No. ________

In The

Supreme Court of the United States

RANDOLPH S. BASKINS
AND BEVERLY J. BASKINS,

Petitioners,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Oklahoma, Second Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Oklahoma Capital Gains Deduction tax scheme as set forth in 68 O.S. 2011, § 2358(F) as applied to Randolph S. Baskins and Beverly J. Baskins violate the Commerce Clause of the United States Constitution?

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OPINION BELOW

The Oklahoma Supreme Court denied the Petition for Certiorari filed by Taxpayers Randolph Baskins and Beverly J. Baskins thus adopting the Opinion of the Court of Civil Appeals of the State of Oklahoma, Division II, which was entered on May 9, 2018. That Order affirmed the Order of the Administrative Law Judge of the Oklahoma Tax Commission. Those rulings are reprinted in Appendix at pages App. 1 through App. 36.

JURISDICTION

The issue decided by the Court of Civil Appeals and the denial of the Petition for Writ of Certiorari constitutes a violation of the Commerce Clause of the United States Constitution. The Review of the constitutionality of the Oklahoma statute in question is within the jurisdictional purview of this Court. Sup. Ct. R. 10(b), (c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 68 O.S. 2011, § 2358(F)

> F.1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital gain treatment that are included in the federal adjusted gross income of

such individual taxpayer during the taxable year.

F.2. As used in this subsection:

(a) 'qualifying capital gains receiving capital gain treatment' means the amount of net capital gains as defined in Section 1222(11) of the Internal Revenue Code, included in an individual taxpayer's federal income tax return that result from:

* * *

> (2) the sale of stock or the sale of a direct or indirect ownership interest in an Oklahoma company, limited liability company or partnership where such stock or ownership interest has been directly or indirectly owned by the individual taxpayer for a holding period of at least two (2) years prior to the date of the transaction from which the net capital gains arise,

* * *

(c) 'Oklahoma company,' 'limited liability company' or 'partnership' means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise.

STATEMENT OF THE CASE

This case involves the denial of a capital gains deduction on the Oklahoma Individual Income Tax Return of Randolph S. Baskins and Beverly J. Baskins for tax year 2011.

Oklahoma Income Tax is "imposed upon the Oklahoma taxable income of every resident or non-resident individual." 68 O.S. 2011, § 2355(B). An individual's "Oklahoma taxable income" is the individual's taxable income as ascertained by the Internal Revenue Code adjusted further as provided under the Oklahoma taxing scheme. 68 O.S. 2011, § 2353(12). The beginning point for determining Oklahoma taxable income is federal adjusted gross income. 68 O.S. 2011, § 2353(13). The Oklahoma Capital Gains deduction found at Section 2358(F) of Title 68 is a deduction against the income tax imposed by Section 2355. The deduction is available to any individual taxpayer and permits a deduction from Oklahoma adjusted gross income for federal capital gains which meet certain requirements. That deduction provides in pertinent part as follows:

> F.1. For taxable years beginning after December 31, 2004, a deduction from the Oklahoma adjusted gross income of any individual taxpayer shall be allowed for qualifying gains receiving capital gain treatment that are included in the federal adjusted gross income of such individual taxpayer during the taxable year.

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> * * *
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> (c) 'Oklahoma company,' 'limited liability company' or 'partnership' means an entity whose primary headquarters have been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arise.

Throughout this litigation the parties have stipulated as to essential facts of this case. Those facts are as follows:

