Nos. 18-1569, 18-1570

IN THE

Supreme Court of the United States

RICHARD CHAMBERLAIN, *et ux.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Respondents.

SAMUEL EDELMAN, *et ux.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK FOR THE FIRST AND THIRD JUDICIAL DEPARTMENTS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether New York's personal income tax scheme is consistent with the dormant Commerce Clause and with this Court's decision in *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. __, 135 S. Ct. 1787 (2015), when New York provides its residents with a tax credit for personal income taxes paid to another State on income earned in that State, but not for taxes paid to another State on intangible income not derived from economic activities in the other taxing State.

RELATED CASES

- *Edelman v. New York State Department of Taxation and Finance*, Index No. 156415/2016, Supreme Court of the State of New York, New York County. Judgment entered June 13, 2017.

- *Edelman v. New York State Department of Taxation and Finance*, 6970-6971, Supreme Court of the State of New York, Appellate Division, First Department. Judgment entered June 26, 2018.

- *Edelman v. New York State Department of Taxation and Finance*, Motion No. 2018-1235, New York State Court of Appeals. Decision entered March 26, 2019.

- *Chamberlain v. New York State Department of Taxation and Finance*, Index No. 174-16, Supreme Court of the State of New York, Albany County. Judgment entered March 13, 2017.

- *Chamberlain v. New York State Department of Taxation and Finance*, 525967, Supreme Court of the State of New York, Appellate Division, Third Department. Judgment entered November 1, 2018.

- *Chamberlain v. New York State Department of Taxation and Finance*, Motion No. 2018-1236, New York State Court of Appeals. Decision entered March 26, 2019.

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STATEMENT

In *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. __, 135 S. Ct. 1787 (2015), this Court held that Maryland's personal income tax violated the dormant Commerce Clause because Maryland failed to give its residents a full credit against Maryland's income tax for taxes paid to other States on income earned in those States. The Court noted that, in failing to provide a full credit, Maryland was an outlier: "the near-universal state practice is to provide credits against personal income taxes for taxes paid to other States." *Id.* at 1801.

New York provides the precise tax credit whose absence doomed Maryland's taxing scheme in *Wynne*. Under New York law, State residents receive a credit for personal income taxes that they pay to another State on income earned in that State. Like many other States, however, New York does not offer its residents a credit for tax paid to another State on income from intangible assets when that income cannot be traced to activities in that State.

Petitioners[1] are two couples who, for multiple years, were domiciled in Connecticut, maintained residences in New York, and spent more than 183 days in New York. As a result, they were subject to liability for personal income tax as residents in both Connecticut and New York. Both sets of petitioners initially filed resident income tax returns in Connecticut, and nonresident income tax

1. The petitioners in *Edelman* and *Chamberlain* have filed separate petitions for writs of certiorari; we submit this single opposition to both.

returns in New York for those years. After an audit in each case, petitioners were found to be statutory residents of New York, and assessed liability for income tax on, inter alia, their income from the sale of stock in businesses that they managed. New York did not give them a credit for resident income taxes that they paid to Connecticut on that intangible income because the income was not earned in Connecticut.

It is that feature of state law that petitioners ask this Court to review. Petitioners challenge the failure to give them credit for taxes paid to Connecticut on the income from the sale of intangible assets with no connection to Connecticut. *Wynne* did not address the absence of a credit for tax paid to another state on income from intangible assets not traceable to activities in that State, and thus the decisions below upholding the New York statute do not conflict with *Wynne*. Nor does that feature of New York law violate the dormant Commerce Clause, because it does not discriminate against interstate commerce.

A. *Edelman* Facts and Proceedings Below

In 2010 and 2013, petitioners Samuel Edelman and Louise Edelman were domiciled in Connecticut and statutory residents of New York. *Edelman* Pet. App. 3a, 7a-8a. The Edelmans founded and owned shares in Edelman Shoe, Inc., a corporation formed in Delaware and based in New York City. *Id.* 7a. In 2010, they sold their stock in Edelman Shoe to an unrelated corporation, and continued to work at the New York offices of the acquiring corporation. *Id.* 8a.

