No. 13-485

In the
Supreme Court of the United States

COMPTROLLER OF THE TREASURY OF MARYLAND,
Petitioner,
v.
BRIAN WYNNE, *et ux.*,
Respondents.

On Writ of Certiorari to the
Court of Appeals of Maryland

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER MARYLAND STATE COMPTROLLER OF THE TREASURY

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August 5, 2014

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission ("the Commission") respectfully submits this brief in support of the Petitioner-Appellant Maryland State Comptroller of the Treasury urging this Court to reverse the decision of the Maryland Court of Appeals.[1] That decision fundamentally misinterprets this Court's dormant Commerce Clause jurisprudence and would upend vital and long-established principles of residency-based taxation if followed by this Court.

The issue before this Court is whether the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, requires Maryland to reduce its own tax on income realized by resident shareholders of a corporate entity by an amount equal to the taxes paid by those shareholders in other states in which the entity conducted business. Maryland gives its residents only a partial credit against its own income tax for income taxes

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[1] No counsel for any party authored this brief in whole or in part. Only *amicus curiae* Multistate Tax Commission and its member states, through the payment of their membership fees, made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state, other than the State of Maryland. Finally, this brief is filed with the consent of the parties.

paid to other states in that situation. MD. CODE ANN., TAX-GEN. § 10-703.[2] The Maryland Court of Appeals has determined that the failure to afford a full credit results in prohibited discrimination against interstate commerce because, assuming other states also assert the authority to tax the income, Maryland residents might be more inclined to invest in business entities that confine their operations to Maryland to avoid the possibility of being "double-taxed" on any portion of their incomes. *Maryland State Comptroller of Treasury v. Wynne*, 64 A.3d 453, 470 (Md. 2013).

The decision of the state of Maryland to tax its own residents on one-hundred percent of their incomes, providing only a partial credit for taxes paid to other states, does not violate the dormant Commerce Clause because the Maryland tax scheme does not discriminate against interstate commerce. Maryland is not taxing an out-of-state business; it is only taxing the income of its own residents for the benefit of residing in Maryland, and properly doing so without regard to the putative geographic source or the means by which that income is earned.

In addition to having the sovereign authority to adopt such a system, Maryland has compelling policy reasons for ensuring that its residents pay for the

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[2] Maryland's taxing system includes both state-level and county-level income taxes. MD. TAX-GEN. § 10-103(a)(1). Maryland allows a credit against taxes paid to other states but does not allow a similar county-level credit for taxes paid to other states. MD. TAX-GEN. § 10-703(a). For purposes of this brief, the Commission analyzes both taxes as state-level impositions. *See Frey v. Comptroller*, 29 A.3d 475 (Md. 2011).

benefits they receive as a consequence of their status, including access to publicly-financed education and a safety net of public assistance and social programs. By the same token, states also have the sovereign authority to impose nondiscriminatory taxes on nonresidents to the extent they derive a portion of their income from businesses or property interests located within those states based on the protections and benefits provided by those states. *Shaffer v. Carter,* 252 U.S. 37, 50 (1920).

The Maryland Court of Appeal's holding that residency-based income taxes must yield to source-based taxes would have far-reaching effects on state and local governments if affirmed by this Court. These governments provide different kinds of services and protections both for their citizens and nonresidents. These services are funded by a system of potentially overlapping taxes that may include residency and source-based taxes levied on or by reference to gross or net income, narrowly or broadly defined, or on some other base. Where each tax is facially neutral and non-discriminatory, there are no constitutional guidelines for determining which tax must yield to the other, and no reason to believe the framers of the Constitution intended to impose any particular taxing system upon the states. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 277-79 (1978).

A decision upholding the Maryland Court of Appeals would involve the state courts in a never-ending task of determining whether particular taxes imposed on an individual as a resident should be reduced or eliminated because another state or local government also has jurisdiction to impose a tax on

the individual as a nonresident. For example, must a state that imposes an annual stock value tax on resident shareholders, measured by reference to retained earnings of their corporate investments, give a credit against that tax for income taxes paid by the corporations to other states? Analyzing the interplay of many potentially conflicting state and local government tax systems to determine whether a credit is mandated would require the courts to make legislative value judgments, and could ultimately undermine our system of federalism by limiting state tax policy choices and revenues. The framers recognized that the power to tax was:

> [T]he highest attribute of sovereignty, the right to raise revenue; in fact, the right to exist; without which no other right can be held or enjoyed. The general power to tax is not denied to the states…

M'Culloch v. State of Maryland, et. al, 17 U.S. 316, 336 (1819).

