No. 24-____

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORPORATION AND COMBINED AFFILIATES,

Petitioner,

v.

NEW YORK STATE TAX APPEALS TRIBUNAL AND NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE,

Respondents.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a state impose a "heads I win, tails you lose" regime that taxes either side of an interstate or foreign transaction, depending on which side has a nexus to the state, even though such a regime would inherently disadvantage interstate and foreign commerce if it were replicated by every jurisdiction?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was appellant in the New York Court of Appeals, is International Business Machines Corporation & Combined Affiliates (IBM). IBM has no parent corporation, and no publicly held corporation owns 10 percent or more of IBM's stock. Included below are IBM's subsidiaries per its Annual Financial Report for the year ending December 31, 2023.

Respondents, who were respondents in the New York Court of Appeals, are the New York State Tax Appeals Tribunal and New York State Commissioner of Taxation and Finance.

Name of Subsidiary	**Country of Incorporation**
IBM Argentina Sociedad de Responsabilidad Limitada	Argentina
IBM Australia Limited	Australia
IBM Global Financing Australia Limited	Australia
IBM Oesterreich Internationale Bueromaschinen Gesellschaft m.b.H.	Austria
Red Hat Austria GmbH	Austria
IBM Bahamas Limited	Bahamas
IBM Belgium Financial Services Company BV/SRL	Belgium
International Business Machines of Belgium BV/SRL	Belgium
WTC Insurance Corporation, Ltd.	Bermuda
IBM Brasil-Industria, Maquinas e Servicos Limitada	Brazil
Banco IBM S.A..	Brazil
IBM Bulgaria Ltd.	Bulgaria
IBM Canada Limited—IBM Canada Limitee	Canada
IBM Global Financing Canada Corporation	Canada
IBM de Chile S.A.C.	Chile
IBM Global Financing de Chile SpA	Chile

Name of Subsidiary	Country of Incorporation
IBM (China) Investment Company Limited	China (P.R.C.)
IBM (China) Co., Ltd.	China (P.R.C.)
IBM de Colombia S.A.S.	Colombia
IBM Business Transformation Center, S.r.l.	Costa Rica
IBM Croatia Ltd./IBM Hrvatska d.o.o.	Croatia
IBM Ceska Republika spol. s.r.o.	Czech Republic
IBM Danmark ApS	Denmark
IBM Global Financing Danmark ApS	Denmark
Red Hat APS	Denmark
IBM del Ecuador, C.A	Ecuador
IBM Egypt Business Support Services	Egypt
IBM Eesti Osauhing (IBM Estonia Ou)	Estonia
IBM Global Financing Finland Oy	Finland
Oy IBM Finland AB	Finland
Compagnie IBM France, S.A.S.	France
IBM France Financement, SAS	France
RED HAT FRANCE	France
IBM Deutschland GmbH	Germany
IBM Deutschland Kreditbank GmbH	Germany
IBM Global Financing Deutschland GmbH	Germany
Red Hat GmbH	Germany
IBM Hellas Information Handling Systems S.A.	Greece
IBM China/Hong Kong Limited	Hong Kong
IBM Magyarorszagi Kft.	Hungary
IBM India Private Limited	India
PT IBM Indonesia	Indonesia
IBM Ireland Limited	Ireland
IBM Ireland Product Distribution Limited	Ireland
RED HAT LIMITED	Ireland
IBM Israel Ltd.	Israel
IBM Capital Italia S.r.1.	Italy
IBM Italia Servizi Finanziari S.r.l.	Italy
IBM Italia S.p.A.	Italy
IBM Japan Credit LLC	Japan
IBM Japan, Ltd.	Japan
IBM East Africa Limited	Kenya
IBM Korea, Inc.	Korea (South)

Name of Subsidiary	Country of Incorporation
IBM Kuwait SPC	Kuwait
“IBM Latvija” SIA	Latvia
UAB “IBM Lietuva”	Lithuania
IBM Luxembourg Sarl	Luxembourg
IBM CAPITAL MALAYSIA SDN. BHD.	Malaysia
IBM Malaysia Sdn. Bhd.	Malaysia
IBM Malta Limited	Malta
International Business Machines (Mauritius) Limited	Mauritius
IBM de Mexico, Comercializacion y Servicios S. de R.L. de C.V.	Mexico
IBM Maroc	Morocco
IBM International Group B.V.	Netherlands
IBM Nederland B.V.	Netherlands
IBM New Zealand Limited	New Zealand
RED HAT NEW ZEALAND LIMITED	New Zealand
International Business Machines West Africa Limited	Nigeria
IBM Finans Norge AS	Norway
International Business Machines AS	Norway
IBM Capital Peru S.A.C.	Peru
IBM del Peru, S.A.C.	Peru
IBM Philippines, Incorporated	Philippines
IBM Global Financing Polska Sp. z.o.o.	Poland
IBM Polska Sp. z.o.o.	Poland
Companhia IBM Portuguesa, S.A.	Portugal
IBM Qatar LLC	Qatar
IBM Romania Srl	Romania
IBM Middle East and North Africa RHQ LLC	Saudia Arabia
IBM-International Business Machines d.o.o., Belgrade	Serbia
IBM International Capital Pte. Ltd.	Singapore
IBM Singapore Pte. Ltd.	Singapore
RED HAT ASIA PACIFIC PTE. LTD.	Singapore
IBM Slovensko spol s.r.o.	Slovak Republic
IBM Slovenija d.o.o.	Slovenia

Name of Subsidiary	Country of Incorporation
IBM Global Financing South Africa (Pty) Ltd	South Africa
IBM South Africa (Pty) Ltd.	South Africa
IBM Global Financing Espana, S.L.U.	Spain
IBM Global Services Espana, S.A.	Spain
International Business Machines, S.A.	Spain
IBM Global Financing Sweden AB	Sweden
IBM Svenska Aktiebolag	Sweden
IBM Global Financing Schweiz GmbH	Switzerland
IBM Schweiz AG-IBM Suisse SA-IBM Svizzera SA-IBM Switzerland Ltd	Switzerland
IBM Taiwan Corporation	Taiwan
IBM Tanzania Limited	Tanzania
IBM Capital (Thailand) Company Limited	Thailand
IBM Thailand Company Limited	Thailand
IBM Tunisie	Tunisia
IBM (International Business Machines) Turk Limited Sirketi	Tiirkiye
IBM Ukraine	Ukraine
IBM Middle East FZ-LLC	United Arab Emirates
IBM United Kingdom Limited	United Kingdom
IBM United Kingdom Asset Leasing Limited	United Kingdom
IBM United Kingdom Financial Services Limited	United Kingdom
IBM del Uruguay, S.A.	Uruguay
IBM Credit LLC	USA (Delaware)
IBM International Group Capital LLC	USA (Delaware)
IBM International Foundation	USA (Delaware)
IBM World Trade Corporation	USA (Delaware)
Red Hat, Inc.	USA (Delaware)
Softlayer Technologies, Inc.	USA (Delaware)
IBM de Venezuela, S.C.A.	Venezuela
IBM Vietnam Company Limited	Vietnam