The Edelmans filed nonresident New York tax returns for 2010 and 2013. *Id.* 8a. After an audit, New York found that the Edelmans were residents of New York in 2010 and 2013, and owed $6,165,329 in unpaid taxes, the vast majority of which resulted from their capital gain on the 2010 sale of Edelman Shoe. *Id.* 9a. Under Connecticut law, the Edelmans could seek a credit on their Connecticut income tax for the tax that they paid to New York, if they demonstrated that the income was derived from New York. *See* Conn. Gen. Stat. § 12-704(a)(1); Conn. Agencies Regs. §§ 12-704(a)-1(a)(1), 12-704(a)-4(a)(3). The record contains no indication that the Edelmans sought a credit on their Connecticut taxes.

The Edelmans instead commenced a declaratory judgment action in New York Supreme Court, New York County, alleging that New York's failure to provide them with a full credit for taxes paid to Connecticut on their intangible income violated the dormant Commerce Clause. *Edelman* Pet. App. 9a. The court dismissed the complaint for failure to state a cause of action, relying on the New York Court of Appeals' decision in *Tamagni v. Tax Appeals Tribunal*, 91 N.Y.2d 530 (1998), *cert. denied*, 525 U.S. 931 (1998), and distinguishing this Court's decision in *Wynne*. *Edelman* Pet. App. 12a-14a. The decision was affirmed by the Supreme Court of New York, Appellate Division, First Department, which rejected the Edelmans' argument that *Wynne* undermined *Tamagni*. *Id.* 2a. The Edelmans appealed to the New York Court of Appeals, claiming that the appeal presented a substantial constitutional question, but the Court of Appeals dismissed the appeal on the ground that no substantial constitutional question was directly involved; it also declined to grant discretionary review of the case. *Id.* 1a.

B. *Chamberlain* Facts and Proceedings Below

From 2009 to 2011, petitioners Richard Chamberlain and Martha J. Crum, a married couple, were domiciled in Connecticut and statutory residents of New York. *Chamberlain* Pet. App. 2a, 6a. Chamberlain was the president of Chamberlain Communications Group, Inc., of which Chamberlain, Crum, and their family trust owned 90% of the stock. *Id.* 6a; *Chamberlain* Record on Appeal at 350. At the relevant time, Chamberlain Communications was a New York corporation with its sole office in New York City; it was not qualified or authorized to do business as a foreign corporation in any jurisdiction. *Chamberlain* Record on Appeal at 357.

In 2007, Chamberlain and other shareholders, including Crum, sold their stock in Chamberlain Communications to an unrelated entity. *Chamberlain* Pet. App. 6a. Chamberlain was employed in New York by the successor corporation through 2010. *Id.* Under the sale agreement, Chamberlain and Crum received a substantial portion of the purchase price in 2010. *Id.* 3a.

Chamberlain and Crum filed nonresident New York tax returns during 2009-2011. After an audit, New York found that Chamberlain and Crum were residents of New York in those years, and owed $2,731,953 in unpaid taxes, again principally as a result of the sale of their company. *Id.* 3a, 7a. As with the Edelmans, the record contains no indication that Chamberlain and Crum sought a tax credit from Connecticut for the tax they paid to New York.

Chamberlain and Crum commenced a declaratory judgment action in New York Supreme Court, Albany

County. The court granted summary judgment to the defendants, again relying on *Tamagni* and distinguishing *Wynne*. *Id*. 12a-13a. The Supreme Court of New York, Appellate Division, Third Department, affirmed, relying on the First Department's decision in *Edelman*. *Id.* 4a. The Court of Appeals dismissed Chamberlain and Crum's appeal and denied their motion for leave to appeal. *Id*. 1a.

C. New York's Taxation of Residents' Intangible Income

New York has defined a resident to include either a person domiciled in the State or one who "maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state." N.Y. Tax Law § 605(b)(1)(B); *see generally Tamagni*, 91 N.Y.2d at 535 (describing New York's definition of resident); *Gaied v. N.Y. State Tax Appeals Tribunal*, 22 N.Y.3d 592, 598 (2014) (requiring taxpayer to "have a residential interest" for property to constitute permanent place of abode). The latter category are referred to as statutory residents. Among States with income taxes, many have some form of statutory residence, and the most common approach is New York's. *See infra*, p. 19 at n. 5. These statutory provisions are designed to discourage tax evasion by limiting the ability of a state resident to avoid income tax liability by maintaining a domicile elsewhere.