The Commission was established by the Multistate Tax Compact, which became effective in 1967. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the validity of the Compact). Today, forty-seven states and the District of Columbia participate in the Commission as compact, sovereignty, or associate members.

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportion-

ment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. Multistate Tax Compact, Art. I. The Compact was one response by the states to the need for reform in state taxation of interstate commerce. *See, e.g.,* H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965) and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary, 89th Cong., 2d. Sess. (1966) (illustrating the depth and scope of congressional inquiry into the potential for federal preemption of state tax).

The Commission's interest in this case arises from our goal of preserving the states' sovereign authority to determine their own tax policies within federal constitutional and statutory limitations. There may be nothing more fundamental to state sovereignty than preservation of the authority to determine how residents will be taxed for the privileges and benefits of citizenship. Extension of dormant Commerce Clause tests, applied by this Court in other contexts, to a tax imposed by a state on its residents' income from investments is a significant and unnecessary intrusion upon state authority.

SUMMARY OF ARGUMENT

The Commission urges this Court to hold that Maryland's taxing system is a valid and non-

discriminatory exercise of the state's unquestioned power to tax its residents on income derived from whatever source, in order to ensure that all residents pay for the privilege of living within the state's protections. The state is not required to reduce the tax obligations imposed on its residents for the privilege of residing within the state simply because another jurisdiction has the authority to impose a facially neutral, nondiscriminatory tax on a portion of that individual's income based on its origin. The benefits and protections afforded to the Respondents ("the Wynnes" or "the taxpayers") as residents differ from the benefits and protections afforded by other states to them as investors in a business operating in those states. The Maryland Court of Appeals erred in evaluating a tax on residents as if it were a tax on a multistate business, and reached the wrong conclusion as a result of applying the wrong test to the wrong activity.

A decision upholding the Maryland Court of Appeals would have profound and unpredictable effects on state and local governments. A holding that the Commerce Clause requires a state to reduce a facially neutral, non-discriminatory tax imposed on its own residents based on the amount of tax imposed on that individual by another state for activities in that state would disrupt the system of federalism on which our Union is founded. Under this system, individuals may enjoy the privileges and rights of citizenship in their state of residency, as well as the benefits provided to them by other states in which they have property or activities. States, in turn, have extensive jurisdiction and authority with respect to

their own citizens, by virtue of their residency in the state, as well some jurisdiction over nonresidents, who may be present or have property or activities in the state. Under this system, there is potential for some overlapping taxation. This is not a flaw of federalism, but a reflection of it.

ARGUMENT

I. Maryland's Decision to Tax its Residents Upon Their Entire Incomes Without Allowing a Full Credit for Taxes Paid in Other Jurisdictions Does Not Violate The Commerce Clause of the United States Constitution

The Wynnes are residents of Maryland who are subject to tax on their total income without regard to source. MD. CODE ANN., TAX-GEN. §§ 10-101(i), 10-102, 10-203. They do not claim that Maryland's imposition of tax on their total incomes is not fairly related to the considerable benefits and protections provided to them as residents of the state. *See Wynne*, 64 A.3d at 463.

The Maryland Court of Appeals ignored the taxpayers' status as residents and instead applied a four-part test commonly used by this Court in determining whether a tax impermissibly burdens a business operating in multistate commerce. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).[3] *Wynne*, 64 A.3d at 463. The Maryland court

[3] The test is: (a) does the tax fall upon an activity with a substantial nexus to the taxing state; (b) is it fairly apportioned; (c)

applied this test, designed to determine when states might exceed their authority to tax interstate transactions or multistate business operations, to a residency-based tax. This yielded what was, perhaps, a predictable result: a dormant Commerce Clause violation. Although the decision below nominally turned on the extent of any "credit" which must be allowed for taxes paid to other states, the Maryland court's reasoning could apply to any residency-based tax that was imposed on income that arguably had a foreign source.