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International Business Machines Corp. & Combined Affiliates v. Tax Appeals Tribunal, No. 34, consolidated with *Walt Disney Co. & Consolidated Subsidiaries v. Tax Appeals Tribunal*, No. 35 (N.Y.) (consolidated opinion issued April 23, 2024).

International Business Machines Corp. & Combined Affiliates v. Tax Appeals Tribunal, No. 533572 (App. Div. 3d Dep't 2023) (opinion issued March 16, 2023).

Matter of International Business Machines Corp., DTA Nos. 827825, 827997, and 827998 (Tax Appeals Tribunal opinion issued March 5, 2021; Division of Tax Appeals opinion issued December 19, 2019).

Walt Disney Co. & Consolidated Subsidiaries v. Tax Appeals Tribunal, No. 35, consolidated with *International Business Machines Corp. & Combined Affiliates v. Tax Appeals Tribunal*, No. 34 (N.Y.) (consolidated opinion issued April 23, 2024)

Matter of Walt Disney Co. & Consolidated Subsidiaries v. Tax Appeals Tribunal, No. 532479 (App. Div. 3d Dep't) (opinion issued October 20, 2022).

Matter of Walt Disney Co., DTA No. 828304 (Tax Appeals Tribunal opinion issued August 6, 2020; Division of Tax Appeals opinion issued May 29, 2019).

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INTRODUCTION

States have broad discretion in designing their tax systems. As a result, it is possible in a global economy for the same transaction or income stream to be subject to taxation in multiple jurisdictions. That is not, in itself, unconstitutional. But there is an important limit: A state cannot adopt a regime that, if adopted by *every* jurisdiction, would tax interstate or foreign commerce more severely than intrastate commerce. *See Comptroller of Treas. of Md. v. Wynne,* 575 U.S. 542 (2015). That would discriminate against interstate or foreign commerce, which this Court has long held offends the Commerce Clause. *Id.* at 562.

One implication of that rule is that states cannot have it both ways when it comes to interstate or foreign commerce. They must commit to a neutral and internally consistent system. *See id.* Consider a tax on train rides. A state could choose to tax at the origin; a ride from Albany to Chicago would be taxable in New York, but the return trip would not. Or a state could tax at the destination, yielding the reverse result. Both are reasonable, and neither would tax interstate trips more than intrastate voyages if all states took the same tack. *See Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) ("If every State were to impose a tax identical to Oklahoma's, that is, a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax."). But what if New York said it would tax at the origin—unless the origin was outside New York, in which case it would tax at the destination? While that may sound reasonable—the State wants one bite at the taxing apple—think about what would happen if every state did the same. If New York and Illinois

both adopted this either/or system, a ride from Albany to Rochester would be taxed just once, but a trip from Albany to Chicago would be taxed *twice* (at the origin by New York and again at the destination by Illinois). That discriminates against interstate commerce and violates the internal consistency test.

The train hypothetical obviously is stylized, but this Court has repeatedly applied the same logic to reject state tax regimes that try to have their cake and eat it too. For example, Washington imposed a tax on both a product's *manufacture* and its *sale*, but provided an exemption from the manufacturing tax for taxpayers engaging in both activities within the state; this Court struck it down. *See Tyler Pipe Indus., Inc. v. Wash. State Dep't of of Rev.*, 483 U.S. 232 (1987). Washington was trying to make sure it taxed the item at least once—but if every state did the same, double taxation would fall uniquely on products transported across state lines for sale. As this Court has therefore held repeatedly, that "one way or the other" approach is impermissible. *See also, e.g.*, *Wynne*, 575 U.S. 542; *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984).

Yet that is *exactly* what New York did here. This case involves payment of royalties from one corporate affiliate to another. Like most jurisdictions, New York historically taxed those royalties only on the receiving end, while allowing the payor to deduct them from its income. But it got frustrated with corporations that shielded income by shipping royalties to affiliates in low-tax jurisdictions. The State could have solved that problem by shifting the tax to the payor: replacing the payor's deduction with an exclusion from income for the recipient. Instead, the State amended its rules to effectively impose the tax on *whichever side* allowed

the State to tax it: If the payor was subject to New York taxes, it would be taxed on the royalties it paid, and the recipient could exclude them from its income. But if the payor was not subject to New York taxes, then instead the recipient would have to pay tax on the royalties. Either way, New York wins.

That creates the same discrimination this Court has long found unconstitutional. If every state did this, *interstate* payment of royalties would be taxed twice—once as a non-deductible part of the payor's income in its jurisdiction, then again as a non-excluded part of the recipient's income in its jurisdiction. Meanwhile, *intrastate* transfers (meaning those between affiliates subject to tax in the same state) would be taxed only once, in that state. Just like the train hypothetical, Washington's manufacturing tax exemption, and the income tax regime in *Wynne*, the either/or scheme burdens interstate and foreign commerce. It is thus a plain violation of this Court's well-established internal consistency requirement.

The New York Court of Appeals upheld it anyway. In doing so, the court deepened a split, departing from decisions of at least three other states that invalidated similar regimes involving payments among corporate affiliates. New York is not the first state to uphold such a system, but it is the first to do so since this Court's clarification of the constitutional test in *Wynne*. And its decision cannot be squared with *Wynne*. Indeed, it flouts this Court's precedents. If left in place, the New York court's decision risks opening a gaping hole in the internal consistency test, inviting states to manipulate their tax regimes to discriminate against interstate and foreign commerce. This Court should therefore grant certiorari.

