No. 06-1210

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the New Hampshire business profits tax regime facially discriminate against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the State, a restriction virtually identical to restrictions struck down by this court in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), and by state courts of North Dakota, California, and Mississippi?

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BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

This brief is filed, with the written consent of the parties lodged with the Clerk of this Court, on behalf of the Council On State Taxation as *amicus curiae* in support of the Petitioner in the above captioned matter.[1]

[1] No Counsel for a party authored this brief in whole or in part, and no person or entity other than amicus curiae, its members or counsel has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief and their letters have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

Description of Association Filing as Amicus

The Council On State Taxation (COST) is a non-profit trade association formed in 1969 to preserve and promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST represents nearly 600 of the largest corporations in the United States, including companies from every industry segment. COST's membership conducts business in every state and between every state. The membership are thus concerned when states or localities seek to circumvent this Court's application of Constitutional limitations on states' ability to discriminate against interstate commerce. COST's mission is to preserve and promote equitable and nondiscriminatory taxation of multi-state businesses. Thus, COST members and the organization itself have a financial and organizational interest in the Court's determination in this case.

Description of Amicus Interest

The New Hampshire Supreme Court's decision, if left unchecked, provides a roadmap for other states to discriminate against interstate commerce. COST has a unique perspective on the wider applications and implications that the reasoning of the New Hampshire court could have on other taxpayers and other state and local governments, and seeks to bring to this Court's attention the importance of resolving this issue. It has been the unfortunate experience of COST's members that many states have a significant reluctance in remedying unconstitutional taxes. Because of this historical reluctance, COST has an interest in seeing this issue resolved. COST has a strong interest in preventing discrimination against interstate commerce from proliferating, and, accordingly, has a strong interest in the Court's review of this case.

SUMMARY OF ARGUMENT

The analysis adopted by the New Hampshire court is flawed in that it disregards several significant decisions of this Court and conflicts with every other State court decision on this issue. The New Hampshire Supreme Court held that the State of New Hampshire does not discriminate against foreign commerce although the State's taxing regime allows a parent company to claim a deduction for dividends from foreign subsidiaries with operations in New Hampshire, but does not allow a parent company to deduct dividends it receives from a foreign subsidiary without operations in New Hampshire.

Unchecked, the New Hampshire Supreme Court's decision provides a ready roadmap for states to discriminate against interstate commerce. Further, even taxes found unconstitutional by this Court and others could be revived using the New Hampshire model. In either case, the decision provides a blueprint for states to impose a tax burden on interstate commerce without imposing the same burden on their own.

Lastly, a denial of *certiorari* in this case will encourage states to rely on an unproven and suspect tax structure. If this decision is allowed to stand, it will create uncertainty for taxpayers and state governments alike.

ARGUMENT

I. Under the Commerce Clause of the Unites States Constitution, and as affirmed by numerous decisions of this Court, the New Hampshire business profits tax unconstitutionally discriminates against foreign commerce because the net result of the tax regime is the favoring of local commercial interests over out-of-state businesses.

The question presented in this appeal is whether the New Hampshire business profits tax (BPT) regime facially dis-

criminates against foreign commerce in violation of the Commerce Clause by providing a tax deduction for dividends received from foreign subsidiaries only to the extent that the foreign subsidiary conducts income-generating business in the state.

New Hampshire's BPT violates the Commerce Clause by impermissibly favoring local commercial interests over out-of-state business. Decades of U.S. Supreme Court precedent hold that, under the Commerce Clause, a state may not discriminate in its tax system in favor of local companies over out-of-state companies. If the holding below is allowed to stand, it will undermine numerous Supreme Court decisions.

The Commerce Clause of the United States Constitution provides that Congress shall have the authority to "regulate commerce . . . among the several states." Art. I, § 8, cl. 3. This affirmative grant of power has given rise to a concomitant negative or dormant implication—the states may not discriminate against interstate trade. *Associated Industries v. Lohman*, 511 U.S. 641, 646 (1994). The dormant element of the Commerce Clause thus prohibits economic protectionism on the part of states. States may not adopt measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id* at 647. Thus, a state may not tax a transaction or incident more heavily when it crosses state lines than if it were to occur entirely within one state. *Id.* Economic protectionism can be made out by a showing of either discriminatory effect or discriminatory intent. *Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263, 270 (1984). Nor may a state tax a transaction or incident more heavily when it crosses national borders than if it were to occur entirely within one state. In fact, this Court has held that foreign commerce is afforded even greater protection than that afforded interstate commerce. *Kraft General Foods, Inc. v. Iowa Department of Revenue*, 505 U.S. 71 (1992); *Japan*

Line, Ltd., et al. v. County of Los Angeles, 441 U.S. 434, 449 (1979).