New York does not tax the income of nonresidents unless it is derived from a source within the State. N.Y. Tax Law § 631(b)(2). By contrast, residents, whether domiciliaries or statutory residents, are taxed on their income no matter where earned. N.Y. Tax Law § 612(a).

New York recognizes that its residents may be subject to tax in other jurisdictions, however. It accordingly allows residents a credit on income taxes paid to "another state of the United States, a political subdivision of such state, the District of Columbia or a province of Canada" if the income is "derived therefrom" and is also taxable in New York. N.Y. Tax Law § 620(a); N.Y. Comp. Codes R. & Regs. tit. 20, ("20 N.Y.C.R.R.") § 120.1(a).

To determine whether a resident's income is derived from a source in another jurisdiction, New York uses the same sourcing test that it uses to determine if a nonresident's income is "derived from or connected with New York sources." N.Y. Tax Law § 631(a). Thus, a resident is entitled to a credit against personal income tax due to another jurisdiction "upon compensation for personal services performed in the other jurisdiction, income from a business, trade, or profession carried on in the other jurisdiction, and income from real or tangible personal property situated in the other jurisdiction." 20 N.Y.C.R.R. § 120.4(d).

New York taxes a resident's income from intangible property in accordance with these principles. Intangible income includes investment income, such as interest, dividends, and gains from the sale of intangible assets such as stock. It generally "has no identifiable situs" because it "is not derived, at least directly, from the taxpayer's efforts in any jurisdiction outside of New York" and thus "cannot be traced to any jurisdiction outside New York." *Tamagni*, 91 N.Y.2d at 530. For intangible income, New York follows the common law doctrine of *mobilia sequuntur personam*, whereby intangible property, in the absence of an otherwise identifiable situs, is deemed to

"follow" its owner. It thus shares its owner's geographic location. *Id.* at 536; *see also Curry v. McCanless*, 307 U.S. 357, 367-68 (1939) (explaining the *mobilia sequuntur personam* principle); 2 J. Hellerstein & W. Hellerstein, State Taxation ("Hellerstein"), ¶ 20.05(6), pp. 20-91 to 20-92 (3d ed. 2003) (noting that most states recognize the *mobilia* principle).

Accordingly, where intangible property cannot be traced to the other taxing State, New York residents are taxed on their intangible income without credit for taxes paid on that income to that State. "However, where the taxpayer can show that intangible income is in fact derived from the taxpayer's activities in a state other than New York, the taxpayer is entitled to the credit." *Tamagni*, 91 N.Y.2d at 536 (citing 20 N.Y.C.R.R. § 120.4(d)). Specifically, resident taxpayers are entitled to a credit against tax paid to another State on intangible income where it "is from property employed in a business, trade or profession carried on in the other jurisdiction." 20 N.Y.C.R.R. § 120.4(d).

While intangible income is presumed to share the geographical location of its owner, taxpayers are thus given an opportunity to demonstrate that such income arose from property used in a particular jurisdiction. *See Michaelsen v. N.Y. State Tax Comm'n*, 67 N.Y.2d 579, 584 (1986) (stock options in New York company exercised by nonresident employee were compensation attributable to nonresident's profession); N.Y. State Dep't of Tax. & Fin., Technical Services Bureau, "New York's Tax Policy Relating to the Taxation of Intangible Personal Property of Nonresidents," TSB-M-92(3)I (October 9,

1992)[2] (interest on business checking account is intangible income from property employed in business carried on in New York).

New York adopted its current approach to resident tax credits for intangible income in 1968.[3] New York's approach is followed by many states, which generally "limit their credits for taxes paid to other states to taxes that are paid on income 'derived from sources in other states.'" 2 Hellerstein ¶ 20.10(2), at pp. 20-225 to 20-226; *see infra*, p. 20 at n. 6.

