

No. 14-1422

IN THE
Supreme Court of the United States

THE FIRST MARBLEHEAD CORPORATION
AND GATE HOLDINGS, INC.,
Petitioners,

v.

MASSACHUSETTS COMMISSIONER OF REVENUE,
Respondent.

**On Petition for a Writ of Certiorari to the
Massachusetts Supreme Judicial Court**

**BRIEF FOR TAX EXECUTIVES
INSTITUTE, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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**INTRODUCTION AND
STATEMENT OF INTEREST**

Amicus curiae Tax Executives Institute, Inc. (“TEI”) respectfully submits this brief in support of petitioners, The First Marblehead Corporation and Gate Holdings, Inc.¹ The Massachusetts Supreme Judicial Court’s

¹ All parties received at least 10 days’ notice of TEI’s intention to file this brief, and the brief is filed with the consent of all parties. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than TEI,

application of the internal consistency test to determine whether Massachusetts' financial institutions excise tax is fairly apportioned under the dormant Commerce Clause is directly contrary to this Court's subsequently-issued decision in *Comptroller of the Treasury of Maryland v. Wynne*, No. 13-485 (U.S. May 18, 2015). TEI thus urges this Court to issue an order granting the petition for writ of certiorari, vacating the Massachusetts Supreme Judicial Court's judgment and remanding this action to the Massachusetts court for further consideration in light of *Wynne*.

TEI is a voluntary, nonprofit association of corporate and other business executives, managers and administrators responsible for the tax affairs of their employers. TEI was organized in 1944 under the laws of the State of New York and is exempt from taxation under section 501(c)(6) of the Internal Revenue Code. TEI is dedicated to promoting the uniform and equitable enforcement of the tax laws, reducing the costs and burdens of administration and compliance to the benefit of the government and taxpayers, and vindicating Commerce Clause protections and the constitutional rights of taxpayers.

TEI's members are employed by a broad cross-section of the business community. The rules governing State taxes generally and, in particular, those governing the allocation and apportionment of income among States, directly affect the multistate companies represented by TEI's membership. As individuals who must contend daily with the interpretation and administration of the Nation's tax laws, TEI's members have a vital interest in ensuring that State courts correctly apply

its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the tests articulated by this Court when determining whether a tax complies with the U.S. Constitution.

Wynne confirms that State courts must evaluate whether a State's tax scheme is fairly apportioned under the internal consistency test by "hypothetically assuming that every State has the same tax structure." *Wynne*, Slip Op. at 19. *Wynne* then provides a clear and comprehensive example of how courts must evaluate a challenged tax scheme under the internal consistency test, articulates the factors that courts must consider, and confirms that because the Maryland tax scheme operates as a tariff, the tax was per se invalid. *Wynne*, Slip Op. at 19-26.

The Massachusetts Supreme Judicial Court failed to conduct that analysis when analyzing Massachusetts' financial institutions excise tax in *First Marblehead Corporation v. Commissioner of Revenue*, 23 N.E.3d 892 (2015). The Massachusetts court acknowledged the internal consistency test but incorrectly concluded that the questioned tax was constitutional because the taxpayer was not actually subject to double taxation. *Id.* at 906. That is not the test, under *Wynne* or this Court's other precedents.

Granting this petition, vacating *First Marblehead* and remanding this action to the Massachusetts Supreme Judicial Court will oblige that court to apply the internal consistency test articulated in *Wynne*. Such an order is imperative to eliminate the confusion created by the Massachusetts Supreme Judicial Court's opinion, which purports to apply the test mandated by this Court – but fails to do so.

TEI thus respectfully submits this *amicus curiae* brief.

SUMMARY OF REASONS FOR ISSUING A GVR ORDER

An order that grants certiorari, vacates the lower court's decision and remands the action to the lower court ("GVR order") is the appropriate result in this case. This Court decided *Wynne* on May 18, 2015, more than three months after the Massachusetts Supreme Judicial Court issued its January 28, 2015 decision in *First Marblehead*. The Massachusetts court thus did not have the benefit of this Court's opinion in *Wynne*.