At a minimum, the Court should hold the petition for *Zilka v. City of Philadelphia, Tax Review Board* (23-914), where the Court requested the views of the Solicitor General. *Zilka* involves the same doctrines as this case and, if granted, could bear on the proper analysis of the New York tax at issue here.[1]

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet.App.1a) is published at 2024 WL 1724639. The opinion of the New York Appellate Division (Pet. App.43a) is published at 210 A.D.3d 86. The opinion of the Tax Appeals tribunal (Pet.App.52a) is unpublished. The opinion of the Administrative Law Judge (Pet.App.83a) is unpublished.

JURISDICTION

The New York Court of Appeals issued its decision on April 23, 2024. Pet.App.1a. On July 16, 2024, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 20, 2024. No. 24A36. This Court has jurisdiction under 29 U.S.C. § 1257(a).

PROVISIONS INVOLVED

The Commerce Clause states: "Congress shall have Power … [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3.

The statutory provision at issue is former New York Tax Law § 208(9)(o), reproduced at Pet.App.112a.

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[1] Beyond failing the internal consistency test, New York's tax regime is also facially discriminatory, for the reasons detailed in Disney's separate petition for certiorari—further underscoring the need for this Court's review.

STATEMENT

A. Taxation of Royalties, in New York and Elsewhere.

Large corporate families often assign intellectual property rights to an affiliate that is charged with the responsibility to manage the property, which then licenses rights to the property to other affiliates in exchange for royalty payments. Pet.App.4a-5a. For example, a technology company might license software to a subsidiary in exchange for royalties. Pet.App.4a-5a, 9a. This is a legitimate practice typically done to allow for the use of intellectual property, simplify operations, and ensure consistent product quality. *See* Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 9.20[8][j] (3d ed. 2023).

Most jurisdictions allow the affiliate that *pays* these royalties to deduct them from its income as business expenses, such that the royalty income is taxed only at the level of the *receiving* affiliate. *See id.* New York did the same until 2003. Pet.App.4a-5a. The State grew concerned, however, that companies were assigning intangible property to affiliates in low-tax jurisdictions, while New York affiliates then deducted royalty expenses. Pet.App.5a. That meant these companies were effectively shielding their income from New York's high tax.

To close this perceived loophole, New York enacted Tax Law § 208(9)(o), which established a new process to tax royalty payments between related entities. Pet.App.5a. Under that provision, companies *paying* royalties to affiliates must "add[] back" the payments to their income—in effect, disallowing any deductions on such payments for the payor. That is known as the

"Add-Back Requirement."[2] To prevent double taxation of the same royalties in New York, the statute allowed corporations *receiving* such royalties to exclude them from income—but only so long as the payor added them back for New York tax purposes. § 208(9)(o)(3). This is known as the "Royalty Income Exclusion." (New York revised these provisions after the events relevant here. Pet.App.3a-4a n.1.)

The bottom line of this tax regime is that it created an either/or system: New York taxpayers could exclude royalties received from an affiliate only if the payments came from another New York taxpayer that added them back to their income. This ensured corporate families were always taxed on the royalty income in New York at least once (but only once), whether on the paying end or the receiving end.

B. IBM and Its Corporate Structure.

International Business Machines Corporation (IBM) is a multinational technology and consulting corporation that was organized and founded in New York in 1911. Pet.App.55a; COA Br. 9. IBM operates in over 170 countries, primarily through locally incorporated subsidiaries. Pet.App.8a. One of IBM's subsidiaries, World Trade Corporation (WTC), is a Delaware corporation headquartered in New York,

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[2] The add-back requirement had three statutory exceptions (none of which are at issue here). An add-back was not required when: (1) the royalty payor was included in a combined report with the royalty recipient, N.Y. Tax Law § 208(9)(o)(2)(A); (2) the royalty was paid directly or indirectly to an unrelated royalty recipient, *id.* § 208(9)(o)(2)(B)(i); or (3) the royalty was paid to a related recipient in a foreign country with a comprehensive income tax treaty with the U.S., *id.* § 208(9)(o)(2)(B)(ii)). Other exceptions were added after the period relevant here.

which is "IBM's principal entity to conduct offshore activities," including "contract[ing] directly with third-party customers" and "serv[ing] as the holding company" for foreign affiliates. Pet.App.8a, 54a.

Since 1949—long before New York enacted the provision at issue here—IBM and WTC have licensed intellectual property to subsidiaries around the world, who in turn paid royalties back to IBM and WTC. Pet.App.8a-9a; COA Br. 9. Unlike corporations who reduced their taxes by deducting royalty payments from New York tax returns, IBM thus *included* royalty payments in its New York tax base. IBM collected royalties from foreign subsidiaries to whom it had licensed its intellectual property; those subsidiaries paid royalties *into* the State, Pet.App.8a-9a; COA Br. 9. This was the opposite of the "loophole" that New York sought to close in the 2003 law.

C. Procedural History.

This dispute arose because, by generally shifting its taxation of related royalties to the *payor* side to avoid tax avoidance by companies sending royalties abroad, New York created a regime that should (if applied in a non-discriminatory fashion) have permitted IBM to exclude from its income the royalties it *received* from foreign affiliates. IBM sought to use the new Royalty Income Exclusion to do just that.

More specifically, from 2007 to 2012, IBM filed a combined New York tax report[3] that sought to exclude

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[3] A "combined" franchise tax report considers the "combined entire net income" of all commonly-owned unitary domestic companies. *See* N.Y. Tax Law § 211(4) (2009). Such a report does not include income from companies "organized under the laws of a country other than the United States." *See id.* § 211(4)(a)(5).

royalties received from foreign affiliates, on the basis that these royalties qualified for the Royalty Income Exclusion under § 208(9)(o)(3). Pet.App.9a. In its 2007 to 2010 tax reports, IBM initially included these royalty payments as income but later amended its reports to exclude them, and sought a refund. *Id.* For 2011 to 2012, IBM excluded these royalty payments from its income in the first instance. *Id.*

The New York State Department of Taxation and Finance (the State) denied IBM the Royalty Income Exclusion because the foreign entities paying the royalties were not New York taxpayers and thus were not "adding back" the royalty payments to New York taxable income. Pet.App.3a, 9a. The State Division of Tax Appeals affirmed, as did the Appellate Division, Third Department. Pet.App.9a-10a.

