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No. 13-485

In The Supreme Court of the United States

MARYLAND STATE COMPTROLLER OF THE TREASURY,
Petitioner,

v.

BRIAN WYNNE, *et ux.*,
Respondents.

On Writ of Certiorari to the
Court of Appeals of Maryland

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Court has long contrasted a state's broad taxing power over its own residents with the more circumscribed authority of a state to tax nonresidents on a "source" basis on income earned from activities within the taxing state's territory. *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). The Wynnes, individual Maryland taxpayers, seek a ruling that limits Maryland's broad taxing authority over its residents and requires the State to tax them in the same manner as nonresidents, that is, on the basis of "source" rather than domicile. Resp. Br. at 36-37, 49. Yet the Wynnes offer neither precedent nor a principled basis for concluding, as they do, *id.* at 49, that the state of residence has a lesser claim on its residents' income than other states in which its residents invest or do business.

Under the Wynnes' analysis, a state's taxing power over its own residents would be confined to income received from sources "within its borders," *id.* at 38; "income earned outside the taxing jurisdiction" would be subject to tax only by the state where the income-generating activities took place, contrary to the until-now "well-established principle" that a state "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995). In seeking this remarkable outcome, the Wynnes ask this Court both to expand its dormant Commerce Clause jurisprudence and to jettison nearly a century of case law upholding the power of a state to "tax *all* the income of its residents." *Id.*; *see*

also Shaffer, 252 U.S. at 57. The Wynnes offer nothing that supports their novel legal theory and this Court should reject it.

Abandoning arguments made below, the Wynnes rely instead on three supposedly "control[ling]" cases involving taxes on corporate gross receipts rather than taxes on an individual's net income. Resp. Br. at 20 (citing *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948)). The "control[ling]" force of these three cases eluded the Court of Appeals, which failed to cite any of them, perhaps because two of the cases, *J.D. Adams* and *Central Greyhound Lines*, were not cited in the Wynnes' briefing below, and the third, *Gwin*, made only a one-sentence cameo appearance; none of the cases merited mention in the Wynnes' previous two submissions to this Court.

These cases provide no support for the Wynnes' theory that states lack greater power to impose personal income taxes on their own residents than on nonresidents. The decisions do not purport to address, much less endorse, this heretofore unknown proposition—unsurprisingly, since the Court in each case was analyzing a gross receipts tax assessed on total revenues, not a tax on net income, the type of tax Maryland imposes. This Court's precedents have never confused the two forms of taxes, which operate very differently. *See* Charles Trost, *Federal Limitations on State and Local Taxation* §10:1 (2d ed.). Indeed, *Gwin* itself identified net income taxes

as a permissible alternative revenue measure that avoids the constitutional infirmities of the gross receipts tax the Court invalidated in that case: "There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to *net income* derived from it, and to other forms of taxation not destructive of it." 305 U.S. at 441 (emphasis added). Whatever guidance the Wynnes might try to extract from the line of jurisprudence involving taxes levied upon gross revenues, there is no basis for disregarding the distinction upon which those decisions insisted and extending their holdings to the very different context of net income taxes. These three decisions, evaluating challenges to corporate gross receipts taxes, had no occasion to address, and provide no basis for disturbing, the "well-established principle" that supports a state's broad taxing authority over all of its own residents' income. *Chickasaw Nation*, 515 U.S. at 462-63.

Citing their newfound trilogy of gross-receipts-tax cases, the Wynnes now argue that (1) the Commerce Clause prohibits multiple taxation of interstate commercial transactions, and further prohibits the "risk" of a state's multiple taxation of the personal income of its own residents, *see* Resp. Br. at 14-15; (2) Maryland's tax scheme is constitutionally problematic because it protects C-corporations from multiple taxation but not S-corporations, *see* Resp. Br. at 3-4; and, (3) Maryland's partial-tax-credit scheme substantially burdens commerce engaged in by S-corporations in which Marylanders own shares, *see* Resp. Br. at 11-12.