D. The New York Court of Appeals Upholds New York's Tax Scheme Against a Dormant Commerce Clause Challenge

In 1998, the New York Court of Appeals upheld New York's resident tax on intangible income against a dormant Commerce Clause challenge similar to the challenges here. *See Tamagni*, 91 N.Y.2d at 530. Among other things, the court concluded that New York's taxing scheme did not discriminate against or burden interstate commerce because the tax "simply taxes residents based on their

2. Available at https://www.tax.ny.gov/pdf/memos/multitax/m92_3i_1e.pdf, last accessed August 22, 2019.

3. In 1954, New York enacted a definition of a statutory resident as one who maintains a permanent place of abode in New York and is present more than 183 days in a year. 1954 N.Y. Laws ch. 99, § 1, amending former N.Y. Tax Law § 305(7). In 1957, it first offered a resident tax credit, former N.Y. Tax Law § 363(2), which it has continued to offer since, 1960 N.Y. Laws ch. 563, § 2. Finally, in 1968, New York adopted the regulation that explicitly requires use of the same sourcing test for residents' income that is used for nonresidents' income. Former 20 N.Y.C.R.R. § 121.3 (adopted 1968, renumbered 1982 and 1992).

status as residents" without regard "to any specific commercial or economic transaction or activity." *Id.* at 538, 540. And resident status, in turn, "is imposed solely based upon [a taxpayer's] presence and maintenance of a permanent place of abode in New York, without regard to any economic activities incidental to [the taxpayer's] presence here." *Id.* at 538.

In finding that New York's tax scheme did not burden interstate commerce, the court rejected two arguments that petitioners raise here. *See Edelman* Pet. 16; *Chamberlain* Pet. 16-17. First, it denied that the tax implicated the interstate labor market because one of the taxpayers commuted to work in New York, reasoning that the tax was "based solely upon the taxpayer's presence in New York" and was "not assessed against the interstate labor market per se." 91 N.Y.2d at 541. Second, it rejected the claim that the tax implicated the interstate real estate market, because the basis of the tax was "maintenance of a permanent place of abode in New York," not an interstate transaction. *Id.*; *see* N.Y. Tax Law § 605(b)(1)(B).

E. This Court's Decision in *Wynne*

In 2015, this Court in *Wynne* invalidated an aspect of Maryland's personal income tax under the dormant Commerce Clause. 135 S. Ct. at 1787. The Court found that Maryland discriminated against interstate commerce by failing to provide its residents with a full credit against taxes paid to other States on income earned in those States.

The tax scheme considered in *Wynne* had three basic components: (1) Maryland taxed the income of its residents

no matter where earned; (2) Maryland provided only a partial credit for taxes that its residents paid to other jurisdictions on income earned in those jurisdictions; and (3) Maryland taxed nonresidents on their income derived from Maryland sources. *Id.* at 1792.

The taxpayers in *Wynne* owned stock in a subchapter S corporation that "earned income in States other than Maryland" and that "filed state income tax returns in 39 States." *Id.* at 1793. The corporation passed its income directly through to its shareholders, who reported their ratable shares of the corporation's income on their individual tax returns. *Id.* at 1793 & n.1. The taxpayers, who were domiciliaries, and thus residents, of Maryland, claimed a credit on their Maryland tax returns for the tax that the corporation paid to other states on income the corporation earned in those states. *Id.* at 1793. However, they were only allowed a partial credit under Maryland law. *Id.* This Court held that Maryland's failure to provide a full credit, in light of its overall tax scheme, discriminated against interstate commerce. *Id.* at 1795.

Wynne rested on two grounds. First, the Court found that Maryland's tax could not be reconciled with three of the Court's prior dormant Commerce Clause decisions involving multi-state businesses. In those cases, the Court invalidated tax schemes under which each business paid taxes to the State of its headquarters on income or gross receipts derived from business that it conducted in other States, while also paying taxes on that same income or receipts to those other States. *Id.* at 1795. In all three cases, the income subject to double taxation was income "derived from activities in interstate commerce" such as "services provided in neighboring States." *Id.*

Second, to help identify whether Maryland's scheme discriminated against interstate commerce, the Court subjected it to the "internal consistency test," which "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Id.* at 1802-03 (citations omitted). The Court found that Maryland's scheme failed that test because if every State adopted its three basic components as described above, the result would discriminate against interstate income.