The *Wynne* decision squarely addresses the internal consistency test that the Massachusetts Supreme Judicial Court purported to but did not apply in *First Marblehead* and confirms that the internal consistency test requires an examination of whether a tax scheme creates hypothetical, rather than actual, double taxation. *Wynne* also provides a clear example of how to conduct that analysis. This Court should compel the Massachusetts Supreme Judicial Court to reconsider its flawed decision in light of *Wynne* because this Court's articulation of the internal consistency test in *Wynne* makes it manifest that the Massachusetts Supreme Judicial Court failed to apply that test and the Massachusetts court made no effort to determine whether the Massachusetts tax operated as a tariff.

REASONS FOR ISSUING A GVR ORDER

I. A GVR ORDER IS APPROPRIATE TO PROVIDE STATE COURTS WITH THE OPPORTUNITY TO CONSIDER DECISIONS SUBSEQUENTLY ISSUED BY THIS COURT.

Congress has provided this Court with a broad power to "vacate . . . any judgment, decree, or order of a court lawfully brought before it for review" and

“remand the cause and . . . require such further proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. This Court has exercised its discretionary power to issue a GVR order “in light of a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, new state statutes, changed factual circumstances, and confessions of error or other positions newly taken by the Solicitor General, and state attorneys general.” *Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996) (citations omitted).

The benefits of a GVR order are numerous. They include “conserv[ing] the scarce resources of this Court that might otherwise be expended on plenary consideration, assist[ing] the court below by flagging a particular issue that it does not appear to have fully considered, assist[ing] this Court by procuring the benefit of the lower court’s insight before we rule on the merits, and alleviat[ing] the ‘[p]otential for unequal treatment’ that is inherent in our inability to grant plenary review of all pending cases raising similar issues.” *Id.* at 167 (citations omitted).

Importantly, a GVR order need not be limited to matters in which “a grant of certiorari and eventual reversal are probable,” as required by the Court’s All Writs Act standard. *Id.* at 168. Rather, a “more liberal” standard is warranted for GVR orders because they “are premised on matters that we have reason to believe the court below did not fully consider, and because they require only further consideration.” *Id.* GVR orders thus have the opportunity to “improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal. . . .” *Id.*

II. THIS COURT SHOULD ISSUE A GVR ORDER DIRECTING THE MASSACHUSETTS SUPREME JUDICIAL COURT TO RECONSIDER *FIRST MARBLEHEAD* IN LIGHT OF *WYNNE*.

A. *Wynne* Confirms That the Internal Consistency Test Requires a Showing of Hypothetical, Rather Than Actual, Discrimination and Demonstrates How to Conduct That Analysis.

In *Wynne*, this Court was asked to determine whether Maryland's personal income tax scheme was constitutional. *Wynne*, Slip Op. at 1. Maryland's tax scheme did not provide its residents with a full credit for income taxes paid to other States on income earned in those States. *Id.* This Court reaffirmed its prior jurisprudence, holding that the dormant Commerce Clause precludes a State from taxing a transaction more heavily when it crosses state lines than when it occurs entirely within the State and confirmed that such protection extends to individual State residents. *Id.* This Court then determined that Maryland's tax scheme failed the internal consistency test and discriminated against interstate commerce, in violation of the dormant Commerce Clause. *Id.* at 22.

Expounding upon the internal consistency test, this Court noted that the test was "formally introduced more than three decades ago . . . and it has been invoked in no fewer than seven cases. . . ." *Id.* at 20 (citations omitted). Citing its decision in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), the Court stated that the test "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.” *Wynne*, Slip Op. at 18-19.

The Court then opined:

By ***hypothetically assuming that every State has the same tax structure***, the internal consistency test allows courts to isolate the effect of a defendant State’s tax scheme. This is a virtue of the test because it allows courts to distinguish between (1) tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States, and (2) tax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes.

Wynne, Slip Op. at 19 (emphasis added; citations omitted). The Court also ruled that taxpayers do not have to demonstrate actual double taxation under the inconsistency test. *Id.* at fn. 5 (citations omitted).