IBM appealed to the New York Court of Appeals. Pet.App.10a. It argued that the New York tax regime, to the extent it allows royalty income to be excluded only if the royalty payor is subject to New York taxes, violates the Commerce Clause. Pet.App.12a-15a. In particular, § 208(9)(o) failed this Court's "internal consistency" requirement. *Id.* That test asks whether, if every state were to adopt the same taxation rule, it would disadvantage interstate commerce relative to domestic commerce. Pet.App.17a. New York's regime did so: It imposed a heavier tax burden on businesses that pay royalties across state lines. Pet.App.19a.

The Court of Appeals affirmed, holding that the tax was not "facially discriminatory" because the "income only had to be included on a New York tax return once," regardless of geography. Pet.App.15a. As for internal consistency, the court thought "duplicative

taxation" of interstate royalties was just an "incidental result" of non-discriminatory schemes, rather than an "impermissible burden on interstate commerce," apparently because other factors might impact the company's total tax burden. Pet.App.17a-21a.

Chief Judge Wilson concurred, offering "different reasons" for rejecting IBM's challenge. Pet.App.22a. He acknowledged the "risk of double taxation." Pet.App.39a. But he reasoned that since eligibility for the Royalty Income Exclusion turned on whether the payor *was subject to taxes* in New York—not whether it was "incorporated in New York"—it did not offend the Commerce Clause. Pet.App.22a-23a. In effect, he maintained that it is permissible to discriminate against "a corporation that does not do business in New York," so long as there is no discrimination based on where the company is incorporated or based. Pet.App.29a-32a, 35a.

REASONS FOR GRANTING THE PETITION

Multiple taxation is unavoidable in our national and international economy, and the Constitution does not forbid it. *Wynne*, 575 U.S. at 562. But it *does* prohibit state tax regimes that place a heavier burden on interstate or foreign commerce relative to intrastate or domestic commerce. *See id.* That is plain discrimination, and it discourages interstate or foreign trade, in turn defying the Commerce Clause. *See Bos. Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977) ("[T]he fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States."); *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 369 (2023) ("antidiscrimination … lies at the 'very core'" of Commerce Clause jurisprudence).

For the last forty years, most recently in *Wynne*, this Court has employed the "internal consistency test" as one way to "identify tax schemes that discriminate against interstate commerce." 575 U.S. at 562.[4] This test assesses whether a tax would impose a heavier burden on transactions that cross jurisdictional lines relative to those within a single state. The Court asks: If every jurisdiction adopted the same tax rule, would interstate transactions face a heightened risk of greater taxation, disadvantaging them compared to intrastate ones? *Id.* If the answer is yes, the tax discriminates against interstate or foreign commerce and therefore violates the Commerce Clause. *Id.*

The New York tax regime at issue here violates this test, because it taxes royalties on the recipient's side *only* if those royalties were not already taxed by New York on the payor's side. In other words, New York is trying to have it both ways—to ensure that it gets to tax either the royalties flowing *into* the State or *out* of the State. Although one can certainly understand that impulse, since New York itself is not imposing double taxation, the result is classically internally inconsistent: If all states took the same tack, royalty payments would trigger double taxation *only* if they cross jurisdictional lines. Nothing in the principal or concurring opinions escapes that simple fact—or its clear legal consequence.

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[4] *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983); *Armco*, 467 U.S. 638; *Tyler Pipe*, 483 U.S. 232; *Am. Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987); *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Okla. Tax Comm'n*, 514 U.S. 175; *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005).

At least three states have recognized in parallel contexts that such an either/or rule is discriminatory. New York instead followed New Hampshire to hold otherwise, thereby deepening a conflict while flouting this Court's precedents. This Court should grant review to resolve the conflict, preserve the integrity of its decisions, and prevent other states from following suit to benefit their state treasuries at the expense of foreign and interstate commerce.[5]

I. THE NEW YORK DECISION DEEPENS A CONFLICT OVER THE CONSTITUTIONALITY OF EITHER/OR STATE TAX REGIMES.

This case involves the payment of *royalties* from one affiliate to another, but courts have long grappled with similar problems posed by transfers within a corporate family. The recurring question is whether the income should be taxed on the front end or the back end, which matters when the two affiliates are in different states or countries. New York was not the first state to take the "we'll tax it one way or the other" approach. Yet at least three others—Mississippi, North Dakota, and California—had their regimes invalidated by state courts as discriminatory and violative of the internal

[5] This case deals with international rather than interstate commerce, but that difference is immaterial. As the New York Court of Appeals agreed, "*Wynne* … traces the use of [this] test to *Container Corp. of Am. v Franchise Tax Bd.*, which dealt with foreign commerce," and "the Tax Department does not dispute" that "the internal consistency test applies to international commerce." Pet.App.33a n.5. Accordingly, this petition treats foreign and interstate commerce as equivalent. If anything, the additional burden that applies when a state "seeks to tax the instrumentalities of foreign" commerce makes the constitutional violation here even clearer. *See, e.g.*, *Japan Line, Ltd. v. Cnty. of Los Angeles*, 441 U.S. 434, 451 (1979).

consistency test. In going the other way, New York did not strike out alone, but it did deepen the conflict, and exposed that this Court's 2015 decision in *Wynne* was not sufficient to resolve the controversy.

A. Other State Courts Have Invalidated Parallel Tax Regimes.

The New York Court of Appeals's decision squarely conflicts with those of at least three other state courts, all of which concluded that materially similar tax regimes failed the internal consistency test and thus discriminated against interstate commerce. In those three states, companies that received dividends from affiliates that paid taxes to the state were permitted to exclude those dividends from their income. Yet that benefit was withheld from companies whose dividend-paying affiliates were not already taxed by the state. All three states held that this regime of taxing either the dividend payor or the dividend recipient gave preferential treatment to intrastate dividends, violating the internal consistency test.

Mississippi. Most recently, in *Mississippi Department of Revenue v. AT&T Corporation*, the Mississippi Supreme Court considered whether the State could "tax differently two categories of business income that are completely identical except for the geographic footprint of the distributing corporation." 202 So. 3d 1207, 1226 (Miss. 2016) (cleaned up). At issue was a state law that allowed a parent company to exclude dividends from its income, but only if those dividends flowed from a subsidiary that itself filed a Mississippi tax return. *Id.* at 1209. This either/or law ensured that Mississippi would tax all dividends once and only once, either at the parent or subsidiary level.