Petitioner GE is the parent company of numerous affiliated corporations, both domestic and foreign, that carry on a wide range of business operations in the United States and in other countries. It is undisputed that during each of the tax years at issue in this case (1990-1999), a portion of GE's business operations were conducted by foreign affiliates that did no business in New Hampshire or in any other State. However, because GE conducted business in the State, GE was required to file a New Hampshire BPT return and pay a BPT for each of the tax years at issue. Its foreign subsidiaries, on the other hand, did no business in New Hampshire and, accordingly, did not file their own BPT tax returns.

In the meantime, certain of GE's foreign subsidiaries paid dividends to GE, and these dividends were calculated as a part of GE's total BPT liability in the State of New Hampshire. But, only because GE's foreign subsidiaries did no business in New Hampshire, the State denied GE any dividends received deduction with respect to those dividends.

The crux of this case, and the reason the dividend deduction scheme is clearly invalid, lies with the fact that New Hampshire is treating dividends received from foreign subsidiaries not doing business in the state less favorably than those received from foreign subsidiaries doing business in the state—in direct conflict to many decisions by this Court. In 1977, the U.S. Supreme Court articulated a 4-prong test for determining whether a state is violating the Commerce Clause with respect to taxes affecting interstate commerce. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under the *Complete Auto* test: (1) activities taxed must have a substantial nexus with the taxing state; (2) the tax must be fairly apportioned; (3) the state tax must not discriminate against interstate commerce; and (4) the tax must be fairly related to the services provided by the state. *Id.*

Of primary significance in this case is the third prong in *Complete Auto* which begs the question: Is New Hampshire's taxing scheme with respect to dividends received from foreign subsidiaries that do not do business in New Hampshire discriminatory ?

In *Fulton Corp. v Faulkner*, 516 U.S. 325 (1996), this court addressed a North Carolina intangibles tax that was imposed on the value of corporate stock owned by North Carolina residents. The Court held that the North Carolina taxing scheme favored domestic corporations over their foreign competitors in raising capital in the state and discouraged domestic companies from participating in interstate commerce. Just as in *Fulton*, the New Hampshire tax regime favors corporations engaged in local activity over their out-of-state competitors.

The court below determined that when analyzing the dividends-received deduction as part of a larger taxing scheme, there was no improper discriminatory treatment. In taking this position, the court ignored *Fulton*, as well as the unanimous opinion in *Japan Line* where Justice Blackmun writes that: "*In addition to* answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must *also* inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause." 441 U.S. 434, 449 (1979)(emphasis added).

In other words, the lower court's analysis was incomplete. The court finished its analysis after asking and answering whether the New Hampshire taxing regime imposed multiple taxation, failing to address whether the taxing regime in-

volved discrimination in favor of companies doing business in New Hampshire.

There are many more cases that validate the holding in *Complete Auto* and to which the lower court could have looked to recognize the inadequacy of its analysis in the GE matter. Six years after *Complete Auto*, the Supreme Court ruled in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), that West Virginia's wholesale gross receipts tax, from which local manufacturers were exempt, unconstitutionally discriminated against interstate commerce. In the *Armco* Court's view, "A State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Id.* at 642. New Hampshire's dividends-received deduction contains the same constitutional flaw as West Virginia's gross receipts tax regime. Just as West Virginia favored local manufacturers by exempting the gross receipts tax on those manufacturers, New Hampshire favors local businesses by only allowing deductions for dividends from subsidiaries with a local presence.