Randolph S. Baskins and Beverly J. Baskins ("Taxpayers") acquired shares of stock in a company known as Primus International Holding Company. Several years later, Primus International Holding Company notified the Taxpayers that the company would be sold to Precision Castparts Corp. This sale was completed on or about August 9, 2011 and as part of that sale the Taxpayers sold their shares of Primus International Holding Company stock and reported a long term capital gain deduction on their 2011 Oklahoma Tax Return. Taxpayers had owned the stock for more than two (2) years prior to its sale. The Oklahoma Tax Commission's Compliance Division denied the Taxpayers' Amended Claim for a capital gains deduction because Primus International Holding Company did not have its "primary headquarters" in Oklahoma but instead was headquartered in the state of Washington. The Oklahoma Tax Commission advised the Taxpayers that their claim for capital gains deduction had been disallowed "because the capital gains were from a company whose primary headquarters were not located in Oklahoma for at least three (3) uninterrupted years prior to the sale." In support of its position, the Tax Commission cited Section 2358(F)(2) of Title 68 as it was applicable in tax year 2011 which allowed a capital gains deduction for the sale of stock in an "Oklahoma company" held for at least two (2) years before the sale at issue. An Oklahoma company is defined in that statute as "an entity whose primary headquarters had been located in Oklahoma for at least three (3) uninterrupted years prior to the date of the transaction from which the net capital gains arises." 68 O.S. 2011, § 2358(F). The Taxpayers followed that determination by filing a Protest with the Oklahoma Tax Commission. Ultimately an Administrative Law Judge from the Oklahoma Tax Commission was presented with an issue as to whether the Taxpayers qualified for the Oklahoma Capital Gains deduction under the statute in question as claimed in their 2011 Oklahoma Tax Returns. The Administrative Law Judge concluded that the headquarters requirement contained in Section 2358(F)(2)(c) of Title 68, contrary to the argument of the Taxpayers, did not violate the Commerce Clause to the United States Constitution. The Administrative Law Judge cited as authority for that proposition the decision of the Supreme Court of Oklahoma in *CDR Systems Corporation v. Oklahoma Tax Commission*, 2014 OK 31, 339 P.3d 848 as dispositive on that issue. Taxpayers argued that the Oklahoma Supreme Court improperly decided *CDR* and that in any event, the continued finding by the Administrative Law Judge that the statute in question was not facially discriminatory and that the Dormant Commerce Clause did not apply to the facts of this case was improper. Taxpayers' contention was that the denial of the capital gains deduction for the sale of stock in a non-Oklahoma headquartered company discriminated against interstate commerce and is therefore unconstitutional.

An Order was entered by the Tax Commission adopting the recommendations of the Administrative Law Judge. Taxpayers filed a timely appeal with the Oklahoma Supreme Court. The case was assigned to the Oklahoma Court of Civil Appeals, Division II, which rendered its decision affirming the decision of the Oklahoma Tax Commission again citing as authority the

Supreme Court's decision in *CDR*. A Petition for Writ of Certiorari was timely filed with the Oklahoma Supreme Court. The Petition for Certiorari was denied by the Court in its Order dated September 24, 2018.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO REAFFIRM THE DORMANT COMMERCE CLAUSE AND FIND THAT THE OKLAHOMA CAPITAL GAINS STATUTE IS UNCONSTITUTIONAL AND IS IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The essence of the ruling in the instant matter denying the capital gains deduction to the Taxpayers is that the capital gains deduction provided to only those Oklahoma taxpayers who sell stock in an "Oklahoma Company" is valid and does not violate the Commerce Clause of the United States Constitution. The Court is mistaken. The statute in question violates the Commerce Clause.

There is a substantial body of United States Supreme Court authority which addresses state statutes which discriminate on the basis of geographic location. As the leading treatise on state taxation observes, "since 1977 the Court has considered four (4) taxing schemes involving measures explicitly designed to encourage economic activity within the state. In each case the Court invalidated the measure and did so with rhetoric so sweeping as to cast a constitutional cloud over many state tax incentives." *Hellerstein & Hellerstein*, State Taxation, ¶4.14[3][b]. The body of Supreme Court law in this area establishes that the prior decision of the Oklahoma Supreme Court in *CDR* as well as the decision in the instant case is inconsistent with case law from other states on the constitutionality of state tax incentives.

In *Worldcorp. v. Nevada Dep't of Taxation*, 944 P.2d 824 (Nev. 1997), the Nevada Supreme Court considered a statute, which provided an exemption from sales tax for the sales of aircraft and major components of aircraft to an air carrier which "[*m*]*aintains its central office in Nevada* and bases a majority of its aircraft in Nevada." *Id*. at 825 (quoting the statute) (emphasis supplied). Three related taxpayers, whose headquarters were in Virginia, and whose lease payments had been subjected to sales tax in Nevada contended that the Nevada statute "violated the Commerce Clause of the United States Constitution because *it unfairly burdened interstate commerce by exempting from sales and use tax only those entities with central offices located in Nevada*." *Id*. at 826 (emphasis supplied). After discussing multiple U.S. Supreme Court precedents striking down state taxes as unconstitutionally discriminatory, the Nevada Court declared:

> [The statute] provides that two companies will be taxed differently depending on the domicile of their respective central offices. Those headquartered in Nevada will receive the tax exemption while corporations headquartered

> in a foreign jurisdiction will not. [The taxpayer] would have qualified for the tax exemption, but for the simple fact it moved its central office to Virginia. This disparate treatment between domestic and foreign corporations is precisely the type of economic protectionism prohibited by the Commerce Clause. As the Supreme Court stated in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273-74 (1988), "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors [violate the Commerce Clause]." Therefore, we conclude that [the statute] must be stricken from our statutory scheme because it runs afoul of the Commerce Clause.

