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 Department

BRIEF *AMICUS CURIAE* OF THE BUSINESS COUNCIL OF NEW YORK STATE, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*

The Business Council of New York State, Inc. ("The Business Council") is the leading business organization in New York State, representing the interests of large and small firms throughout the state.[1] The Council's membership is made up of roughly 2,400 companies, local chambers of commerce, and professional and trade associations.

The Business Council's membership consists of both small businesses and some of the largest corporations in the world. The Business Council's members employ more than 1.2 million individuals in New York. The Business Council serves as an advocate for employers in the state's political and policy-making arenas, working for a healthier business climate, economic growth, and jobs.

New York's tax law contains a formula by which it deems a person to be a "statutory resident"— even if that person is not domiciled in New York. If a person is a "statutory resident," New York's tax law imposes income tax on all of that person's intangible income— even if that person is domiciled in another state. New York offers no credit for tax paid to the domiciliary state on the same income. Further, if a person is domiciled in New York and that person would be a "statutory resident" of another state (under New

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[1] In satisfaction of Supreme Court Rule 37.6, The Business Council represents that no portion of this brief was written by counsel for any party to this appeal, and no party (or counsel for any party) made a monetary contribution intended to fund the preparation or submission of this brief. This brief was funded entirely by *amicus curiae* and its counsel. The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief.

York's definition of that term), New York would tax all of that person's income too—without any credit for tax paid to the state of statutory residence.

The decision below sustained this scheme.[2] The decision below, therefore, allows New York to impose personal income tax on all of the intangible income earned by a "statutory resident" even if that person also pays tax on the same income to the person's state of domicile.[3] As a result, New York statutory residents are subject to double taxation on the same income—once to their state of domicile, and once to New York. The Business Council is concerned that this double taxation harms people who engage in business in New York (or who would engage in business in New York, but for New York's statutory residency provision).

SUMMARY OF THE ARGUMENT

There is no doubt that New York's statutory residency provision fails the internal consistency test. Under this Court's recent decision in *Comptroller of the Treasury v. Wynne*, a tax on individual income that fails the internal consistency test violates the dormant Commerce Clause. 135 S. Ct. 1787, 1803 (2015). Therefore, New York's statutory residency provision violates the dormant Commerce Clause.

Despite the fact that New York's statutory residency provision fails the internal consistency test, the New

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[2] Another taxpayer has a petition for a writ of certiorari pending that presents the same question as the Petition in this case. *See* Petition for Writ of Certiorari, *Chamberlain v. N.Y. State Dep't of Taxation & Fin.* (No. 18-1569).

[3] A "statutory resident" is an individual who spends any portion of 183 days or more in New York and maintains a "permanent place of abode" in New York. N.Y. Tax Law § 605(b)(1)(B).

York courts held that the provision does not violate the dormant Commerce Clause, on a truly remarkable basis. The courts below reasoned that New York's regime—which results in taxation by two states of the Petitioners' gain from the sale of a business—does not affect interstate commerce. *See* App. 5a; App. 14a.

This result simply cannot be reconciled with this Court's dormant Commerce Clause precedent. New York's statutory residency provision undoubtedly implicates the dormant Commerce Clause. Furthermore, New York taxes statutory residents as if they were residents, without providing them the full protections or benefits of residency; for this reason, New York's statutory residency provision is even more offensive than the Maryland statute that the Court struck down in *Wynne*.

The decision below would be troubling on its own. Unfortunately, it does not stand alone: it is part of a trend of state courts avoiding this Court's Commerce Clause precedent by labeling an interstate activity as "intrastate." This case provides a suitable vehicle to stop this trend.

Finally, this case is particularly important due to New York's preeminence in American commerce. New York's ability to leverage its commercial preeminence to unfairly tax its neighbors has been recognized since the founding era. In fact, Alexander Hamilton explicitly cited New York's ability to impose coercive taxes on Connecticut residents—and the resulting harm from those taxes—as a reason to ratify the Constitution. Due to its commercial preeminence, New York has little incentive to tone down its aggressive statutory residency provision.

As a result, New York coerces individuals to either forgo New York's economy, change domicile to New York, or pay tax on the same income twice. This type of coercion is fundamentally inconsistent with the Constitution. Accordingly, The Business Council urges the Court to grant Petitioner's petition for a writ of certiorari.

ARGUMENT

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S DORMANT COMMERCE CLAUSE PRECEDENT.

In *Wynne*, this Court held that a state tax on individual income that fails the internal consistency test violates the dormant Commerce Clause. 135 S. Ct. at 1803–04. As explained in the Petition, New York's statutory residency provision fails the internal consistency test. Pet. 14–21; *see generally* Michael S. Knoll & Ruth Mason, *New York's Unconstitutional Tax Residence Rule*, 85 State Tax Notes 707, 709–10 (2017). Therefore, New York's statutory residency provision violates the dormant Commerce Clause. *See Wynne*, 135 S. Ct. at 1803–04.

