No. 23-1202

IN THE
Supreme Court of the United States

ELLINGSON DRAINAGE, INC.,

Petitioner,

v.

SOUTH DAKOTA DEPARTMENT OF REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT PETITIONER

NIKKI DOBAY
GREENBERG TRAURIG, LLP
400 Capitol Mall, # 2400
Sacramento, CA 95814
(916) 868-0616
nikki.dobay@gtlaw.com

TYLER MARTINEZ
Counsel of Record
JOSEPH D. HENCHMAN
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
(703) 683-5700
tmartinez@ntu.org
jbh@ntu.org

June 10, 2024

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. LOWER COURTS ARE INCREASINGLY MISAPPLYING THIS COURT'S DECISIONS REGARDING FAIR APPORTIONMENT OF STATE TAXES ON INTERSTATE COMMERCE. 4

A. "Fairly Apportioned" Must be Evidenced in the Actual Operation of the Tax. 5

B. This Decision is Only the Latest Example of Lower Courts Misapplying *Dicta* Instead of Applying this Court's Fair Apportionment Decisions. 7

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

American Trucking Ass'n v. Scheier,
483 U.S. 266 (1987) 6

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.,
520 U.S. 564 (1997) 6

Comm'r of Rev. v. J.C. Penney Co.,
730 N.E.2d 266 (Mass. 2000) 8

Complete Auto Transit v. Brady,
430 U.S. 274 (1977) 2, 4

Comptroller of the Treasury of Maryland v. Wynne,
575 U.S. 542 (2015) 2, 8, 9

D.H. Holmes Co. Ltd. v. McNamara,
486 U.S. 24 (1988) 7, 8

Gen. Motors Corp. v. City & Cnty. of Denver,
990 P.2d 59 (Colo. 1999)..... 8

Goldberg v. Sweet,
488 U.S. 252 (1989) 2, 5

Henneford v. Silas Mason Co., Inc.,
300 U.S. 577 (1937) 2, 7

PPG Indus., Inc. v. Tracy,
659 N.E.2d 1250 (Ohio 1996)..... 8

South Dakota v. Wayfair,
585 U.S. 162 (2018) 6

West Lynn Creamery, Inc. v. Healy,
512 U.S. 186 (1994) 6

Western Live Stock v. Bureau of Rev.,
303 U.S. 250 (1938) 6

Yamaha Corp. of Am. v. State Bd. of Equalization,
73 Cal. App. 4th 338 (1999) 8

Zilka v. Tax Revenue Board of the City of Philadelphia,
304 A.3d 1153 (Pa. 2023) 3, 9

Zilka v. Tax Revenue Board of the City of Philadelphia,
U.S. No. 23-914..... 3

Other Authorities

Andrew Wilford, *South Dakota's Use Tax Threatens Basic Principles of Fair Tax Policy*, NTUF (June 7, 2024) https://www.ntu.org/foundation/detail/south-dakotas-use-tax-threatens-basic-principles-of-fair-tax-policy 5

INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. NTUF therefore has an institutional interest in the outcome of this case.[1]

[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* further certifies timely notice to all parties of the intent to file this brief.

SUMMARY OF THE ARGUMENT

Once again, a lower court has held that mere provision of a tax credit of some kind is sufficient for a tax on interstate commerce to pass constitutional muster. As in recent cases from Maryland and Pennsylvania, the South Dakota court below here misses this Court's central holdings that a fairly apportioned tax requires looking at the actual, practical operation of the tax. It is true that credits usually operate to ensure fair apportionment, but not always.

This case is another one of those situations. Here, to operate temporarily in South Dakota, an out-of-state construction company had to pay a 4.5% tax to the state on the value of all its construction equipment. The South Dakota Supreme Court upheld the tax as fairly apportioned based solely on the fact that the state offered a credit for tax previously paid, citing this Court's opinion in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577 (1937), and the *dicta* in *Goldberg v. Sweet*, 488 U.S. 252 (1989), as conclusive of such a tax's constitutionality.

But a tax credit is not talismanic, as explained repeatedly by this Court in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015), and other cases. Taxing 100% of the value of equipment when the actual use is much smaller is not fair apportionment. Worryingly, the court below held that the imposition of the maximum tax on a minimal presence would not raise any apportionment issue, stating simply that "use is use," no matter how small. App. 14a ¶33. While tax credits can be a proxy in many

instances for fairly apportioning sales and use tax burdens among multiple states, they are not a silver bullet and do not always work. Courts therefore need to look beyond the mere existence of a tax credit to examine the practical effect of the tax scheme, as in *Wynne*.

In *Wynne*, in *Zilka v. Tax Revenue Board of the City of Philadelphia*, 304 A.3d 1153 (Pa. 2023), *petition for cert. filed*, No. 23-914 (U.S. Feb. 20, 2024), and now in this case, the lower courts have continued to misapply this Court's *dicta* and have incorrectly concluded that credits are an automatic satisfaction of the "fairly apportioned" factor. Cases like this one will continue to happen until this Court instructs lower courts on which matters more: the dicta in *Goldberg* or the central holdings of those cases.