Id. at 828 (footnotes omitted).

In addition to the Nevada Supreme Court's decision in *Worldcorp*, the large body of case law arising out of state and lower federal courts striking down similar tax incentives on Commerce Clause grounds provides the basis for reaching the conclusion that the *CDR* decision was wrong and that reliance on that decision by the Court of Appeals in the case at bar is inappropriate. *See Pelican Chapter, Associated Builders & Contractors, Inc. v. Edwards*, 128 F.3d 910 (5th Cir. 1997) (property tax exemption for new manufacturing establishments, limited to taxpayers maintaining 80 percent in-state work force and using 80 percent in-state materials, discriminates against interstate commerce); *Cutler v. Franchise Tax Bd.*, 146 Cal. Rptr. 3d 244 (Cal. Dist. Ct. App. 2012) (limiting deferral of gain from sale of small business stock when reinvested in other qualified small businesses to businesses with 80 percent of their assets and payroll in California, violates the Commerce Clause); *Sprint Commc'ns Co. v. Kelly*, 642 A.2d 106 (D.C. 1994) (property tax exemption for personal property used by a telecommunications company to produce taxable gross receipts and sales tax exemption for property purchased by a telecommunications company for use in producing services subject to gross receipts tax discriminate against interstate commerce); *Div. of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So. 2d 1000 (Fla. 1988) (tax preference for alcoholic beverages made from citrus fruits and other agricultural products grown primarily, though not exclusively, within the state discriminates against interstate commerce), *rev'd on other grounds*, 496 U.S. 18 (1990); *Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 317 (Fla. 1984) (corporate income tax credit for fuel taxes limited to Florida-based air carriers discriminates against interstate commerce); *Russell Stewart Oil Co. v. Dep't of Revenue*, 529 N.E.2d 484 (Ill. 1988) (tax preference for gasohol made from products that were used by almost all in-state producers but not many out-of-state producers discriminates against interstate commerce); *Comptroller of the Treasury v. Armco, Inc.*, 521 A.2d 785 (Md. Ct. Spec. App. 1987) (exemption from state corporate income tax for DISC dividends if at least 50 percent of the net taxable income of the DISC is subject to taxation in the state discriminates against interstate commerce); *Archer Daniels Midland Co. v. State ex rel. Allen*, 315 N.W.2d 597 (Minn. 1982) (tax reduction for gasohol produced in state discriminates against interstate commerce); *Nw. Aerospace Training Corp. v. Comm'r of Revenue*, No. 6523, 1995 WL 221639 (Minn. Tax Ct. Apr. 4, 1995) (exemption for receipts from leases of flight equipment if lessees made three or more flights into the state discriminates against interstate commerce); *Gen. Motors Corp. v. Dir. of Revenue*, 981 S.W.2d 561 (Mo. 1998) (requirement that affiliated group of corporations derive at least 50 percent of its income from sources within the state in order to file consolidated income tax return discriminates against interstate commerce); *Giant Indus. of Ariz., Inc. v. Taxation & Revenue Dep't*, 796 P.2d 1138 (N.M. Ct. App. 1990) (gasoline excise tax deduction for ethanol-blended gasoline manufactured exclusively within the state discriminates against interstate commerce); *Am. Tel. & Tel. Co. v. N.Y. State Dep't of Taxation & Fin.*, 637 N.E.2d 257 (N.Y. 1994) (deduction for access charges paid by long-distance telephone companies to local telephone companies, which is reduced only for interstate long-distance companies by their state apportionment percentage, discriminates against interstate commerce); *RJ Reynolds Tobacco Co. v. N.Y. Dep't of Fin.*, 237 A.D.2d 6 (N.Y. App. Div. 1997), *appeal dismissed*, 694 N.E.2d 885 (1998) (accelerated depreciation deduction limited to in-state property discriminates against interstate commerce); *PPG Indus., Inc. v. Commonwealth*, 790 A.2d 252 (Pa. 1999) (capital stock tax manufacturing exemption, which was measured by and inversely proportional to extent of a corporation's out-of-state activity, thereby affording preferential treatment to corporations that engaged in manufacturing activities in state, facially discriminated against interstate commerce); *Burlington N., Inc. v. City of Superior*, 388 N.W.2d 916 (Wis. 1986) (exemption from occupation tax on iron ore dock operators for iron ore taxed under occupation tax on local mineral producers discriminates against interstate commerce); *Wis. Dep't of Revenue v. NCR Corp.*, Nos. 92 CV 1516 & 92 CV 1525 (Wis. Cir. Ct., Dane Cty. Apr. 30, 1993) (deduction for dividends received from subsidiaries limited to subsidiaries more than 50 percent of whose income was taxable by the state discriminates against interstate commerce); and *Beatrice Cheese, Inc. v. Wis. Dep't of Revenue*, Nos. 91-I-100 & 91-I-102, 1993 WL 57202 (Wis. Tax App. Comm'n Feb. 24, 1993) (accelerated depreciation deduction limited to in-state property discriminates against interstate commerce); *cf. Nw. Airlines, Inc. v. Wis. Dep't of Revenue*, 717 N.W.2d 280 (Wis. 2006) (sustaining allegedly discriminatory tax incentive in the form of a property tax exemption for air carriers that operated a hub facility in the state on the grounds that Congress had consented to such discrimination over a vigorous dissenting opinion arguing that Congress had not consented to such an exemption and that the exemption discriminated against interstate commerce in violation of the Commerce Clause).