In urging the Court to disavow its long-standing recognition of a state's plenary taxing power over its own citizens, the Wynnes both undervalue the fundamental nature of this sovereign power and ignore that the income of a C-corporation income, unlike that of an S-corporation, is *always* taxed twice—first, at the entity level and then as income to its shareholders, *see* Br. Multistate Tax Comm'n at 9-10. Having invested in Maxim, an S-corporation whose owners benefit from pass-through tax treatment in Maryland, the Wynnes should not be heard to complain about the supposed burden of paying taxes to states where Maxim operates in addition to the taxes Maryland is entitled to impose on either form of investment income received by its residents.

I. The State's Power to Tax Its Own Residents Is a Deeply Rooted and Fundamental Attribute of Sovereignty.

"The States . . . retain substantial sovereign authority under our constitutional system," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), including "the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests," *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959). This state power, understood from the time of the framers to be an inherent attribute of sovereignty, "'extend[s] to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the

State.'" *Gregory*, 501 U.S. at 457 (quoting *The Federalist* No. 45 at 292-93 (C. Rossiter ed. 1961)).

Indeed, Alexander Hamilton explained that the states entering the Union would continue to "possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants." *The Federalist* No. 32 at 197-98 (C. Rossiter ed. 1961). The essential and fundamental nature of this power "is an incident of sovereignty, and is co-extensive with that to which it is an incident." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824) ("The power of taxation is indispensable to [the states'] existence . . . ."); *The Federalist* No. 33 at 173 (C. Rossiter ed. 1961); *accord Arkansas v. Farm Credit Servs.*, 520 U.S. 821, 826 (1997) ("The power to tax is basic to the power of the State to exist."); *see also Department of Revenue of Or. v. ACF Indus.*, 510 U.S. 332, 345 (1994) (recognizing that "the taxation authority of state government" is "central to state sovereignty").

The foundational nature of these principles makes it highly improbable that the states thought they were surrendering this fundamental aspect of their powers by ratifying constitutional provisions that, on their face, do nothing more than authorize Congress to regulate foreign and interstate commerce. Indeed, in observing that federal powers under the constitution are "few and defined" and assuring that "[t]he powers reserved to the several States will extend to all the objects which . . . concern the lives, liberties, and properties of the people, and the

internal order, improvement, and prosperity of the State," James Madison tersely dismissed the notion that these powers were threatened by the Commerce Clause: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained." *The Federalist* No. 45 at 293 (C. Rossiter ed. 1961).

The Wynnes and their *amici* undervalue the sovereignty interests embodied in, and advanced by, the well-established principle justifying a state's authority to tax its residents based on their domicile. The taxing power of a government over its citizens is recognized as a deeply-rooted attribute of sovereignty not only in this Court's precedents; it has long had "international acceptance" as a "general principl[e]." *Chickasaw Nation*, 515 U.S. at 463. A state's power to decide how to structure its "fiscal systems" and how to choose among different methods for raising the revenue needed to fund government services is likewise understood to be an inherent power that derives from the states' status as sovereigns within our federalist system. *Allied Stores,* 358 U.S. at 526. For these reasons, this Court has declared that generally "[a] State is free to pursue its own fiscal policies, unembarrassed by the Constitution," and "[n]othing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the States and to inject themselves in a merely negative way into the delicate processes of fiscal policy-making." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 436, 444, 445 (1940).

Thus, the Court has recognized that the judiciary is ill-suited for evaluating a state's fiscal alternatives, *id.* at 445, such as the Wynnes' attempt to minimize the relative importance of the "$45 to $50 million per year . . . at stake in this case," Resp. Br. at 50, and their proposal that Maryland should lean more heavily on regressive property and sales tax measures, contrary to the approach chosen by the General Assembly, *id.* at 50-51. The Wynnes' *amici* misstate the basis for the choices that Maryland made through the "delicate processes of fiscal policy-making," *J.C. Penney*, 311 U.S. at 445, by mischaracterizing the legislative history and purpose behind Maryland's County tax, *see*, *e.g.*, Tax Exec. Inst. Br. at 17; Am. Ass'n of Att'y-CPAs Br. at 3 n.4; Tax Economists Br. at 6, 7, 15; id. at 27-31) (claiming the 1975 amendments had purpose of discriminating against interstate commerce). Far from being motivated by some discriminatory or invidious purpose, the County tax was enacted after extensive deliberation as part of a comprehensive set of fiscal reforms intended to allocate tax burdens more equitably among the State's residents, to reduce the State's reliance on regressive methods of taxation, and to provide greater budgetary stability for the State's local governments.