This court has repeatedly said that Commerce Clause inquiry is not formalistic but requires looking at the practical operation of the challenged taxes. This means that courts should not simply check the box if a credit is present but undertake an inquiry into whether the tax operates to be fairly. This case presents an opportunity for this Court to do so and clarify that holding.

ARGUMENT

I. LOWER COURTS ARE INCREASINGLY MISAPPLYING THIS COURT'S DECISIONS REGARDING FAIR APPORTIONMENT OF STATE TAXES ON INTERSTATE COMMERCE.

With increasing frequency, lower courts have been elevating the *dicta* from this Court's fair apportionment cases over the central holdings of those decisions, emboldening the states to push the bounds on taxing interstate activity.

At issue is how to apply the fairly apportionment prong from the four-factor test in *Complete Auto v. Brady*, 430 U.S. 274, 279 (1977). Under *Complete Auto*, taxes on interstate commerce may survive a "challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.*

In this case, the Petitioners argued below that South Dakota's taxing based on 100% of the current value of construction equipment that was in the state for a mere few days was not "fairly apportioned" under the third *Complete Auto* factor. This Court has held repeatedly that courts should look at the actual operation of the tax, but lower courts in *Wynne*, *Zilka*, and now this case instead are applying *dicta* that suggests that the existence of a credit of some kind is conclusive that the tax is fairly apportioned.

A. "Fairly Apportioned" Must be Evidenced in the Actual Operation of the Tax.

Petitioners raise several arguments as to why an out-of-state company paying a 4.5% tax on the entire value of their construction equipment temporarily in South Dakota is not fairly apportioned. *See*, *e.g.*, App. 11a–13a ¶¶ 26–31; Pet. at 11–12. Fairly apportioned taxation should be related to actual amount of time and services used by the interstate entity engaged in business temporarily in the taxing state.

In *Goldberg*, this Court held that the fairly apportioned rule "ensure[s] that each State taxes only its fair share of an interstate transaction." 488 U.S. at 260 (collecting cases). Tax credits, apportionment formulas, and interstate compacts are often employed to avoid this multiple taxation problem. *See*, *e.g.*, Andrew Wilford, *South Dakota's Use Tax Threatens Basic Principles of Fair Tax Policy*, NTUF (June 7, 2024) https://www.ntu.org/foundation/detail/south-dakotas-use-tax-threatens-basic-principles-of-fair-tax-policy.

But here, the South Dakota Supreme Court did something dangerous: while citing the external consistency test from *Goldberg*, it held that because the South Dakota law had a tax credit, it automatically satisfied fair apportionment, App. 15a ¶34, regardless of actual economic effects. App. 14a ¶33. Acknowledging the state would recognize a 90% windfall, the court concluded it could constitutionally do so simply because another state had not yet taxed the sale or use of the Ellingson construction equipment. App. 10a ¶24 (stating *Goldberg* test); App.

14a ¶33 (rejecting Ellingson's apportionment argument).

This formalistic conclusion is at odds with numerous decisions by this Court instructing lower courts to look at the actual economic effects of a tax. For example, this Court has long rejected "formalism [that] merely obscures the question whether the tax produces a forbidden effect." *American Trucking Ass'n v. Scheier*, 483 U.S. 266, 296 (1987) (internal quotation marks and citation omitted); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 576 (1997) ("As a practical matter, the statute encourages affected entities to limit their out-of-state clientele, and penalizes the principally nonresident customers of businesses catering to a primarily interstate market."); *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250, 259 (1938) ("Practical rather than logical distinctions must be sought.").

In *South Dakota v. Wayfair*, 585 U.S. 162, 179–80 (2018), this Court held that its "Commerce Clause jurisprudence has 'eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.'" (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)). That is because this "Court's Commerce Clause jurisprudence [is] grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws." *Id.* at 180. The South Dakota Supreme Court in this instance needed to look at the practical effects of fully taxing minimal use of mobile construction equipment in the state.

B. This Decision is Only the Latest Example of Lower Courts Misapplying *Dicta* Instead of Applying this Court's Fair Apportionment Decisions.

Despite the central holdings of the cases discussed above, lower courts in *Wynne*, *Zilka*, and now this case have zeroed in on out-of-context *dicta* from various cases to conclude the existence of a tax credit for taxes paid in another state is conclusive and satisfies the fair apportion requirement.

A use tax with a credit for taxes previously paid was upheld by this Court in *Henneford*. There, Washington state-imposed use tax on construction equipment brought permanently into the state, and this Court upheld the tax for putting in-state and out-of-state purchasers on equal footing—the one paying sales tax (in-state) and the other use tax (out-of-state). *See Henneford*, 300 U.S. at 580–81, *id.* at 584 ("For the owner who uses after buying from afar the effect is all one whether his competitor is taxable under one title or another."). The existence of the tax credit was not dispositive: this Court still undertook an analysis of the practical economic effects to see if the Commerce Clause was satisfied. *See id.* at 583–85. Notably in the current case, unlike in *Henneford*, the construction equipment is not in the state permanently, creating a fundamental mismatch in tax treatment by the out-of-state Petitioners and in-state competitors.