In short, the *CDR* Court failed to recognize the overwhelming weight of Commerce Clause authority which invalidates state tax incentives such as the Oklahoma Headquarters Requirement. This misapprehension is reflected not only in the inconsistency between the Court's decision in *CDR*, and virtually every other court which has considered similar tax incentives, but also with the view as to acceptable alternatives to Oklahoma's headquarters deduction. For example, the *CDR* Court suggested that the Legislature "could have required companies to be domiciled in Oklahoma to receive the deduction or to incorporate in Oklahoma to receive the deduction. . . . " But this is simply wrong – the Legislature could not have constitutionally enacted such a requirement. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169 (1999) (invalidating state taxing scheme favoring domestic over foreign corporations as unconstitutionally discriminatory under the Commerce Clause). For all these reasons, this Court must find that the Oklahoma Headquarters Requirement discriminates against interstate commerce and is therefore unconstitutional.

II. THE DORMANT COMMERCE CLAUSE DOES APPLY.

In the *CDR* decision of the Oklahoma Supreme Court as relied upon by the *Baskins* Court found that the Dormant Commerce Clause did not apply to the facts of that case and thus the Court found that the facts did not apply to Taxpayers in the case at bar. In CDR and the case at bar, the Court misapplied the requirement of a taxpayer who is burdened by a discriminatory tax to pinpoint an identical taxpayer who is benefitted by the tax as a precondition to invoking the protection that the commerce clause affords against state discrimination. This limited view is not only unsupported but eviscerates the concept of commerce clause discrimination.

The Oklahoma Supreme Court in *CDR* relied on the decision of this court in *General Motors v. Tracy*, 519 U.S. 278, 298 (1997) that "any notion of discrimination assumes a comparison of substantially similar entities." The Oklahoma Supreme Court in *CDR* and the Court of Appeals in the *Baskins* case thus concluded that the Dormant Commerce Clause did not apply because "there is no common market in which substantially similar entities compete under the design of the statute." It is undisputed that there is fierce competition among business in the "common market" for investor funds. The factual circumstances in the case at bar bear no resemblance to those of *General Motors* where the benefitted and burdened entities were found to operate in different markets. The key question which must be asked in every case in order to properly guide the "competitive market" analysis is what is the market affected by the challenged tax statute. In *General Motors* the tax was a levy on the sale or use of natural gas and the court found that there were two (2) discrete markets for the sale or use of such gas; the unregulated market in which General Motors purchased gas; and the regulated market in which other buyers purchased gas from the local utility companies. Because there was no competition between those markets, the tax preference for the sales in the regulated local market could not "discriminate" against sales in the unregulated market because the tax preference could not induce a purchaser of unregulated gas to purchase on the local, tax favored market. *See General Motors*, 419 U.S. at 296-97, n.11. In the present case the tax is not a levy on a specific transaction activity or product in a specific market but instead is a tax imposed on income from an investment. The proper scope of the factual inquiry into the existence of competition in such a situation is not competition between particular business products or services but the competition for business investment. The disputed statute gives Oklahoma headquartered companies a competitive advantage over companies headquartered elsewhere.[1]