The effort began in 1962 when the General Assembly created a commission to examine the State's tax system. Md. Joint Resolution No. 1 (1962). That commission recommended "sweeping changes in State and local taxes" in its 1965 report; the same year, the General Assembly appointed a special legislative commission to study possible

revisions to the tax code. Md. Joint Resolution No. 11 (1965); Preliminary Report of the Special Legislative Commission on State and Local Taxation and Financial Relations, at i (Oct. 1965).

The special legislative commission concluded that, although "[l]ocal governments provide the strength of our State and Nation," they have been "unable to provide for the legitimate needs of their people through present resources." Final Report of the Special Legislative Commission on State and Local Taxation and Financial Relations at 1 (Jan. 7, 1966). The report cautioned, however, against relying on increased property taxes as a source of additional revenue because of the regressive effects of such taxes. *See id.* at 3. The commission advised that "it is offensive to our inherent sense of fair play to require those with the least income to pay a larger percentage of that income for taxes than those with greater income" and that, instead, "tax burdens" should be "fair," "equitable," and "bear a reasonable relationship to ability to pay." *Id.* at 1, 2. Because "taxes upon income are the only ones capable of progressivity," the report recommended that the State rely more heavily on income taxes and shift from a flat income tax rate to a progressive, graduated rate schedule. *See id.* at 3-4. Although a tax reform bill based on these recommendations failed during the 1966 legislative session, the Legislature met in special session to enact a temporary measure authorizing local jurisdictions to impose their own income taxes. 1966 Md. Laws Spec. Sess., ch. 2.

Later that year, the Governor-elect appointed another committee to review the State's tax system and recommend new legislation. *See* Report of the Committee on Taxation and Fiscal Reform: A Program to Meet Maryland's Fiscal Problems in 1968 (Feb. 1, 1967). This committee also recommended that the State "move to correct the regressive nature of its total tax structure" and that "the only effective means of improving our situation is to shift the burden from property taxation to taxation of income on a graduated basis." *Id.* at 2. In particular, with respect to local governments, the committee concluded that property taxes "cannot continue to carry the bulk of the burden of local government" because they are "the most regressive of all taxes." *Id.* at 1. "If local governments are to continue to carry their present share of responsibility for providing services," the committee explained, "then local governments must be given other sources through which they can tax the wealth of their citizens equitably." *Id.* The committee therefore recommended, among other things, that (1) the State shift to a graduated income tax and (2) each county be required to impose an additional income tax levy on top of the State's new graduated income tax. *Id.* at 7-8. The General Assembly implemented these recommendations in 1967 through an omnibus tax reform bill. 1967 Md. Laws, ch. 142.

The local income tax, therefore, was part of a multi-year comprehensive effort by Maryland's policymakers to distribute the burdens of local government more equitably among State residents based on their ability to pay and these reforms

quickly had the desired effect of decreasing the State's reliance on regressive forms of taxation. By 1971, Maryland had "raise[d] two and a half times as large a percentage of [its] revenues from the income tax as the average of state and local governments in the country." Report of the Study Commission on the State Tax Structure at 9-11 (Jan. 4, 1971). According to a later report—based primarily on data from the 1973 tax year—property taxes in Maryland declined as a percentage of total local government revenues, in some cases dramatically, because of the new local income tax. *See* 1975 Report of the State Tax Reform Study Committee at 4 (Feb. 23, 1976); Technical Supplement to the 1975 Report of the State Tax Reform Study Committee at 21 (Feb. 23, 1976).