Similarly, in *D.H. Holmes Co. Ltd. v. McNamara*, 486 U.S. 24, 31 (1988), this Court observed that a "Louisiana taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes

that have been paid in other States."[2] But despite this seemingly-conclusive statement, the Court in *D.H. Holmes* still undertook an economic analysis of whether the tax scheme's actual practical operation was fairly apportioned. *See id.* at 31–33 (concluding that Louisiana taxed only the catalogs distributed to in-state customers and not the catalogs sent out-of-state). If the sentence suggesting that the mere existence of a tax credit was dispositive, much of this Court's analysis in that and other decisions would be superfluous.

A trio of cases—one decided by this Court and two pending—show that this issue is continuing to grow. Granting review of these cases will protect interstate trade from over aggressive state and local taxation.

In *Wynne*, 575 U.S. at 567, this Court held that Maryland's inclusion of only a partial tax credit for taxes paid to another state made "the total tax burden on interstate commerce higher." This Court further rejected Maryland's argument that the provision of a tax credit of some kind was dispositive, explaining "[t]he critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer." *Id.* The mere presence of a tax credit did not automatically cure the overall tax scheme's constitutional deficiencies. Instead, the Court needed to look deeper, into the practical effects of Maryland's

---

[2] The court below did not cite to *D.H. Holmes* but other courts have. *See*, *e.g.*, *Comm'r of Rev. v. J.C. Penney Co.*, 730 N.E.2d 266, 273 (Mass. 2000); *Gen. Motors Corp. v. City & Cnty. of Denver*, 990 P.2d 59, 72 (Colo. 1999); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 73 Cal. App. 4th 338, 368 (1999); *PPG Indus., Inc. v. Tracy*, 659 N.E.2d 1250, 1251 (Ohio 1996).

tax, to conduct its analysis. *Id*. at 545 ("Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause.").

States and lower courts continue to view tax credits as talismanic. A state merely paying lip service to the Court's precedent on this issue is shown in *Zilka*. There the Pennsylvania Supreme Court upheld the tax scheme merely because the city and state provided tax credits. *See Zilka*, 304 A.3d at 1171. But because Ms. Zilka's Philadelphia's tax rate was higher than Wilmington's, the city of Philadelphia refused to provide a full credit to Ms. Zilka for her state-level taxes paid to Delaware, she was forced to pay a tax on the same income twice (once to Delaware and again to Philadelphia) while an in-state worker could avoid such multiple taxation. *Id*. at 1158. This situation highlights how a tax credit can break down in as-applied situations and result in the "total tax burden on interstate commerce [that] is higher." *Wynne*, 575 U.S. at 566.

So too in the case at bar. *Ellingson* is another instance where a state's tax credit may work in most cases, but not in this case, to fairly apportion the tax burden. South Dakota assessed a use tax against Ellingson Drainage, a Minnesota based company, on the value of its out-of-state equipment that was used in-state for only a few days at a time. *See*, *e.g.*, App. 2a ¶¶2–3; App. 9a ¶20. Ellingson objected to South Dakota's assessment, arguing the "use tax imposed on its equipment is unfairly disproportionate to the extent of the equipment's usage in South Dakota[]" as some of the equipment was only used in the state for one day. App. 6a ¶13.

South Dakota may have a tax credit, but in Ellingson's case its tax scheme operates to tax much more than their fair share of interstate commerce, which fails the fair apportionment requirement. Nonetheless, the South Dakota Supreme Court held the tax passed constitutional muster because it provides a tax credit for taxes paid to another state. *See* App 10a ¶23. Since Ellingson did not pay any taxes to another state on the equipment at issue, South Dakota assessed a use tax on 100% of the equipment's current value. *See id*. This is a windfall to South Dakota, simply because it has a tax not taken by other states. The South Dakota Supreme Court dismissed the argument the tax should be apportioned based on the value of the equipment in relation to the percentage of time the equipment was used in South Dakota, concluding "use is use." App. 14a ¶33.

In *Wynne*, in *Zilka*, and in this case, states and lower courts have zeroed in on the mere existence of a tax credit as satisfying *Complete Auto*'s fairly apportioned requirement. Credits can work in many instances, but not all. This case affords the opportunity for this Court to explain that language in *Goldberg*, *D.H. Holmes*, and *Henneford* does not override the requirement that courts must look at the practical operation of a state tax on interstate commerce to ensure it is fairly apportioned. Anything less would permit multiple taxation on out-of-state taxpayers with little recourse to the political branches of the taxing state. Commerce Clause protections are designed to prevent this very burden on our nation's economy.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant a writ of certiorari and reverse the decision below.

Respectfully submitted,

NIKKI DOBAY
GREENBERG TRAURIG, LLP
400 Capitol Mall, # 2400
Sacramento, CA 95814
(916) 868-0616
nikki.dobay@gtlaw.com

TYLER MARTINEZ
Counsel of Record
JOSEPH D. HENCHMAN
NATIONAL TAXPAYERS UNION FOUNDATION
122 C Street N.W., #700
Washington, D.C. 20001
(703) 683-5700
tmartinez@ntu.org
jbh@ntu.org

June 10, 2024