In particular, a State resident who earned income strictly in-state would be taxed less than a resident of the same State who earned income in a neighboring State, which itself taxed nonresident income based on source. *Id.* at 1803-04. This is because the intrastate income would be taxed only once, by the State of residence, whereas the interstate income would be taxed twice, once by the State of residence and once by the State of source. The Court likened this result to a "tariff" on interstate commerce, the "paradigmatic example of a law discriminating against interstate commerce." *Id.* at 1804 (citation omitted). In striking Maryland's tax scheme, however, the Court emphasized that double-taxation is not inherently invalid, so long as it does not arise from taxes that discriminate against interstate commerce. *Id.* And the Court noted that Maryland could cure the constitutional deficiency by offering a tax credit for personal income taxes paid to other states, "the near-universal state practice." *Id.* at 1801 (citation omitted).

REASONS FOR DENYING THE PETITION

I. There Is No Conflict Between New York's Personal Income Tax Scheme and This Court's Decision in *Wynne*

Petitioners' primary argument in favor of certiorari, and even summary reversal, is that New York courts disregarded this Court's recent decision in *Wynne* in upholding New York's tax scheme against their dormant Commerce Clause challenge. In particular, they claim that New York's tax scheme fails the internal consistency test used by *Wynne* to identify discrimination against interstate commerce. *Edelman* Pet. 13; *Chamberlain* Pet. 13. Petitioners are mistaken: the decisions below do not conflict with *Wynne* or with any other decision of this Court. There is therefore no need for review, much less summary reversal, in these cases.

In fact, the decisions below specifically recognized that New York's tax scheme contains precisely the tax credit that this Court found, in *Wynne*, would cure the defect in Maryland's tax scheme. *Edelman* Pet. App. 4a; *Chamberlain* Pet. App. 4a. That tax credit would have cured the defect because, under this Court's dormant Commerce Clause precedents, a State may not discriminate against or burden interstate commerce. *Wynne*, 135 S. Ct. at 1794. This occurs when a State taxes "a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id*. (citations omitted); *see also American Trucking Assoc. v. Michigan Public Serv. Comm.*, 545 U.S. 429, 437 (2005) (dormant Commerce Clause bars discrimination against "interstate transactions"); *Oregon*

Waste Systems, Inc. Dep't of Envtl. Quality of State of Or., 511 U.S. 93, 98 (1994) (same for "the interstate flow of articles of commerce"). Thus, a State may not tax "manufacturing or selling activity outside the State" at a higher rate than the same activities conducted in-state. *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 248 (1987).

One method that the Court has used to help identify discriminatory taxation is the test of "internal consistency." To pass this test, "the tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco v. Hardesty*, 467 U.S. 638, 644 (1984). A State's tax regime fails the test where its identical application by every State "would place interstate commerce at a disadvantage as compared with intrastate commerce." *Wynne*, 135 S. Ct. at 1803 (citing *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)). Such failure shows that "a State is attempting to take more than its fair share of taxes from the interstate transaction." *Oklahoma Tax Comm'n*, 514 U.S. at 185.

As explained above, *Wynne* found that Maryland's personal income tax scheme discriminated against interstate commerce, but specifically noted that it could have removed the burden and cured the defect by providing residents with a credit for taxes paid to other jurisdictions on income earned in those jurisdictions. 135 S. Ct. at 1805-06. New York provides exactly such a credit. N.Y. Tax Law § 620(a); 20 N.Y.C.R.R. § 120.4(d). Thus, the decisions below do not conflict with this Court's decision in *Wynne*.

Petitioners misread this Court's precedent in their attempts to find a conflict worthy of review, claiming (*Edelman* Pet. 17; *Chamberlain* Pet. 17) that the decisions below wrongly distinguished *Wynne* based on the type of income at issue. But petitioners overlook that the difference in these cases is not the technical classification of the income, but the paramount fact that it was not derived from any economic activity in the taxing jurisdiction. Indeed, if the intangible income in these cases was earned anywhere, it was in New York. *See Chamberlain* Record on Appeal at 357 (Chamberlain Communications was not authorized to do business outside New York); *Edelman* Pet. App. 7a (Edelman Shoe was based in New York City).