In 1974, a decision by the Maryland Court of Appeals altered the way the County tax had been administered by sustaining a taxpayer's challenge to the tax scheme and holding that the statutory credit for taxes paid to another state extended to the county component of the tax. *Stern v. Comptroller*, 271 Md. 310 (1974). This holding interfered with the balance struck by the General Assembly in two ways. First, as the Court of Appeals later recognized, "permitting Maryland residents to deduct credits from county income taxes in the amount of income taxes paid to other states" would lead to certain taxpayers "paying little or no local tax for the services provided by the county while a neighbor with similar income, exemptions, and deductions might be paying a substantial local tax to support those services." *Frey v. Comptroller*, 422 Md. 111, 140 (2011) (quoting *Blanton v. Comptroller*, 390 Md. 528, 536 n.9 (2006)).

Second, the ruling in *Stern* decreased the revenue that local jurisdictions could raise through income taxes—the means of taxation that the General Assembly had selected when it overhauled the tax system in 1967 to make it less regressive.

The legislative history therefore offers no support for the claim that the 1975 change was animated by a discriminatory purpose. On the contrary, the Maryland Legislature simply acted to clarify that County income taxes could not be reduced by the credit for taxes paid to another jurisdiction.[1] 1975 Md. Laws, ch. 3. There is no evidence that, in doing so, the General Assembly intended to erect protectionist barriers to interstate commerce or to deter its residents from participating in interstate commerce. Rather, the Legislature's goals—as they

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[1] Prior to the Court of Appeals' decision in *Stern*, the administrative construction by the Comptroller and the Maryland Tax Court was that the credit did not apply to the County tax. As the Tax Court explained in *Scott v. Comptroller*, Income Tax No. 198, 1970 WL 582 (Md. Tax Oct. 13, 1970), the credit provision "was enacted in 1939 and ha[d] not been changed since that time . . . . Such being the case, the Legislature could only have intended in 1939 that the tax credit then provided for be deducted from the resident's state income tax, since there was no county income tax in Maryland at that time." The Comptroller defended his administration of the tax on these grounds. Brief of Appellee at 3*, Stern v. Comptroller*, 271 Md. 310 (1974). If the Comptroller had believed that the Legislature intended the credit to apply, the *Stern* case would not have arisen. Thus, it does not appear that the credit provision was ever understood to apply to the County tax until *Stern*, and, in overturning the Court of Appeals' ruling, the General Assembly was simply restoring that original understanding.

were throughout this whole period—were to ensure the equitable distribution of the State's tax burden among its own residents and ensure that local jurisdictions would have sufficient resources to provide the necessary services to those residents. Indeed, future study committees appointed by the General Assembly continued to view the "innovation" of Maryland's local income tax as an integral piece of that endeavor. *See, e.g.*, 1975 Report of the State Tax Reform Study Committee at 3 (explaining that the County tax was a "major contributing factor" in Maryland's decreased reliance on regressive property taxes).

Maryland's County tax, therefore, has its roots in careful policy judgments by elected officials about how to fairly and equitably distribute the burden of taxation among Maryland residents. These policy judgments are best left to the states in the exercise of their sovereign power to craft their own tax systems.

II. A Requirement for Mandatory Apportionment Is Incompatible with a State's Power to Tax Its Residents' Entire Income.

The Wynnes no longer advance any argument responsive to the predominant concern of dormant Commerce Clause jurisprudence, which is deterring discrimination resulting from protectionist state laws. *See Department of Revenue v. Davis*, 553 U.S. 328, 337 (2008) ("[T]he dormant Commerce Clause is driven by concern about economic protectionism[.]"). Their brief in this Court does not attempt to defend the Court of Appeals' finding of such discrimination.

The Wynnes evidently have accepted the reality that Maryland's tax treats in-state and out-of-state income exactly the same (and then offers a credit for out-of-state taxes that effectively results in higher taxes on in-state income). Instead, the Wynnes now limit their "discrimination" argument to a conflation of prongs two and three of the *Complete Auto* test, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); that is, they effectively contend that absent a full credit for out-of-state taxes, Maryland's County tax "discriminates against interstate commerce" solely because, in their view, it "is not fairly apportioned." Resp. Br. at 23. Their malapportionment argument lacks merit on its own, and it fares no better when it is collapsed into their discrimination claim.