The income tax preference for investors in Oklahoma headquartered companies therefore constitutes an example of the type of discrimination that squarely falls within General Motors' description of the case to which the commerce clause does apply, namely one where "eliminating" the "tax" of non-Oklahoma headquartered companies "would serve the commerce clause's fundamental objective of preserving a national market for competition undisturbed by preferential tax advantages conferred by a state . . . resident competitors. *General Motors*, 519 at 299.[2] In short the

[1] The *CDR* Court explicitly recognized that such competition exists and was the intent of the Statute. (*CDR* ¶ 24) ("The deduction is a tool used by the state to compete for business investment in Oklahoma's economy. . . .").

[2] While every company bringing a Commerce Clause discrimination claim could argue that the imposition of a tax increases its cost of doing business, this fact is relevant only if the tax affects decision making in the market at issue. If increased costs do not affect decision making in the targeted market, as in *General Motors*, the increased costs are irrelevant, because taxpayers will not make locational decisions on the basis of the tax. By contrast, when a tax is directed generally at economic activity in the state (as an income tax, like Oklahoma's statute indisputably is), a

disputed statute raises the cost for Oklahoma taxpayers who invest in non-Oklahoma headquartered companies vis-à-vis investors in Oklahoma headquartered companies.

In *CDR* as relied upon by the Court of Appeals in the case at bar, the Oklahoma Supreme Court made a requirement that as a pre-condition to challenging a statute's tax preference for Oklahoma headquartered companies the taxpayer in that case had to first establish that a "substantially similar entity that also produced handholds and who had its primary headquarters in Oklahoma" benefitted from the tax preference. This application of the anti-discrimination prong of the Dormant Commerce Clause is not so limited. *General Motors* established the "competitive market" requirement; however, other state court opinions which have applied that standard have not been as limited. *See In re the Appeals of CIG Field Servs. Co.*, 112 P.3d 138 (Kan. 2005) (market competition existed between single-county and interstate natural gas gathering systems even though experts for the state pointed out numerous differences between the two systems); *Jordan v. Dep't of Motor Vehicles*, 75 Cal. App. 4th 449 (Cal. Dist. Ct. App. 1999) (Commerce Clause prohibited a fee on federally certified vehicles but not state-certified vehicles); *cf. Smith v. N.H. Dep't of Revenue Admin.*, 813 A.2d 372 (N.H. 2002) (court concluded that there

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deduction from that tax available only to those who engage in specified in-state activity necessarily puts an unconstitutional thumb on the scale of tax-neutral decisionmaking and violates the United States Supreme Court's doctrine barring discriminatory state taxes.

was no market competition between in-state bank investment products and out-of-state non-bank products only after extensive economic testimony regarding the markets for products). Importantly for purposes of the current case, the California court in *Jordan* noted that "[i]t is more expensive to register a used federally certified vehicle in California than a comparable used California-certified vehicle." 75 Cal. App. 4th at 462. The same point applies here. Because of the statute, it is unquestionably more expensive for an Oklahoma resident taxpayer who owns stock in a business headquartered outside of Oklahoma to sell his/her stock than for a taxpayer who owns stock in an Oklahoma headquartered business to do so. Clearly the capital gains scheme adopted by the legislature is a burden on interstate commerce and is unconstitutional.

The application by the Tax Commission of the statute to Taxpayers can lead only to the conclusion that the protection afforded by the commerce clause prohibiting economic protectionism by burdening out-of-state companies is violated. The case which clearly identifies this issue was the decision of this Court in *Fulton v. Faulkner*, 516 U.S. 325, 330, 116 S.Ct. 848, 853 (1996). In that case the court very clearly indicated that the commerce clause protects commerce not just taxpayers. In the case at bar, the denial of the capital gains deduction to Taxpayers for the sale of stock in a non-Oklahoma headquartered company clearly and unequivocally discriminates against interstate commerce and is therefore unconstitutional.

CONCLUSION

This Court should grant the Writ of Certiorari and reverse the decision of the Oklahoma Court of Appeals.

Respectfully submitted,

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