The court concluded that this scheme "fail[ed] the internal consistency test" because it imposed an additional tax burden on dividends received from out-of-state subsidiaries (*i.e.*, those without a tax nexus to the State) relative to in-state subsidiaries (*i.e.*, those with a tax nexus to the State). *Id.* at 1226. "Because a non-nexus subsidiary distributes its already-taxed income to the parent as a dividend, [Mississippi] then subjects the parent to a second layer of taxation," which "[n]exus subsidiaries are exempt from." *Id.*

As the court appreciated, if every state adopted that system, companies with out-of-state dividend-paying subsidiaries would face double taxation on the same income (in the paying state and the receiving state), while those with in-state dividend-paying subsidiaries would pay tax only once. The only way to level the playing field would be for the subsidiaries to establish a taxable presence in Mississippi so that dividends could be excluded from the parent's income. Punishing companies with affiliates outside the state's tax reach violates the Commerce Clause. *See id.*

North Dakota. In *D.D.I., Inc. v. State ex rel. Clayburgh*, the North Dakota Supreme Court also invalidated a materially identical either/or state tax scheme. 657 N.W.2d 228 (N.D. 2003). Like the Mississippi regime, state law granted a "deduction to a dividend recipient to the extent the dividend payor's income was subject to North Dakota corporate income tax," but "did not grant a dividends received deduction" if "the dividend payor's income was not subject to North Dakota corporate income tax." *Id.* at 233. This law too ensured North Dakota would tax either dividend payors or recipients if one of the parties was outside of the state.

As in Mississippi, the court held that the differential treatment based on the dividend-payor's nexus to the State discriminated against interstate commerce. *See id.* at 231–35. Analyzed under the internal consistency rubric, the statute "effectively imposes a double layer of tax on the out-of-state income but not on the in-state income." *Id.* In light of "the corporate income tax that an out-of-state corporation's state might impose on the out-of-state corporation's profits," the regime unconstitutionally invited "double taxation for out-of-state corporate income." *Id.* at 234.

California. The California Court of Appeal struck down a similar provision. *See Farmer Bros. Co. v. Franchise Tax Bd.*, 108 Cal. App. 4th 976 (2003). The law there provided "a deduction for dividends received from corporations subject to tax in California, while no deduction [was] afforded for dividends received from corporations not subject to tax in California." *Id.* at 980, 986. Fitting the familiar pattern, this regime guaranteed the State would either tax the payor or recipient of the dividend.

As in Mississippi and North Dakota, the California court held that the statute "violate[d] the internal consistency doctrine" because "the imposition of the dividends received deduction by every state would favor intrastate commerce over interstate commerce by giving a greater tax benefit to taxpayers investing in their home state corporations as opposed to out-of-state corporations." *Id.* at 988–89; *see also Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d 611, 622 (Cal. App. 2000) (finding that similar dividends deduction violated the Commerce Clause "by allowing a deduction for insurance subsidiary dividends only to corporations domiciled in California").

* * *

As these examples illustrate, multiple state courts have recognized that it is inherently discriminatory for a state to tax either a payor or recipient of income. While this either/or mantra may appear sensible at first glance—after all, the state is *refraining* from collecting double taxation for itself—such a regime *invites* multiple taxation overall when it is replicated across all jurisdictions. It "creates a classic internal consistency problem," Walter Hellerstein, *Is "Internal Consistency" Dead?: Reflections on an Evolving Commerce Clause Restraint on State Taxation*, 61 TAX L. REV. 1, 15 (2007), because whenever a transaction crosses state lines, both jurisdictions will claim it as their own and subject it to tax. That impermissibly functions as a mechanism to favor businesses that operate entirely within a single state at the expense of those that operate nationally or internationally.

B. New York Is the First State To Uphold Such a Regime Post-*Wynne*.

The New York tax regime at issue here functions in materially the same way as the laws in Mississippi, North Dakota, and California that were struck down for either/or discriminatory taxation. Those states implemented a strategy of taxing dividend income either at the subsidiary level when the subsidiary was in-state, or at the parent level when the subsidiary was out-of-state, ensuring that the state would always get one crack at taxing the income. In § 208.9(o), New York did the same thing for royalty payments.

Like the Mississippi, North Dakota, and California laws, New York's regime was designed to tax the royalty payments once (but only once), by taxing either

the payor or the recipient, whichever side was subject to New York taxation. If the payor was a New York taxpayer, the sums had to be added back to its taxable income. N.Y. Tax Law § 208.9(o)(2). If the recipient was a New York taxpayer, it could not exclude that income unless the payor had already added it back to its taxable income. *Id.* § 208.9(o)(3). This ensured that New York could tax the royalty payment, regardless of which party was subject to its tax laws. If replicated universally, New York's regime (like Mississippi's, North Dakota's, and California's) would trigger double taxation that could be avoided only if both transacting parties did business and paid taxes in New York.

Nonetheless, the New York Court of Appeals upheld this either/or scheme. Its decision directly conflicts with the rulings in these three other states. *See Miss. Dep't of Revenue*, 202 So. 3d at 1226; *D.D.I.*, 657 N.W.2d at 231–35; *Farmer Bros.*, 108 Cal. App. 4th at 985–89. Indeed, the reasoning employed by the New York Court of Appeals is fundamentally at odds with the approaches taken by the courts in Mississippi, North Dakota, and California.

First, because "the income only had to be included on a New York tax return once," the New York court thought the tax impact was "neutral" as between in-state and foreign affiliates. Pet.App.15a. But this "once and only once" feature was present in each of the other cases too. *See Miss. Dep't of Revenue*, 202 So. 3d at 1209–11; *D.D.I.*, 657 N.W.2d at 229–33; *Farmer Bros.*, 108 Cal. App. 4th at 980–83. The other courts did not think it mitigated the discrimination against interstate commerce—for the simple reason that, even if each state taxes the transaction only once, this approach if replicated across the board means *another*

state will inevitably also be taxing interstate or foreign transactions (but not intrastate ones).