Despite the fact that New York's statutory residency provision fails the internal consistency test, New York's courts held that the statutory residency provision does not violate the dormant Commerce Clause. App. 1a, 4a–5a, 14a. The courts below reasoned that New York's regime—which results in taxation by two states of the Petitioners' gain from the sale of a business—does not affect interstate commerce. *See* App. 5a; App. 14a.

This result simply cannot be reconciled with this Court's dormant Commerce Clause precedent. New York's statutory residency provision undoubtedly implicates the dormant Commerce Clause, contrary to New

York precedent that concluded otherwise. Additionally, New York's statutory residency provision is more offensive than the Maryland statute that the Court struck down in *Wynne*; unlike in *Wynne*, New York taxes individuals as if they are "statutory residents" of New York, but without providing them the full protections, rights, or benefits of domicile.

A. New York's statutory residency provision is subject to dormant Commerce Clause scrutiny.

In the decision below, the New York courts relied on *Tamagni,* a New York Court of Appeals decision that concluded that New York's statutory residency provision does not implicate the dormant Commerce Clause.[4] App. 3a–5a, 14a; *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1132 (N.Y. 1998). In *Tamagni*—which predated *Wynne*—the New York Court of Appeals stated that the statutory residency provision was not subject to Commerce Clause scrutiny because the provision "does not apply to any interstate market whatsoever," and therefore did not implicate the dormant Commerce Clause. *Id*.

The New York Court of Appeals' statement in *Tamagni* is fundamentally flawed, both factually and legally.

Factually, New York's statutory residency provision presumably does have an impact on interstate commerce. The New York courts dismissed Petitioners' claim at a preliminary stage, so Petitioners were not even provided an opportunity to present evidence on the effect of New York's statutory residency provision

[4] The New York Court of Appeals summarily dismissed the Petitioners' appeal on "the ground that no substantial constitutional question [was] directly involved." App. 1a.

on interstate commerce. *See* App. 11a, 15a; N.Y. CPLR § 3211(a)(7). However, if Petitioners were given the opportunity, they would likely be able to show that New York's statutory residency provision impacts the employment market, the real estate market, and the tourism market.[5]

Legally, a tax that "attaches only to a 'local' or intrastate activity" is still subject to dormant Commerce Clause scrutiny. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). And while the Court has recognized a limited exception to dormant Commerce Clause scrutiny for "local fees" that all taxpayers must pay to "engage[] in local business," *see Am. Trucking Ass'ns v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 438 (2005), New York's statutory residency provision does not fall within this exception. By its very nature, New York's statutory residence provision *only* applies to taxpayers who are domiciled outside New York, and applies regardless of whether or not the taxpayer engages in business in New York.[6]

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[5] Each of these markets has a substantial relation with interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *see, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937) (employment market); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (real estate market); *United States v. Suarez*, 893 F.3d 1330, 1334 (11th Cir. 2018) (tourism market); see also *City of New York v. State*, 730 N.E.2d 920, 931 (N.Y. 2000) (reasoning that New York City's commuter tax violated the dormant Commerce Clause because it was "assessed against the interstate labor market per se . . . and favors intrastate economic activity over interstate activity") (internal citation omitted).

[6] For example, an individual could become a New York statutory resident by visiting one of New York's eleven vacation regions as a tourist, *see* ILOVENY, https://www.iloveny.com, undertaking an elective medical treatment at one of New York's hospitals, *see*

Therefore, New York's statutory residency provision is undoubtedly subject to dormant Commerce Clause scrutiny.

B. New York taxes statutory residents as if they were domiciled in the state, without providing them the full protections or benefits of residency. For this reason, New York's statutory residency provision is more offensive than the Maryland statute that the Court struck down in *Wynne*.

In an attempt to resolve the legal tension between this case and *Wynne*, the New York courts pointed to factual differences between the cases. *See* App. 4a–5a, 13a. In particular, the trial court observed that the taxpayers are domiciled in Connecticut and are challenging a New York tax, while the taxpayers in *Wynne* were domiciled in Maryland and were challenging a Maryland tax. App. 13a.

While the trial court correctly identified a difference between this case and *Wynne*, it drew the wrong conclusion from that difference. As an initial matter, this difference is immaterial: under the Court's controlling opinion in *Wynne*, any state tax on individual income that fails the internal consistency test violates the dormant Commerce Clause.

But even if it were material, the fact that New York's "statutory residency" applies to people domiciled in another state makes it more offensive, not less:

U.S. News Announces 2018-19 Best Hospitals, U.S. NEWS & WORLD REPORT (Aug. 14, 2018), https://www.usnews.com/info/blogs/press-room/articles/2018-08-14/us-news-announces-2018-19-best-hospitals, or caring for an ailing relative in New York.