This Court then conducted an extensive analysis to determine whether Maryland’s tax scheme passed or failed this hypothetical test. *Wynne*, Slip Op. at 21-26. The Court’s analysis began with an example comparing the hypothetical tax obligations of two taxpayers, April and Bob, who both lived in State A. *Id.* at 21. Using this example, the Court determined that under Maryland’s tax scheme, April, who earned her income in State A, would pay less tax than Bob, who earned his income in State B. *Id.* at 22. The Court concluded that the “internal consistency test reveals what the undisputed economic analysis shows: Maryland’s tax scheme is inherently discriminatory and operates as a

tariff.” *Id.* The Court concluded that “[t]his identity between Maryland’s tax and a tariff is fatal because tariffs are ‘[t]he paradigmatic example of a law discriminating against interstate commerce.’” *Id.* (citing *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193 (1994)).

B. The Massachusetts Supreme Judicial Court Failed to Conduct the Internal Consistency Analysis Mandated in *Wynne*.

The Massachusetts Supreme Judicial Court failed to compare the hypothetical relative tax burdens of interstate and intrastate taxpayers. The court acknowledged the existence of the internal consistency test, stating that “[t]he first . . . component of fairness in an apportionment formula is what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business’[s] income being taxed.” *First Marblehead*, 23 N.E.3d at 906 (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)). However, rather than applying the required hypothetical replication of the challenged tax, the Massachusetts court addressed whether actual multiple taxation was present:

Considering the first factor, ***we have no reason to conclude that application of the apportionment statute as we have interpreted it produces duplicative taxation of [the taxpayer’s] income***, given that [the taxpayer’s] Massachusetts apportionment percentage for the tax year at issue was approximately fifty-one percent, and the record reflects that [the taxpayer] filed tax

returns only in Massachusetts and Florida for the relevant years.

Id. (emphasis added; footnote omitted). Because the taxpayer's cumulative tax burden was less than one hundred percent, the Massachusetts court erroneously concluded that internal consistency was satisfied. *Id.*

Wynne makes it manifest that the Massachusetts Supreme Judicial Court's approach is wrong. The internal consistency test does not rest upon the intricacies and variations of other States' tax schemes, nor does it require taxpayers to prove actual double taxation. Rather, the internal consistency test requires courts to examine whether interstate commerce *would* be taxed more heavily than intrastate commerce if every State replicated the challenged tax scheme. The Massachusetts Supreme Judicial Court did not conduct this review.

A GVR order is needed to direct the Massachusetts Supreme Judicial Court to apply the internal consistency test as articulated in *Wynne* and to examine whether the Massachusetts tax operates as a tariff. This Court issued *Wynne* more than three months after the Massachusetts Supreme Judicial Court decided *First Marblehead*. *Wynne* reaffirms this Court's prior articulations of the internal consistency test, provides a clear and comprehensive example of how courts are to apply that test, and resolves any debate as to whether the internal consistency test is a required component of the dormant Commerce Clause. *Wynne*, Slip. Op. at 14 (Ginsberg, J., dissenting). A GVR order would enable the Massachusetts Supreme Judicial Court to conduct the required analysis of Massachusetts' financial institutions excise tax, consistent with *Wynne*, while conserving this Court's judicial resources.

Indeed, failure to remand this case to the lower court will derogate *Wynne* and this Court's other internal consistency precedents because it would suggest that State courts are not bound to apply the hypothetical analysis mandated by this Court and may instead apply their own formulations or approximations of that test. Failure to remand will also create continued confusion and uncertainty for businesses engaged in interstate commerce because *First Marblehead* purports to apply the internal consistency test but does not actually do so. This Court spent much time and effort to quell such uncertainty by hearing *Wynne*, carefully articulating the internal consistency test, and demonstrating how that test applies. *Wynne* thus provides timely guidance for the Massachusetts Supreme Judicial Court.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari, vacate the *First Marblehead* judgment and remand this action to the Massachusetts Supreme Judicial Court for reconsideration in light of this Court's decision in *Wynne*.

Respectfully submitted,

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