not exist for those operating purely intrastate. If all fifty states placed a tax burden similar to New York's current intangible income tax scheme, then it would directly impact individuals operating in interstate commerce and force them to pay double tax on their intangible income – both in the state where the individual is domiciled and in the state he or she is considered a statutory resident. Thus, the New York tax is not internally consistent and the resulting effect is a disparity in apportionment.

### B. NEW YORK'S TAX SCHEME DISCRIMINATES AGAINST INTERSTATE COMMERCE

New York's intangible income tax scheme for statutory residents also fails the third prong of the *Complete Auto* test because it is discriminatory toward interstate commerce. The Commerce Clause prohibits states from discriminating against or imposing excessive burdens on interstate commerce without congressional approval because it "strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." *Wynne*, 135 S. Ct. at 1794. A state may not impose a tax which discriminates against

interstate commerce by subjecting interstate commerce to multiple taxation. *Id.* The rule against discrimination is to prohibit laws that would "excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994).

New York imposes the same tax on intangible income of domiciled residents and statutory residents even when a statutory resident already paid state tax on intangible income in his or her home state. New York refuses to provide a credit for the state tax that was already paid to the statutory resident's home state on intangible income. This discrimination favors the interstate over intrastate activity because the New York statutory resident is required to pay the same tax twice, whereas the New York domiciled resident is only required to pay the tax once. Moreover, if other states reacted to eliminate their current systems of granting credits for taxes paid to other states, the impact on interstate commerce could be devastating.

Consider the effect on an individual who invests in mutual funds, stocks, bonds, bitcoin or other applicable investments. If that taxpayer spends a significant amount of time outside of his or her home state for any given year for work or vacation, then that taxpayer could be subject to double tax on the income generated from those investments. This is unduly oppressive in today's culture of mobility because the tax scheme forcefully pressures taxpayers to stay in one state. Imagine what a double tax would do to the retiree who relies on investment income in his or her

senior years. Consider also the chokehold this policy places on the growing capital market. New York is discouraging investment in American businesses across state lines. Taxpayers who are domiciled in one state but spend a substantial amount of time in another run the risk of being a tax resident in two states, and thus subject to income tax in both states on intangible investment income. His or her defense against double taxation is to avoid exposure by limiting the days spent in a non-domiciled state. This unnecessary chilling effect on interstate commerce is precisely what the constitution seeks to avoid.

## II. THE NEW YORK COURTS FAILED TO PROPERLY ADDRESS THE COMMERCE CLAUSE

The New York courts refused to apply *Wynne*, stating the present case is distinguishable because *Wynne* did not specifically involve intangible investment income, which may have "no identifiable situs". See *Edelman v. New York*, 80 N.Y.S.3d 241 (2018). The court improperly relied on a New York case, *Tamagni v. Tax Appeals Tribunal*, which was decided before the *Wynne* case. *Matter of Tamagni v. Tax Appeals Tribunal of State*, 695 N.E.2d 1125, 1134 (N.Y. 1998), cert. denied, 525 U.S. 931 (1998). In *Tamagni*, the New York Court of Appeals held intangible income has "no identifiable situs" because it is untraceable to any jurisdiction and consequently could not be ruled outside of New York's jurisdiction (nor could it be traced inside New York's jurisdiction). *Id*. By relying solely on *Tamagni*, the

lower court here bypassed the constitutional analysis required by *Wynne* and failed to adequately address whether New York's tax scheme violates interstate commerce.

New York's refusal to conduct a *Wynne* analysis simply because *Wynne* did not involve intangible income misses the spirit of *Wynne*. This Court explained in *Wynne* that the internal consistency analysis is to help courts identify tax schemes that discriminate against interstate commerce by looking 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 1801–02. New York did not consider the impact its tax scheme would have in this broader context.

Investment income from intangible assets is generally not sourced to any specific state but rather the taxpayer's state of residence. New York's refusal to allow a credit for taxes already paid on intangible income to a taxpayer's domicile on the grounds that this income might be considered untraceable directly conflicts with the often-cited rule that a state may not tax value earned outside its borders. See *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 223 (1980); *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). By acknowledging that intangible income has "no identifiable situs", New York is conceding that it is taxing income that may or may not be earned in New York. If the intangible income could have been earned elsewhere, then New York really has no jurisdiction to tax

that income without providing a credit. New York should not be permitted to tax income that just by chance might have situs in New York when the same intangible income was taxed in the taxpayer's home state.

The goal in reviewing Commerce Clause challenges to state taxes is to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615–16 (1981). This Court has long rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a local or intrastate activity. *Id.* It should similarly reject New York's assertion that its state tax is immune from Commerce Clause scrutiny because investment income has no identifiable situs. The practical effect of New York's tax scheme encourages statutory residents to "opt for intrastate rather than interstate economic activity." *Wynne*, 135 U.S. at 1792, 1805.

Other states have properly applied the *Wynne* test. For example, in *Smith v. Robinson*, the state of Louisiana denied taxpayers a credit against income tax paid for franchises operating in other states. *Smith v. Robinson*, 265 So.3d 740, 754 (2018). Similar to the impact of Maryland's tax scheme in *Wynne*, failing to offer a credit in Louisiana resulted in double taxation of income earned outside the state. *Id.* The Louisiana Supreme Court in *Smith* appropriately applied the *Wynne* test and subsequently held that Louisiana's taxing scheme violated the Dormant Commerce

Clause. *Id.* at 738, 754. The *Wynne* test was also applied in *Dunn v. Idaho State Tax Comm'n*, 162 Idaho 673 (2017). After applying the test, the Idaho Supreme Court held that the state's taxing statute did not violate the Dormant Commerce Clause because it was not inherently discriminatory. *Id.* at 678. In each instance, application of the *Wynne* test was appropriate and it should be applied here as well. Application of the *Wynne* test would likely conclude that New York's tax scheme violates the Dormant Commerce Clause.

New York's taxation of intangible investment income incentivizes people not to work or travel across state lines. However, today's society demands that people work and live in different states at an increasing pace. Travel is more common than ever. A professional may live in one state and have clients or customers in another state, requiring an individual to travel extensively to the location for a brief time period that extends beyond 183 days. A retiree may live in a warm climate part of the year and a colder climate the other half of the year. Circumstances such as these should not expose an individual to the risk of double taxation on their investment income. However, the message from New York is either live here or don't come too often or we will double tax you. Under New York's tax scheme, an individual could essentially sleep on his or her pillow in another state 365 days out of the year, but if he or she maintains an abode in New York and goes there to work, visit grandchildren, catch a ball game, see a play, go skiing, or just go to dinner for a few hours for any part of a given calendar day, then he or she will

be subjected to double taxation on his or her intangible income. The remedy to protect his or her next egg from being subjected to double taxation is to limit the days spent working or traveling in New York, which directly impacts interstate commerce.

New York's refusal to allow its statutory residents a credit for income tax paid to another state for intangible income violates the Commerce Clause of the United States Constitution.

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## CONCLUSION

For the foregoing reasons, this Court should grant review of the *Edelman* case, and the companion case of *Chamberlain v. New York*. *Petition for Certiorari, Chamberlain v. New York State Department of Taxation & Finance*, No. 18-1569 (U.S. June 24, 2019).

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