New York wants to tax statutory residents as if they were domiciled in the state, without providing them with the full protections, rights, or benefits of domicile.

In *Wynne*, the principal dissent took the position that only some state taxes that fail the internal consistency test should violate the dormant Commerce Clause. *Wynne*, 135 S. Ct. at 1814–15 (Ginsburg, J., dissenting). In particular, the principal dissent argued that the dormant Commerce Clause should not protect an individual from taxes imposed by their state of domicile unless the tax is facially discriminatory. *Id.*

As the principal dissent explained, a person who is domiciled in a state "possess[es] political means, not shared by outsiders, to ensure that the power to tax their income is not abused." *Id.* at 1814. For this reason, the principal dissent argued, an individual does not need dormant Commerce Clause protection from their home state's taxes unless the taxes are facially discriminatory. *Id.* at 1814–15; *see also* Brief for the United States as Amicus Curiae Supporting Petitioner at 15, *Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015) (No. 13-485) ("[B]ecause States are politically accountable to their own residents, the [internal consistency test] is unnecessary to prevent state overreaching in the sphere of individual income taxation.").

Unlike the taxpayers in *Wynne,* who were domiciled in Maryland and were challenging a Maryland tax, Petitioners in this case are domiciled in Connecticut and are challenging a New York tax. Petitioners do not "possess political means" to ensure that New York does not abuse its taxing power by subjecting their income to double taxation. *See Wynne*, 135 S. Ct. at 1814–15 (Ginsburg, J., dissenting); *see also* N.Y. Elec. Law § 1-104(22) (restricting the right to vote in New

York elections to people who are domiciled in New York). For this reason, Petitioners are the "outsiders" that, even the principal dissent in *Wynne* agreed, need Commerce Clause protection from double taxation. *See Wynne*, 135 S. Ct. at 1814 (Ginsburg, J., dissenting).

Furthermore, the principal dissent in *Wynne* also argued that "[m]ore is given to the residents of a State than those who reside elsewhere, therefore more may be demanded of them." *Id.* The principal dissent pointed to the various benefits that Maryland provided to Maryland domiciliaries, such as public schools and public health programs, and reasoned that this justified allowing Maryland to tax all of their income. *Id.*

In this regard, the Constitutional violation in this case is even clearer than that in *Wynne* because New York restricts many of its governmental benefits to people who are domiciled in the state. *See People v. Platt*, 22 N.E. 937, 938 (N.Y. 1889) ("[I]n all cases where a statute prescribes 'residence' as a qualification for the enjoyment of a privilege or the exercise of a franchise, the word is equivalent to the place of domicile of the person who claims its benefit."); *accord State v. Collins*, 435 N.Y.S.2d 161, 163 (N.Y. App. Div. 1981). As a result, a "statutory resident" does not receive important benefits from New York, such as the right to send their children to public school in New York, N.Y. Educ. Law § 3202(1), or to receive social services, N.Y. Soc. Serv. Code § 366(d)(1); *Ruiz v. Lavine*, 370 N.Y.S.2d 710, 714 (N.Y. App. Div. 1975). *See also, e.g.*, N.Y. Penal Law § 400.00(3) (license to carry firearm); N.Y. Pub. Off. Law § 3(1) (eligibility for public office); N.Y. Envtl. Conserv. Law § 11-0702(2) (hunting and fishing licenses); 8 N.Y.C.R.R. § 302.1(a)(5), (b) (in-state college tuition). Therefore, New York's claim to statutory residents' income is even weaker

than Maryland's claim to the taxpayers' income in *Wynne*.[7]

II. THIS CASE IS A PERFECT VEHICLE TO ADDRESS THE TROUBLING TREND OF STATE COURTS AVOIDING COMMERCE CLAUSE RESTRICTIONS BY LABELING MULTI-STATE COMMERCIAL ACTIVITY AS "INTRASTATE."

The decision below would be troubling even if it were an outlier. Unfortunately, it is not an outlier: it is part of a trend of state courts recasting multi-state activity as intrastate activity in order to avoid this Court's Commerce Clause precedent.

For example, in *Luther v. Commissioner of Revenue*, the Minnesota Supreme Court sustained that state's "statutory resident" statute, relying on the fiction that "the Commerce Clause is not implicated." 588 N.W.2d 502, 511–12 (Minn. 1999). Similarly, in *CDR Systems Inc. v. Oklahoma Tax Commission*, the Oklahoma Supreme Court upheld a statute that provided a tax deduction only to companies headquartered in Oklahoma on the specious grounds that the deduction had "no negative impact on interstate commerce." 339 P.3d 848, 855 (Okla. 2014). Further, in a recent case, New Jersey's Tax Court cited the decision below in this case to support its conclusion that an internally inconsistent tax imposed on a partnership that engaged in a multi-state business did not violate the Commerce Clause because it did not "implicate interstate commerce." *Ferrellgas Partners, L.P. v. Dir., Div. of Taxation*,

[7] People domiciled in another state would pay their fair share of taxes to New York even without the statutory residency provision, as they must pay New York income tax on their New York-sourced income. N.Y. Tax Law § 601(e)(1).