Although the Wynnes "agree" that "Maryland has the sovereign power to tax all its residents' income, wherever earned," Resp. Br. at 11; *id.* at 27-28 (same), they insist that Maryland is prevented from *exercising* this sovereign power on any of their income earned outside the State. Exercising that power, they contend, creates a "risk" that such income may be "double taxed" by another state, "regardless of whether other States actually exercise their jurisdiction to tax the Wynnes' income earned within their borders," *id.* at 35-36. Thus, their argument in favor of apportionment is internally contradictory. In the Wynnes' view, Maryland possesses a comprehensive sovereign power to tax its residents' income that the State nonetheless cannot exercise in light of the ever-present "risk" of taxation by other states, and the Wynnes enjoy the privileges

of residence in Maryland, but cannot be asked to pay an income tax measured in accordance with these privileges. Nothing in the Constitution or this Court's precedent can be deemed to impose such a paradoxical arrangement that would effectively negate an essential "attribute of sovereign powers" inherent in statehood itself. *Allied Stores*, 358 U.S. at 526.

The Wynnes' argument ultimately rests on a single proposition, namely, that the Constitution requires a state to "apportion" its tax on residents to exclude income that is potentially subject to taxation by other states. They contend that the only power a state may exercise in taxing personal income is the state's "source-based" authority to "tax commerce conducted within its borders," Resp. Br. at 38, not in the broader power to tax on the basis of "domicile" that this Court has repeatedly recognized. The Wynnes concede a state's power to tax beyond borders on domicile basis, Resp. Br. at 11, 27-28, but then insist that Commerce Clause-mandated apportionment limits the domiciliary state's authority to tax a resident's personal income to income from sources within its own territory. It makes no sense, however, that the foundational principle of the sovereign power to tax *all* of a resident's income, wherever sourced, is limited by an apportionment rule that restricts the taxing authority to income from sources or activities within the state. The principle that a state has sovereign power to tax out-of-state necessarily means that its taxing power need not be restricted to income within its borders. The Wynne's argument cannot be

squared with this Court's precedents concerning a state's power of taxation with respect to its own residents for, as the Court has explained, a state's power to tax on the basis of domicile is justified by the unique relationship between a state and its residents. *See, e.g.*, *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) ("The [power to] tax . . . is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state."); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280-81 (1932). Those precedents concerning the "domicile" basis for taxation do more than merely acknowledge the power's existence and its character as an attribute of sovereignty; they endorse a state's exercise of that power and reject the suggestion that the power is lost when another state legitimately exercises its power to tax the same object on a basis other than the taxpayer's domicile. *See Chickasaw Nation,* 515 U.S. at 463 n.12; *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 176-77 (1942); *Curry v. McCanless*, 307 U.S. 357, 368 (1939); *Guaranty Trust Co. of New York v. Va.*, 305 U.S. 19, 23 (1938).

Just as deeply entrenched as the states' sovereign power to tax is the understanding that unique privileges and obligations attach to the relationship between a state and its own residents, particularly in a democracy, where it is the residents who ultimately direct the state's exercise of its sovereign powers. *See McCulloch*, 17 U.S. at 428. It is precisely this relationship that undergirds the domicile-based

taxing power, based on the benefits that states provide to their own citizens, and the concomitant expectation that those citizens will support their government by the payment of taxes.

The Wynnes' argument assumes that these foundational principles have no place in dormant Commerce Clause jurisprudence, but this Court's precedent disagrees. Contrary to the Wynnes' assertion that "this Court's cases have never suggested" that the "host of financial benefits" that states "provide their residents" is "a good enough reason to burden interstate commerce," Resp. Br. at 48-49, the very first case cited in their brief instructs that the "broad inquiry" that applies to state taxing powers under *both* the Due Process Clause *and* the Commerce Clause asks "'whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state'—that is, 'whether the state has given anything for which it can ask return.'" *MeadWestvaco Co. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 24-25 (2008) (quoting *J.C. Penney*, 311 U. S. at 444). When the state imposing the income tax is the state of residence, the answer to that inquiry, under either clause of the Constitution, is inevitably an undeniable "yes."