Another case parallel to the GE case is *Westinghouse Electric Corporation v. Tully*, 466 U.S. 388 (1984), which involved a New York Domestic International Sales Corporation. In *Westinghouse*, the state had determined that a Domestic International Sales Corporation could receive a tax incentive only to the extent its business activity was occurring in the State of New York. The Supreme Court held that a State may not encourage the development of local industry by means of taxing measures that invite a multiplication of preferential trade areas within the United States and that this was an unconstitutional violation of the Commerce Clause. *Id.* In both *Westinghouse* and the GE case, we see both the State of New York and the State of New Hampshire attempting to unconstitutionally link tax incentives for international businesses to in-state activity.

In *Kraft*, the Court addressed the inclusion of dividends from foreign subsidiaries in the tax base and found that Iowa facially discriminated against foreign commerce in violation of the Foreign Commerce Clause. The Court in that case stated that: "It is indisputable that the statute treats dividends received from foreign subsidiaries less favorably than those received from domestic subsidiaries by including the former, but not the latter, in taxable income. None of the several arguments made by Iowa justifies Iowa's differential treatment of foreign commerce." *Kraft*, 505 U.S. 71 (1992). The Court went on to determine that a state's preference for domestic commerce over foreign commerce is inconsistent with the Commerce Clause, even if the state's own economy is not a direct beneficiary of the discrimination: "As the absence of local benefit does not eliminate the international implications of the discrimination, it cannot exempt such discrimination from Commerce Clause prohibitions." *Id.*

Finally, in *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93 (1994), the U.S. Supreme Court found that the purpose behind a law is not the test for determining whether it is "facially discriminatory" but, rather, if it is discriminatory, it is *per se* invalid unless it serves a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Id.* In disregarding *Oregon*, the lower court instead focused on whether New Hampshire tax law resulted in double-taxation for the Petitioner and not, as the Court in *Oregon* clearly directed, on whether the law is "facially discriminatory" and, therefore, "*per se* invalid". *Id.*

In sum, it is clear from the settled decisions of the U.S. Supreme Court that the New Hampshire Supreme Court has made an incorrect ruling with respect to Petitioner GE's case. A straightforward analysis of this Court's past decisions makes clear that the New Hampshire dividends-received deduction unlawfully discriminates against foreign commerce

by providing favorable treatment to entities that do business in the state.

II. The New Hampshire decision conflicts with every other State court decision on this issue.

States have a long history of deliberately using their tax systems to give in-state businesses an unfair competitive advantage over out-of-state or foreign businesses. Because the decision below creates a roadmap for discrimination, it is critical that the U.S. Supreme Court review the tax structure before it is adopted by other states. Such review will help minimize fiscal disruption and uncertainty for states and taxpayers alike. Furthermore, as the number of cases decided by this Court reveals, the question of whether a state tax unconstitutionally discriminates arises routinely. See, e.g. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Armco*, 467 U.S. 638 (1984); *Bacchus*, 468 U.S. 263 (1984); *Westinghouse*, 466 U.S. 388 (1984); *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987); *Kraft*, 505 U.S. 71 (1992); *Fulton*, 516 U.S. 325 (1996).

Several recent state law decisions confirm the continuing contentiousness of discriminatory state taxes that are imposed on dividends from out-of-state or foreign subsidiaries. *D.D.I., Inc. v. North Dakota*, 657 N.W.2d 228 (N.D. 2003); *Farmer Brothers Co. v. Franchise Tax Board*, 108 Cal. App. 4th 976 (2003); *AT&T Corp. v. State Tax Commission*, Dkt. No G-2000-31 (May 26, 2006).

In *D.D.I., Inc.*, the North Dakota Supreme Court struck down the state's dividends-received deduction provision as unconstitutional. North Dakota Code section 57-38-01.3(1)(g) provided a dividends-received deduction only to the extent that the company paying the dividend was subject to North

Dakota tax. As a result, the taxpayers—Florida corporations engaged in business in North Dakota—were denied a deduction for dividend income received from other corporations conducting business either wholly or primarily outside of North Dakota. The North Dakota tax commissioner argued that the provision was a valid compensatory tax, despite the acknowledgment that the provision was facially discriminatory. Relying on *Fulton*, the court rejected the commissioner's argument. According to the court, the deduction provision "effectively imposes a double layer of tax on the out-of-state income but not on the in-state income" and therefore "impermissibly discriminates against interstate commerce." *Id.* at 234-235.