No. 007051-2014, 2018 N.J. Unpub. LEXIS 65, at *30 (N.J. Tax 2018).[8]

This trend is disturbing, and there is no reason to allow it to continue to fester. This case provides a suitable vehicle for this Court to end it. This case clearly involves interstate commerce—indeed, the Petitioners became so-called "statutory residents" because they commuted into New York from outside the state. Further, the case involves actual multiple taxation by two states of a single commercial gain. Thus, this is a perfect case for this Court to send a signal that state courts cannot avoid this Court's Commerce Clause precedent by labeling multi-state activity as intrastate activity.[9]

III. THIS CASE IS PARTICULARLY IMPORTANT DUE TO NEW YORK'S PREEMINENCE IN AMERICAN COMMERCE.

As explained above, New York's statutory residency provision violates the dormant Commerce Clause. New York's preeminence in American commerce both amplifies the impact of the statutory residency provision and insulates New York from political consequences.

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[8] *See also, e.g.*, *Parker v. Idaho State Tax Comm'n*, 230 P.3d 734, 739–40 (Idaho 2010); *Leggett & Platt, Inc. v. Ostrom*, 251 P.3d 1135, 1146 (Colo. App. 2010); *Seegmiller v. Cty. of Nev.*, 62 Cal. Rptr. 2d 238, 240–41 (Cal. Ct. App. 1997).

[9] This Court is the only federal forum with jurisdiction to hear a challenge to a state tax on federal constitutional grounds. 28 U.S.C. § 1341; *see also* U.S. CONST. amend. XI. As this Court acts as the only federal check on state taxation in violation of federal law, the Court should exercise its certiorari liberally in this sphere to increase public confidence that state taxes are fairly imposed and administered. *Cf.* The Federalist No. 81 (Alexander Hamilton).

For these reasons, the question presented in this case is particularly important.

New York has long been recognized for its preeminence in American commerce, and its ability to leverage this preeminence to impose unfair taxes on its neighbors. In fact, Alexander Hamilton cited New York's ability to impose coercive taxes on Connecticut residents under the Articles of Confederation as the example of how, without the Constitution, "some States would have" the opportunity "of rendering others tributary to them by commercial regulations . . . ." The Federalist No. 7, at 40 (Alexander Hamilton) (E.H. Scott ed., 1898). Mr. Hamilton explained to the citizens of New York that the state faced the choice between retaining unlimited taxing power, which would inevitably lead to an invasion by Connecticut and New Jersey, or ceding a portion of the state's taxing power, which would ensure the "quiet and undisturbed enjoyment" of its territory. *Id.* New York chose the latter option.

If anything, New York's gravitational pull on American commerce has grown stronger since 1787. As of 2017, New York's gross domestic product was more than $1.5 trillion—more than Australia's, and almost equal to Iran's. Office of the N.Y. State Comptroller, Financial Condition Report: Economic and Demographic Trends (2018), https://www.osc.state.ny.us/finance/finreports/fcr/2018/fcrindex.htm; *see* CIA, The World Factbook, Country Comparison: GDP (Purchasing Power Parity), https://www.cia.gov/library/publications/the-world-factbook/fields/208rank.html. Nearly half a million people commute to a principal workplace location in New York just from Connecticut and New Jersey. U.S. Census Bureau, ACS-20, Out-of-State and Long Commutes: 2011 (2013), https://www.census.gov/library/publications/2013/acs/acs-20.html.

Due to its commercial preeminence and number of commuters, New York has little incentive to tone down its aggressive statutory residency provision. While some other states with statutory residency schemes provide credits for taxes paid to the state of domicile, *see, e.g.*, Conn. Gen. Stat. § 12-704(d), or only use statutory residency to create a rebuttable presumption of residency, *see* Cal. Rev. & Tax. Code § 17016, New York does neither. Rather, New York has enacted a taxing regime that results in double taxation on taxpayers who are domiciled in another state.

In sum, New York takes advantage of its commercial preeminence to coerce individuals to either forgo New York's economy, change domicile to New York, or pay tax on the same income twice. This type of coercion is fundamentally inconsistent with the Constitution. *See Wynne,* 135 S. Ct. at 1794; The Federalist No. 7 (Alexander Hamilton).

CONCLUSION

For all the reasons described in this brief, The Business Council urges the Court to grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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