The Wynnes' theory is thus wholly unsupported. When all is said and done, they do not cite a single case—under the Due Process Clause, the Commerce Clause, or any other doctrine—holding that a state must apportion the tax base where, as here, the state's sovereign power authorizes it to tax the object

in its entirety. The Wynnes do no more than show that a state must apportion taxes to avoid taxing values beyond its lawful jurisdiction, an undisputed point that has no relevance here, where a state's jurisdiction to tax its own residents' income lawfully extends to "all" of their income, "even income earned outside the taxing jurisdiction." *Chickasaw Nation*, 515 U.S. at 462-63.

Finally, the authority that the Wynnes now wrongly cite as dispositive does not govern in this context. Resp. Br. at 17-18. Those three cases, *J.D. Adams*, *Gwin*, and *Central Greyhound Lines*, involve gross receipts taxes on out-of-state activities of corporations. These precedents are wholly inapposite because they involve neither resident individuals nor net income taxes but, rather, corporations in interstate commerce that challenged states' overreaching in imposing gross receipts taxes on the out-of-state activities of a unitary business. *See Mobil Oil Corp. v. Comm'r of Taxes of Vt.*, 445 U.S. 425, 439 (1980) ("As these cases indicate, the linchpin of apportionability in the field of state income taxation is the unitary-business principle."). This Court's precedents expressly distinguish between these two forms of taxes, precisely on the ground that some gross receipts taxes are structured so that they impermissibly tax values beyond the taxing state's jurisdiction, whereas net income taxes do not present the same concern. *See Gwin*, 305 U.S. at 441. Moreover, this Court has rejected similar "reference[s] to unconstitutional 'burdens' on interstate commerce made in general statements . . . torn from their setting in judicial

opinions" and that "speak of state . . . taxes of a different kind" than that before the Court. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 50 (1940). That is what the Wynnes do here, and their reliance on inapposite corporate gross receipts tax cases should likewise be rejected.

III. Compelling Maryland to Allow a Credit Against County Taxes Would Interfere with the State's Sovereign Prerogative to Allocate Tax Burdens More Equitably Among the State's Residents and Would Be Unworkable.

Under the Wynnes' proposal, individual resident Maryland taxpayers would pay property taxes on property they own within Maryland's borders; they would pay sales taxes on purchases they make within Maryland's borders; and they would pay income taxes on money earned from activities or derived from sources within Maryland. *See* Resp. Br. at 49. Maryland's resident taxpayers would not, however, be responsible for paying individual resident income taxes to Maryland or its local governments on income they receive from sources or activities outside Maryland's territorial borders.

In the Wynnes' view, their proposal is a modest one, and Maryland should be content to restructure its fiscal system to comport with their vision of what the Constitution requires and to make up for the revenue that would be lost under their proposal. The proposed arrangement is both familiar and strange. It is familiar because it describes precisely the tax obligations that a state may constitutionally impose

on nonresidents; it is strange because it takes no account of the unique privileges enjoyed by residents. Under present law, nonresidents already pay those same property, sales, and income taxes that the Wynnes are willing to pay, on the same objects of taxation. Nonresidents also receive the exemption from Maryland personal income taxes to which the Wynnes claim a constitutional entitlement. That is, Maryland does not tax nonresidents on income earned from activities or derived from sources outside Maryland.

But nonresidents, unlike the Wynnes, are not eligible to receive the many benefits and services that Maryland and its local governments provide exclusively to residents. *See* Pet'r Br. at 20-23. Of course, as the Wynnes observe, many other state and local government services are not restricted to residents. But, unlike the Wynnes, nonresidents have no say in the democratic process that determines which services Maryland or Howard County will provide, the amount or quality of those services, or the way they will be delivered. The Wynnes' demand to have their income taxed only on a "source" basis (and thus to pay less for the privileges of residence than neighbors who happen to earn their income in Maryland) denies what this Court's precedents affirm: that "[e]njoyment of the privileges of residence . . . are inseparable from the responsibility for sharing the costs of government," *Lawrence*, 286 U.S. at 279, and that "[a] tax measured by the net income of residents is an equitable method of distributing the burdens of

government among those who are privileged to enjoy its benefits," *New York ex rel. Cohn*, 300 U.S. at 313.