Second, the Court of Appeals seems to have thought that any internal consistency problem would be solved by New York's apportionment regime. Pet.App.18a-20a; *see also* Pet.App.35a-39a. But every state imposing an income tax uses a formula to apportion income, including Mississippi, North Dakota, and California. The Mississippi Supreme Court rejected the argument that the tax scheme satisfied internal consistency because "any given state would only tax the apportioned share of the parent's income that had not already borne a tax in its state." *Miss. Dep't of Revenue*, 202 So. 3d at 1224; *see also id.* at 1226 (reasoning that "second layer of taxation" was being "apportioned on the dividend itself"). The California court, too, implicitly rejected an argument that the state law satisfied internal consistency because "[t]he method used by California to determine the deductible amount of dividends is based upon an apportionment methodology." Reply Br., *Farmer Bros.*, 2003 WL 21977880, at *19-22 (Feb. 13, 2003). Nor did the North Dakota court see merit in this point when the State pressed it. *See* Reply Br., *D.D.I., Inc.*, No. 20020241, at *4 (Dec. 9, 2022) (asserting that scheme satisfied internal consistency because "[i]f all states had the North Dakota apportionment formula, only 100% of a corporation's income would be apportioned").

Third, as for the concurrence's distinction between discrimination based on place of incorporation versus discrimination based on doing business in the state, Pet.App.28a-32a, that does not distinguish these other cases either. None of their regimes turned on where the subsidiary was incorporated or headquartered;

they turned (like New York's law) on whether the affiliate was subject to a state's tax. *Miss. Dep't of Revenue*, 202 So. 3d at 1211, 1226; *D.D.I.*, 657 N.W.2d at 233; *Farmer Bros.*, 108 Cal. App. 4th at 980.

To be fair, New York was not the first state to resist. As the court explicitly recognized, the New Hampshire Supreme Court upheld a "virtually identical taxing scheme" in *General Electric Co., Inc. v. Comm'r, New Hampshire Department of Revenue*, 914 A.2d 246 (N.H. 2006). Pet.App.16a-17a. The New Hampshire scheme allowed a dividends-received deduction for companies with foreign subsidiaries, but only if those subsidiaries conducted business in New Hampshire. 914 A.2d at 249–50. The court upheld the scheme, reasoning that as long as businesses are taxed only once in the state, there is no "differential treatment" favoring intrastate operations. *Id.* at 257. Like the New York Court of Appeals here, the New Hampshire Supreme Court thus found no constitutional issues with an either/or tax regime.

The New Hampshire Supreme Court acknowledged the clear conflict with the state courts discussed above. *Gen. Elec.*, 914 A.2d at 471. Indeed, it explicitly stated that it did "not agree with the[] analysis" from the courts in North Dakota or California (Mississippi's decision came after). *Id.* at 471–72. GE sought review from this Court, which requested the views of the Solicitor General but ultimately denied review. *See Gen. Elec. Co., Inc. v. Comm'r, N.H. Dep't of Revenue* (No. 06-1210). Since then, however, the split has deepened on both sides. Mississippi has aligned with North Dakota and California, while New York has joined New Hampshire in upholding a "virtually identical taxing scheme." Pet.App.16a-17a.

The other development since the New Hampshire decision is this Court's ruling in *Wynne,* 575 U.S. 542, which (as discussed next) should have made clear that New Hampshire got it wrong and that North Dakota and California had properly applied the constitutional standard. The Mississippi Supreme Court correctly so understood, citing *Wynne* in finding unconstitutional a similar tax regime. *Miss. Dep't of Revenue*, 202 So. 3d at 1215–26. But New York failed to heed this Court's guidance and thereby exacerbated a conflict that this Court perhaps thought it had already resolved.

* * *

In sum, there is now a clear, recognized 3-2 split, persisting even post-*Wynne*, over the constitutionality of state tax regimes that seek to tax one side or the other of interstate or foreign transactions in the face of the internal consistency requirement. Only this Court can resolve that conflict.

II. THE NEW YORK COURT OF APPEALS'S DECISION FLOUTS THIS COURT'S PRECEDENTS.

This Court's decision in *Wynne* reaffirmed the longstanding principle that state tax regimes must be internally consistent, prohibiting a "have it both ways" approach to interstate or foreign transactions. Before *Wynne*, states might have reasonably argued that the law was unsettled—but New York cannot claim such uncertainty. The decision below stands directly at odds with this Court's clear guidance. For that reason as well, this Court should grant review and reverse the judgment of the New York Court of Appeals.

A. The Internal Consistency Test Prohibits Discriminatory State Tax Regimes.

The internal consistency test, deeply rooted in this Court's Commerce Clause jurisprudence, serves as a critical mechanism for preventing state tax regimes from discriminating against interstate commerce. *See Wynne*, 575 U.S. at 549. Indeed, this test reflects "a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Jefferson Lines*, 514 U.S. at 180; *see also Nat'l Pork Producers*, 598 U.S. at 369 ("[T]he Commerce Clause prohibits the enforcement of state laws driven by ... economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." (cleaned up)).

As described above, the test asks whether a state's tax structure, if applied universally, would place interstate commerce at a disadvantage compared to intrastate commerce. This principle was first articulated in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), and has been "invoked in no fewer than seven cases," *Wynne*, 575 U.S. at 564. "A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." *Jefferson Lines*, 514 U.S. at 180.

One of the first cases to require internal consistency, *Armco Inc. v. Hardesty*, considered a West Virginia law that imposed a tax on both manufacturing and wholesaling but exempted companies that engaged in both activities in West Virginia from the wholesaling tax. 467 U.S. at 640–42. This exemption did not apply to companies that manufactured in West Virginia and wholesaled in another. *Id.* The Court held that this either/or regime failed the internal consistency test because, if every state adopted West Virginia's approach, a business that manufactured in one state and sold in another would be taxed twice—once on each activity. *Id.* at 642–44. In contrast, a business operating solely within a single state, handling both manufacturing and wholesale, would only be taxed once, thanks to the exemption. *Id.* The Court concluded that the risk of imposing a greater overall tax burden on interstate commerce compared to intrastate commerce was sufficient to violate the Commerce Clause. *See id.*

A few years later, the Court considered a similar tax regime in *Tyler Pipe*. Washington State imposed a tax on receipts from manufacturing and wholesaling but, like West Virginia, offered an exemption for taxpayers doing both in the state. 483 U.S. at 234–37. As in *Armco*, this Court invalidated the tax as internally inconsistent. *Id.* at 248. The Court explained that this regime "exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." *Id.*

Finally, the most recent and significant application of the internal consistency test was in *Wynne*, 575 U.S. at 562. Maryland imposed a "state tax" and a "county

tax" on residents' full income (wherever derived). *Id.* at 546. While Maryland provided a tax credit against the state tax for taxes paid to other states, it did not provide a credit against a resident's county tax. *Id.* As a result, some income that Marylanders earned outside the State was taxed twice. *Id.* Applying the internal consistency test, the Court, in an opinion by Justice Alito, reasoned that if every state adopted a similar scheme, it would penalize residents for earning income across state lines: A resident's in-state income would be taxed once, but out-of-state income would be taxed twice (by the state of residency and the state of generation). *Id.* at 564–67. The Court emphasized that its precedents "all but dictate the result in this case," explaining that it has long "struck down [] state tax scheme[s] that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity." *Id.* at 550–51.