The similarities between North Dakota's dividends received deduction in *D.D.I.* and New Hampshire's dividends received deduction in the present case are apparent. Despite the similarities, the New Hampshire court "found no improper discriminatory treatment" in RSA 77-A:4, IV, New Hampshire's dividends-received deduction. The court incorrectly distinguished the two cases by focusing on taxing symmetry rather than the real issue in this case: whether New Hampshire's dividends-received deduction provision discriminates against foreign commerce.

Similarly, in *Farmer Brothers Co.*, the California Court of Appeals held that the dividends-received deduction provided for under Section 24402 of the California Revenue and Taxation Code violates the Commerce Clause of the U.S. Constitution by discriminating against corporations engaged in interstate commerce. That section provided an income tax deduction for a portion of the dividends received from another corporation to the extent that the dividends were declared from income which was subject to California's franchise tax, alternative minimum tax, or corporation income tax. The court first held that section 24402 discriminates between transactions on the basis of an interstate element,

which is facially discriminatory under the Commerce Clause. The court then addressed the issue of whether the DRD was a compensatory tax and determined that it failed to meet the three conditions necessary for a valid compensatory tax under *Fulton.*

Once again, the similarities between California's dividends-received deduction in *Farmer Brothers* and New Hampshire's dividends-received deduction in the present case are apparent. For the same incorrect reasons above, the New Hampshire court incorrectly distinguished the two cases, finding "no improper discriminatory treatment" in New Hampshire's dividends-received deduction.

More recently, in *AT&T Corp.*, a Mississippi trial court found the state's dividends-received deduction statute to be invalid because it discriminated against interstate commerce. Mississippi Code section 27-7-15(4)(i) permits a parent corporation to exclude from taxable income those dividends that are received from subsidiaries taxed in Mississippi. The dividends-received deduction statute does not, however, permit a parent corporation to exclude dividends received from subsidiaries that do not have a taxable presence in Mississippi. Accordingly, the court ruled that the statute discriminated against interstate commerce. The court stated that Mississippi could not deny a parent corporation the right to exclude dividends merely because its subsidiaries chose not to do business in Mississippi.

While the majority of Supreme Court and state cases discussed herein involve discrimination against interstate commerce as opposed to foreign commerce, the Commerce Clause, as *Japan Line* makes clear, provides an even more rigorous standard of protection to foreign commerce.

III. The potential reach of the New Hampshire court's analysis and past experience with states' willingness to adopt discriminatory taxes suggest that it is imperative for this Court to promptly address the issue.

Unchecked, the New Hampshire Supreme Court's decision provides a ready roadmap for states to discriminate against interstate commerce. While for many sensible and judicious reasons this Court is cautious in accepting cases, it is important that the Court act to discourage other states from adopting New Hampshire's discriminatory provision. The risk of proliferation is not mere fear-mongering but is based on painful and frustrating past experience. State legislatures enact unconstitutional taxes for as many reasons as there are state legislators. Whether because of time constraints, budget limitations, misunderstanding, or willful disregard, state legislatures have always and will continue to enact tax statutes that unconstitutionally discriminate against out-of-state commerce. Only steadfast enforcement of taxpayers' constitutional rights by this Court will deter future attempts to adopt and apply discriminatory tax schemes.

Even taxes previously found unconstitutional could be revived using the New Hampshire model. Should this Court deny *certiorari*, nothing will prevent North Dakota, California, and Mississippi from re-enacting dividends-received deduction provisions identical to those previously declared unconstitutional in *D.D.I., Inc.*, *Farmer Brothers Co.*, and *AT&T Corp.* The New Hampshire decision's blueprint for taxing foreign dividends more heavily when the foreign corporation does no business in the state creates an irresistible political temptation that will undoubtedly exacerbate the problem of discriminatory taxation of foreign commerce.

Review of this case will prevent states from building budgets on unsound revenue streams. Without review states will rely on unproven and suspect tax structures, creating instabil-

ity in their revenue systems. The longer the validity of a tax remains uncertain, the greater the potential upset to state budgets should the tax ultimately be found unconstitutional.

Because the New Hampshire decision departs from this Court's jurisprudence and provides a roadmap for further discrimination, the decision warrants review by this Court.

CONCLUSION

For the reasons state above, *amicus curiae* respectfully requests the United States Supreme Court to accept this case for review.

Respectfully submitted,

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