If the Wynnes are correct that a state of residence may tax its residents only on a source basis, then no state's credit scheme cures the constitutional violation they perceive. Every credit statute contains limitations, the most common of which operate to allow the state of residence to collect taxes on income from sources in another state if that state does not have an income tax or taxes the income at a rate lower than the residence state. *See* Hellerstein, *State Taxation* ¶ 20.10 (3d ed. 2013) (hereinafter Hellerstein). The Wynnes' proposed rule is also impractical, because it will cause significant disruption to existing state tax regimes. Indeed, if this Court holds that a full credit is compelled by the Commerce Clause—and thereby constitutionalizes this entire area of the law—lower courts will inevitably and with far greater frequency be called upon to do what this Court has historically sought to avoid, by "inject[ing] themselves" into the various states' "delicate," and idiosyncratic, "processes of fiscal policy-making." *J.C. Penney*, 311 U.S. at 445. Such delving into the minutiae of state tax policies would become necessary, in a case such as this, because states often do not grant a completely full credit for all taxes paid to other states. Rather, to name just a few examples, states often limit their credits to when the tax paid to the other state was similar in nature, was paid during the same tax year, or was properly based only on sources of income attributable to activity in the other state. *See* Hellerstein ¶ 20.10. Under the Wynnes' proposed

rule, states will likely face Commerce Clause challenges to these restrictions, and courts will ultimately have to resolve whether these partial credits are also constitutionally prohibited.

For example, under the current regime, questions frequently arise about whether a particular out-of-state tax is an "income" tax to which a credit should apply. *See, e.g.*, *Herschend v. Director of Revenue*, 896 S.W.2d 458 (Mo. 1995) (whether an excise tax on a S-corporation was an income tax); *King v. Forst*, 391 S.E.2d 60 (Va. 1990) (whether an unincorporated business tax was an income tax); *see also PPL Corp. v. Comm'r*, 133 S. Ct. 1897 (2013) (facing similar question with respect to federal government's credit for taxes paid to foreign nations). Some states impose even stricter limits, by granting a credit only to net income taxes or "substantially similar" taxes paid to other states. *E.g.,* Ariz. Rev. Stat. §43-1071; Cal. Rev. & Tax Code §18001; Va. Code §58.1-332.2(C). The legality of these restrictions will become federal constitutional questions if the Wynnes prevail.

Similarly, taxpayers may be faced with "double taxation" when their home state allows a credit only for taxes paid during the same tax year, particularly when the relevant income is deferred for tax purposes in one state but not the other. *See* Hellerstein ¶ 20.10 n.742. Some state courts, in fact, have denied credits for taxes paid to other states on these grounds. *E.g.*, *Idaho Tax Comm'n v. Stang*, 25 P.3d 113, 115-16 (Idaho 2001) (denying credit on contributions to IRA in earlier tax year); *Estate of*

Guzzardi v. Director, Div. of Taxation, 15 N.J. Tax 395, , 405-09 (1995), *aff'd per curiam*, 16 N.J. Tax 374 (N.J. Sup. Ct. App. Div. 1996) (denying credit against New Jersey tax imposed on installment sale gain for taxes paid to another state during a prior year on same gain because other state did not recognize installment method of reporting). If this Court accepts the Wynnes' rule, these restrictions might also be subject to challenge under the Commerce Clause.

Finally, most states also limit their credits for taxes paid to other states to those taxes that were attributable to out-of-state activities—that is, based on the other state's properly exercised "source" jurisdiction. *See*, *e.g.*, Ark. Code Ann. § 26-51-504(a)(1); Colo. Rev. Stat. Ann. § 39-22-108; Del. Code Ann. tit. 30, § 1111(a); Me. Rev. Stat. Ann. tit. 36, § 5217-A; Mo. Ann. Stat. § 143.081; W. Va. Code § 11-21-20(a). These statutes, however, cause "a substantial risk of multiple taxation" when "the resident's state defines the source of income differently from the way it is defined by states that tax the income on a source basis." Hellerstein ¶ 20.10[2][b] (internal quotation marks omitted).

In constitutionalizing this area of the law, this Court would make it a constitutional battleground and, more significantly, would for the first time take these important legislative policy questions out of the states' hands. The Court has never before decided that it should interfere in states' choices about how to tax their own residents, and there is no reason for the Court to do so here.

CONCLUSION

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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