B. New York's Regime for Related Royalties Violates the Internal Consistency Test.

Under these precedents, the New York regime plainly violates the internal consistency test. Indeed, this case is squarely controlled by them—particularly *Wynne*, *Armco*, and *Tyler Pipe*. The same dynamic arose in each case: the state had two alternative methods of taxation and wanted to collect revenue either way. While this either/or approach avoided double taxation *in* the state, it created double taxation *overall* for interstate transactions. So too here.

Start with *Wynne*. Instead of taxing income based on *either* residency *or* the location where the income was generated, Maryland sought to do both—taxing

residents on their total income, regardless of where it was earned, and also taxing non-residents on income generated in Maryland—but not offering residents a full credit for taxes paid to other states. *Wynne*, 575 U.S. at 562–67. If every state took the same approach, the effect would be discriminatory against interstate commerce: All income earned by residents interstate would be subject to double taxation (once by the state of residency and again by the state where the income was generated, with no offsetting credit). *Id.* The only way to avoid this double taxation would be to avoid engaging in interstate business altogether. *Id.* That offends the fundamental core of the Commerce Clause.

Similarly, in both *Armco* and *Tyler Pipe*, the states sought to tax *either* manufacturing *or* sale, whichever occurred within their borders, but to a maximum of once per good. *Armco*, 467 U.S. at 642–44; *Tyler Pipe*, 483 U.S. at 243–48. Yet these schemes created the same constitutional problem: If every state taxed in this manner, interstate businesses would uniquely face double taxation—in the state of manufacture and again in the state of sale. *See id.*

New York's tax scheme did exactly the same thing for royalties. Like in those cases, New York's goal was to tax the transaction once. But by setting up a regime that taxed either royalties paid or royalties received—whichever fell within its tax jurisdiction—the only way to avoid double taxation was to ensure that both payor and recipient did business and paid taxes in New York. This facial discrimination in favor of in-state activity is precisely what internal consistency is designed to prevent. *See Wynne*, 575 U.S. 562–67; *Armco*, 467 U.S. at 642–44; *Tyler Pipe*, 483 U.S. at 243–48.

As the leading scholar in this area explained: "A taxing scheme with alternative taxes, taxable events, or tax bases often will fail to pass muster under internal consistency analysis. The defect in these taxing measures, like the defects in the measures the Supreme Court struck down in *Armco* and *Tyler Pipe*, is that the existence of more than one taxable alternative in a single taxing jurisdiction triggers only one tax in that jurisdiction whereas the existence of any taxable alternative in any other jurisdiction triggers a tax in each one of those jurisdictions." Hellerstein, *supra*, at 8–9. Exactly right.[6]

C. The Contrary Rationales Offered by the New York Court of Appeals Are Flawed.

The New York Court of Appeals's reasoning does not hold up to scrutiny and would, if taken seriously, blow a hole through this Court's precedents.

The majority first asserted that because "the income only had to be included on a New York tax return once," this "result[ed] in a neutral economic impact on the corporate group as a whole." Pet.App.15a. But this misunderstands the doctrine. Even if the income only appears on a *New York* tax return once, it is subject to double taxation *across jurisdictions*. *Wynne*,

[6] The analysis would be different if New York had required the recipient to include the income only if it was not taxed in *any* jurisdiction on the payor's side. As this Court recognized in *Tyler Pipe* (citing Justice Cardozo), a tax scheme designed to equalize the tax burden between in-state and out-of-state transactions is consistent with the Commerce Clause. 483 U.S. at 245 n.14. Indeed, many state tax systems operate this way, neutrally and consistently. *See, e.g.*, Multistate Tax Comm'n, Model Statute Requiring the Add-back of Certain Intangible and Interest Expenses, § 1(c) (Aug. 17, 2006); *Kohl's Dep't Stores, Inc. v. Va. Dep't of Taxation*, 810 S.E.2d 891 (Va. 2018).

575 U.S. at 561–62. And "the fact that the tax might have the advantage of appearing nondiscriminatory does not save it from invalidation." *Id.* at 566 (cleaned up).

The court next stated that even if New York's rule results in royalties being taxed in two jurisdictions, it comports with internal consistency because New York "apportions" the income (*i.e.*, only taxes its share of it, based roughly on the taxpayer's share of business operations in New York). Pet.App.18a-20a. But this conflates distinct concepts. The constitutional problem is that the same income is being included in the tax base of taxpayers in two jurisdictions—which would not occur if they operated exclusively in a single state. Apportionment, like tax rates, is a separate step that determines the portion of the income associated with the taxing state; it does not eliminate the discriminatory effect of taxing interstate transactions differently. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 398–99 (1984) ("Nothing about the apportionment process releases the State from the constitutional restraints that limit the way in which it exercises its taxing power over the income within its jurisdiction."); *Wynne*, 575 U.S. at 561–68.

Indeed, as noted above, courts in Mississippi, North Dakota, and California rejected similar apportionment arguments in finding those tax regimes to be unconstitutional. *See Miss. Dep't of Revenue.*, 202 So. 3d at 1222–26; Reply Br., *Farmer Bros.*, 2003 WL 21977880, at *19-22; Reply Br., *D.D.I., Inc.*, No. 20020241, at *4 (Dec. 9, 2022); *see also supra* at 17.

The concurrence evidently recognized flaws in the majority's logic and sought to provide alternative rationales. But its efforts fare no better.

First, the concurrence fleetingly suggested that a payor need only *file a return* in New York to receive the deduction, without *conducting any business* there. Pet.App.25a-28a. Yet it quickly walked that back, conceding that a taxpayer is not actually a "New York taxpayer" if it owes no tax, rendering incorrect this suggestion (which the majority did not repeat). Pet.App.27a n.2.