It was no accident that *Wynne* concerned income (of whatever type) derived from economic activities in the multiple taxing States. That is because the dormant Commerce Clause protects against harms to *interstate commerce*. Accordingly, the trilogy of Supreme Court precedents that *Wynne* relied on each involved a multi-state business engaged in economic activities across multiple States, all of which taxed those activities. *See Wynne*, 135 S. Ct. at 1795. And to illustrate the application of the internal consistency test in *Wynne*, and specifically how it identifies discrimination against interstate income, the Court used the example of a hypothetical taxpayer who resided in one State and worked in another, paying taxes to his State of domicile and to the State "where he earns the income." *Id.* at 1804.

The decisions below therefore properly held that New York's tax credit is consistent with the type that this Court approved in *Wynne*, because when New York residents *can* trace intangible income to another taxing

State, they are entitled to a tax credit. Petitioners misstate this aspect of New York's scheme, claiming that New York "does not offer any credit for taxes paid to another State on intangible income." *Edelman* Pet. 15; *Chamberlain* Pet. 15. Although New York presumes under the *mobilia* doctrine that intangible property shares the location of its owner, its regulation explicitly gives taxpayers an opportunity to demonstrate that their intangible income was "from property employed in a business, trade or profession carried on in the other jurisdiction." 20 N.Y.C.R.R. § 120.4(d). Residents are denied a credit only when they cannot trace income taxed by another State to any commercial or economic activity conducted within that State, because that income does not flow from "interstate commerce." That is, there are no "transactions," "incidents," "free trade," or "interstate flow of articles of commerce" occurring out-of-state that New York disadvantages by withholding a tax credit.

Contrary to petitioners' claims (*Edelman* Pet. 21; *Chamberlain* Pet. 21), then, the decisions below do not conflict with *Wynne* by approving a tax scheme that is the equivalent of an interstate tariff. Rather, New York's tax scheme passes the internal consistency test: if every State (a) taxed a resident's worldwide income, (b) taxed a nonresident solely on income earned in the State, and (c) provided a resident with a credit for taxes paid to a different State on income earned in that State, interstate commerce would not suffer relative to intrastate commerce. No interstate income would be burdened because, whenever a resident's income arose from economic activities in another State, the resident would receive a credit for tax on that income.

To be sure, this scheme permits double taxation in one narrow circumstance: if two States tax a resident's intangible income based on the taxpayer's dual residency in *both* States, and if that income does not derive from activities in *either* State, it will be taxed twice. Petitioners mistakenly argue (*Edelman* Pet. 15-16; *Chamberlain* Pet. 15-16)[4] that this result causes New York's scheme to fail the internal consistency test because it privileges a single-State resident, *i.e.*, a domiciliary, over a dual-State resident, *i.e.*, a statutory resident domiciled in another State. They are wrong for two reasons.

First, *Wynne* emphasized that double taxation is invalid only when it discriminates against interstate commerce, 135 S. Ct. at 1804, and the double taxation here does not implicate interstate commerce, let alone discriminate against it. As one of the courts below stated, the double taxation "does not apply to an identifiable interstate market, or favor intrastate commerce." *Edelman* Pet. App. 14a. It arises, instead, from the circumstance of dual-State residency, which *Wynne* did not address. *Wynne* holds only that if a State taxes a nonresident's income earned within its borders, it cannot *at the same time* deny its own residents a tax credit where *they* earn income in another State that is taxed for the same reason—it is earned there. 135 S. Ct. at 1803-04. But *Wynne* did not consider the issue of double taxation arising from dual residency, and contrary to petitioners' claims (*Edelman* Pet. 17; *Chamberlain* Pet. 17), it did not

4. Petitioners' statement of when double-taxation is triggered is not fully accurate. *Edelman* Pet. 15; *Chamberlain* Pet. 15. The relevant requirement for statutory residence is not simply "property," but that a person maintain a "permanent place of abode." N.Y. Tax Law § 605(b)(1)(B); *see Gaied*, 22 N.Y.3d at 598.

resolve that question when it rejected the idea that all taxes on residents are generally immune from Commerce Clause scrutiny. 135 S. Ct. at 1798.

As petitioners acknowledge, dual-residency itself is made possible because New York, like most States, has adopted the category of a non-domiciliary statutory resident. The issue of New York's statutory residence framework is not properly before the Court, however. Neither the Edelmans nor the Chamberlains contest their status as New York residents, and neither raised a general challenge to New York's statutory residence framework. *Edelman* Pet. App. 8a-9a; *Chamberlain* Pet. App. 6a-7a.

Second, New York's tax scheme does not fail the internal consistency test because that test depends on a comparison of similarly-situated taxpayers, *see Tyler Pipe Indus.*, 483 U.S. at 246-47, and single-state residents (domiciliaries) are not similarly situated to dual-State residents (statutory residents). As the New York Court of Appeals has explained, "statutory residents domiciled in another State are not similarly situated to New York domiciliaries" who reside solely in New York: statutory residents domiciled in another State are entitled to that State's "privileges and protections" and, accordingly, are subject to tax by the other State, while New York domiciliaries who reside solely in New York are subject only to tax by New York. *Tamagni*, 91 N.Y.2d at 541. Thus, the disparate tax treatment afforded these two categories of residents does not invalidate New York's scheme.

By declining to provide its residents with a credit against income tax paid to another State unless they can show that the income was earned there, New York does not "take more than its fair share" of tax revenue from

interstate commerce. *See Oklahoma Tax Comm'n*, 514 U.S. at 185. There is no reason why New York should cede to another State over the taxation of such income. Because New York's tax scheme is fully consistent with *Wynne*, passes the internal consistency test, and does not discriminate against interstate commerce, there is no conflict with *Wynne*, or with the Commerce Clause as interpreted by *Wynne*, that warrants this Court's review.

II. There Is No Urgent Need For Review of The Issue Presented by These Cases

To elicit this Court's intervention, petitioners claim that New York's tax scheme places an "especially intolerable" burden on interstate commerce given New York's economic preeminence, which, "if allowed to stand, would give rise to the very 'economic Balkanization' that this Court denounced in *Wynne*." *Edelman* Pet. 22; *Chamberlain* Pet. 22 (quoting 135 S. Ct. at 1794). These concerns are ill-founded. The requirements for statutory residence are steep, and New York's tax scheme is long-standing and widely followed by other States. Even if the issue presented in these cases was to eventually merit this Court's attention, it does not represent an emerging trend that threatens interstate commerce—far from it. Thus, the Court can and should wait until it can benefit from the decisions of other lower courts.

First, the statutory provisions at issue here affect only persons with residence in two states and income from intangible property that does not represent activity in either of the two states. Because of the high bar to qualify as a statutory resident, the number of people affected will be quite limited. Petitioners exaggerate the impact of this framework by pointing to the high numbers of nonresidents

who commute to New York City for work (*Edelman* Pet. 22; *Chamberlain* Pet. 22), but the average commuter does not maintain two permanent residences in two different states. *See Gaied*, 22 N.Y.3d at 598 (requiring taxpayer to "have a residential interest" for property to constitute permanent place of abode). And the available data indicate that large numbers of people continue to earn income in New York, whether from wages or operating a business, without becoming statutory residents: in 2014, the most recent year for which statistics are publicly available,[5] there were 761,117 nonresident tax returns filed in New York, meaning that over three-quarters of a million people earned income in New York without becoming statutory residents and, as a result, filing resident returns.

Second, the aspects of New York's tax scheme cited by petitioners are not recent innovations. Since 1954, New York has defined a statutory resident as one who maintains a permanent place of abode in New York and spends more than 183 days here. 1954 N.Y. Laws ch. 99, § 1. And the rules and restrictions on the tax credit available for intangible income have been in place since 1968. Former 20 N.Y.C.R.R. § 121.3 (adopted 1968, renumbered 1982 and 1992). There is no evidence that this tax scheme has had any dampening effect on the dynamic growth that the State and the Nation have experienced over the half-century since their enactment.