Next, the concurrence asserted that New York's law did not discriminate based on geography, but rather based on where business is conducted. Pet.App. 29a-32a. That does not cure the constitutional evil; if anything, it makes it worse. The fact remains that the only way to avoid double taxation is to ensure that both the payor and recipient *conduct business* in New York and pay taxes there. Indeed, the concurrence admitted New York's system created the "incentive" for the payor "to file a corporate franchise return in every jurisdiction where the recipient does." Pet.App.34a. That is exactly IBM's point. A regime that coerces companies to do business in a state to avoid double taxation offends the Commerce Clause, regardless of where the entities are incorporated or based. *See, e.g.*, *Armco*, 467 U.S. at 642–45.

Finally, the concurrence stressed that, although the New York tax regime's differential treatment of interstate or foreign transactions created "the risk of double taxation," that was not enough to make it unconstitutional. Pet.App.39a. Insofar as it meant the risk had not yet been proven to have materialized in practice, that is clearly wrong, and has been for nearly a century. *See J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) ("Interstate commerce would thus be subjected to the risk of a double tax burden to

which intrastate commerce is not exposed, and which the commerce clause forbids"); *Gwin, White & Prince. Inc. v. Henneford*, 305 U.S. 434, 439 (1939) (finding a tax unconstitutional "since it imposes … merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed"); Hellerstein *et al.*, *supra* ¶ 4.16[1][e] ("[T]he internal consistency doctrine reinforces the principle that it is the *risk* rather than the actuality of multiple taxation or discrimination that is the test for evaluating the constitutionality of facial attacks on state statutes under the Commerce Clause.").

* * *

Like most tax controversies, this one seems complex at first. But on closer review, it is actually very simple. Taxing royalties whether they flow *in* or *out* of New York is internally inconsistent, because it disparately burdens interstate and foreign transactions. Under this Court's precedents, that either/or taxation violates the Commerce Clause. Letting New York get away with this would weaken the internal consistency test and jeopardize enforcement of Commerce Clause protections against discriminatory state taxes. Review is warranted.

III. THE INTEGRITY OF THE INTERNAL CONSISTENCY TEST IS IMPORTANT AND WARRANTS REVIEW HERE.

The Court should resolve the split exacerbated by the Court of Appeals's decision, and correct its errors, because of the importance of this doctrine and the very real dangers that would arise from undermining it.

Internal consistency is critical to our economy. It ensures that tax schemes do not favor intrastate over interstate or foreign transactions, preserving the

foundational principle that economic activities should not be penalized merely because they cross state (or national) boundaries. The test is also fundamental to maintaining a fair and balanced market, free from protectionist tendencies.

Scholars have long recognized the significance and importance of this test. Professors Michael Knoll and Ruth Mason have emphasized that the internal consistency requirement "promotes competitive neutrality" and is "invaluable" in preventing states from adopting tax structures that would lead to multiple taxation of the same income, which in turn would deter interstate or foreign commerce. Michael S. Knoll & Ruth Mason, *The Economic Foundation of the Dormant Commerce Clause*, 103 VA. L. REV. 309, 340–42 (2017). Indeed, the internal consistency test "finds itself with broad support from academics," because it is able to properly "identify statutes that are inherently discriminatory." Adam B. Thimmesch, *The Unified Dormant Commerce Clause*, 92 TEMP. L. REV. 331, 364 (2020); *see also Wynne*, 575 U.S. at 563 (noting that there is little "question[]" regarding "the economic bona fides of the internal consistency test").

The underlying question here is whether a state can "have its cake and eat it too" by crafting tax schemes that guarantee the state a chance to tax an income stream or transaction at the expense of double taxation of interstate or foreign income or transactions. There are a plethora of other contexts in which states can play that game with respect to transactions within corporate groups: *e.g.*, as to intangible assets, dividends, interest payments, management fees, or business income. The potential for such practices to proliferate could undermine the

national and international economic unions that the Commerce Clause was designed to protect.

New York has since revised the provisions at issue here, perhaps recognizing their constitutional flaws. But this "remains a justiciable controversy," because the repeal "does not affect the tax years at issue in this litigation." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 327 n.1 (1996). This Court has previously reviewed the constitutionality of repealed tax regimes. *E.g.*, *id.* (considering North Carolina's intangibles tax after its repeal). That is because the principle at stake matters more than any particular regime. After all, "[t]he immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." *Armco*, 467 U.S. at 645 n.8. These discriminatory tax schemes can and do readily reemerge in different forms.

In short, the question presented here is important both in theory and in practice, and New York's willingness to defy this Court's precedents creates the troubling specter of other states following suit, eroding the Commerce Clause's protections. For these reasons too, the Court should grant review, and reverse.

IV. ALTERNATIVELY, THIS COURT SHOULD HOLD THIS PETITION FOR *ZILKA*.

Although a grant is warranted, this Court should at minimum hold this petition pending the disposition of *Zilka v. Tax Review Board of Philadelphia* (23-914), another pending petition that implicates the internal consistency test, as to which the Court has called for the views of the Solicitor General.

The issues in *Zilka* closely mirror those in this case, particularly concerning the application of the internal consistency test to state tax schemes that could lead to double taxation of interstate income. Both cases raise significant questions about how to identify practices that discriminate against interstate commerce.

In *Zilka*, the Pennsylvania Supreme Court upheld a regime that permits the double taxation of out-of-state income, a decision that conflicts with the internal consistency principles that *Wynne* reiterated. *Zilka v. Tax Rev. Bd. City of Phila.*, 304 A.3d 1153, 1155 (Pa. 2023); *see also* Pet. for Cert., *Zilka*, No. 23-914, at *14 (asserting that petitioner's "cross-border economic earnings were subject to impermissible multiple taxation"). Both cases thus inquire whether state tax systems can penalize interstate commerce by imposing multiple layers of taxation—a practice the internal consistency test is specifically designed to prevent.

As such, if this Court ultimately grants certiorari in *Zilka*, it will need to apply and clarify the internal consistency test. That in turn would warrant vacatur and remand here, at minimum. So if this Court does not grant review outright, it should at least hold this petition pending the resolution of *Zilka*.

CONCLUSION

This Court should grant the petition.

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