Third, New York's approach has long been shared by many other states, further dispelling the notion that it represents the tip of a noxious trend. Of the forty-four jurisdictions that have adopted some form of income tax,

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5. N.Y. State Dep't of Tax. & Fin., "Analysis of Personal Income Tax Returns," available at https://www.tax.ny.gov/research/stats/stat_pit/analysis_of_personal_income_tax_returns.htm, last visited August 22, 2019.

forty have some form of statutory resident. And within those forty, the most common definition is that employed by New York and seventeen other jurisdictions, namely the maintenance of a permanent place of abode and presence for more than half the year (six months or 183 days).[6] And the most common provision for resident tax credits is the one used by New York: twenty states provide their residents with a credit for taxes paid to another state only on income derived from the other state.[7] Given this

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6. These are: (1) Arkansas, Ark. Code Ann. § 26-51-102(14); (2) Colorado, Colo. Rev. Stat. § 39-22-103(8); (3) Connecticut, Conn. Gen. Stat. § 12-701(a)(1); (4) Delaware, Del. Code Ann. 30 § 1103(2); (5) District of Columbia, D.C. Code Ann. § 47-1801.04(42); (6) Indiana, Ind. Code Ann. § 6-3-1-12; (7) Kentucky, Ky. Rev. Stat. § 141.010(25); (8) Maine, Me. Rev. Stat. Ann. 36 § 5102(5)(B); (9) Massachusetts, Mass. Ch. 62 § 1(f); (10) Minnesota, Minn. Stat. § 290.01(7)(b); (11) Missouri, Mo. Rev. Stat. § 143.101(1); (12) Nebraska, Neb. Rev. Stat. § 77-2714.01(7); (13) New Jersey, N.J. Rev. Stat. § 54A:1-2(m)(2); (14) New York, N.Y. Tax Law § 605(b); (15) Pennsylvania, Pa Stat. Ann. 72 § 7301(p); (16) Rhode Island, R.I. Gen. Laws § 44-30-5(a)(2); (17) Vermont, Vt. Stat. Ann. 32 § 5811(11)(A); and (18) West Virginia, W. Va. Code § 11-21-7(a)(2).

7. These are: (1) Arizona, Ariz. Rev. Stat. § 43-104(19); (2) Arkansas, Ark. Code Ann. § 26-51-102(14); (3) California, Cal. Rev. & Tax. Code § 17016; (4) Connecticut, Conn. Gen. Stat. § 12-704; Conn. Agencies Regs. §§ 12-704(a)-1(a)(1), 12-704(a)-4(a)(3); (5) Delaware, Del. Code Ann. 30 § 1103(2); (6) District of Columbia, D.C. Code Ann. § 47-1801.04(42); (7) Idaho, Idaho Code § 63-3013(1); (8) Maine, Me. Rev. Stat. Ann. 36 § 5102(5)(B); (9) Missouri, Mo. Rev. Stat. § 143.101(1); (10) Montana, Mont. Code Ann. § 15-30-2101(28); (11) Nebraska, Neb. Rev. Stat. § 77-2714.01(7); (12) New York, N.Y. Tax Law § 605(b); (13) North Carolina, N.C. Gen. Stat. § 105-153.3(15); (14) North Dakota, N.D. Cent. Code § 57-38-01(11); (15) Oklahoma, 68 Okla. Stat. § 2353(4); (16) Oregon, Or. Rev. Stat. § 316.027; (17) South Carolina, S.C. Code Ann. § 12-6-3400(A)(1); (18) Utah, Utah Code Ann. § 59-10-103(1)(q); (19) Vermont, Vt. Stat. Ann. 32 § 5811(11)(A); and (20) West Virginia, W. Va. Code § 11-21-7(a)(2).

widespread adoption of statutes like New York's, there should be many opportunities for the courts of other States to rule on challenges like the one at issue here. At this time, no other courts appear to have been presented with the issue since *Wynne*. This Court should allow the issue to percolate in the lower courts, and await the emergence of a conflict, or at the very least the emergence of multiple decisions addressing the issue, before undertaking to consider the issue itself.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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