As this Court has held on many occasions, the purpose of the dormant Commerce Clause is to prevent states from erecting economic barriers around themselves by favoring in-state economic interests at the expense of out-of-state competitors. *See, e.g., New Energy Co. of Ind. v. Limbach,* 486 U.S. 269, 273–274 (1988); *Fulton Corp. v. Faulkner,* 516 U.S. 325, 330 (1996); *Dep't of Rev. of Kentucky v. Davis,* 553 U.S. 328 (2008). Taxes imposed by a state on its own residents in a neutral manner present little opportunity for application of the Commerce Clause. *See Goldberg v. Sweet,* 488 U.S. 252, 266 (1989)("It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.") There is no evidence in this case that Maryland's facially neutral taxing system was designed to or has the effect of benefiting in-state economic interests at the expense of out-of-state competitors. This omission is fatal to the claim of impermissible discrimination.

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is it non-discriminatory; and (d) is the tax fairly related to benefits and protections afforded by the states? 430 U.S. at 279-80.

A. Maryland is Not Taxing an Interstate Business; It is Imposing a Tax on its Residents

The taxpayers are shareholders in Maxim, Inc., a corporation formed in Maryland (*Pet. for Writ of Cert.* at 3) that has elected under Subchapter S of the Internal Revenue Code ("I.R.C."), along with all its shareholders, to forgo entity-level taxation otherwise imposed on corporations under the federal income tax system. *See* 26 U.S.C. § 1363. Maryland follows the federal election and allows the entity to forego state tax at the entity level. But Maryland also provided a credit to the Wynnes for taxes paid by Maxim where another state did not follow federal tax treatment and instead imposed an entity-level tax. *Br. of Pet.* at 5 n.4.

The crux of the taxpayers' Commerce Clause argument is that Maryland's residency-based tax is actually a tax on Maxim's extra-territorial income: "it is Maxim's income, imputed to the Wynnes by Maxim's S-Corporation's election and Maryland's tax statutes." *Supp. Resp. to the Solicitor General's Brief in Support of Cert.* at 8.

If Maxim's shareholders had not made the Subchapter S election, Maryland would impose separate taxes on Maxim and on the Wynnes. *See* MD. CODE ANN., TAX-GEN. §§ 10-102, 10-101(l), 10-104. In addition to taxing the Wynnes on one-hundred percent of any corporate distributions or dividends received, the state would tax a portion of Maxim's income derived from sources within the state. Nor would the Wynnes be entitled to take a credit against the tax on corporate distributions for taxes the corporation

might have paid to other states. But Maxim is not a taxpayer in Maryland and Maryland has not sought to tax any of its income. This was the conceptual mistake made by the Maryland court: conflating the taxes imposed upon the Wynnes, as residents receiving investment income, with a tax on Maxim itself.

Because of this mistake, the Maryland court determined that it must apply *Complete Auto's* four-part test to the tax on the Wynne's income. The court noted that there was no dispute that the first (substantial nexus) and fourth (fair relationship) prongs were met. The court concluded, however, that the failure to grant a full credit violated the second and third prongs, fair apportionment and non-discrimination.

In determining whether Maryland's tax was "fairly apportioned," the Maryland Court of Appeals applied the "internal consistency" and "external consistency" standard announced in *Container Corp. of Am. v. Franchise Tax Bd.,* 463 U.S. 159, 169 (1983). *Wynne,* 64 A.3d at 467-68. The test for internal consistency is described as follows: "the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." The test for "external consistency" is described as: "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Container,* 463 U.S. at 169.

Neither the internal nor external consistency tests are applicable to Maryland's tax on its residents. As for internal consistency, had the Maryland

Court of Appeals understood that Maxim was not subject to a tax on its earnings, and the only "taxable event" at issue was the Wynnes' residency within the state, it is hard to understand how the court would have reached its conclusion that Maryland's taxing system was internally inconsistent, since the Wynnes can be legal residents of only one state. *See Restatement (Second) of Conflicts*, § 11 (1969).

By the same token, the court's determination that Maryland's tax system is "externally inconsistent," (*Wynne,* 64 A.3d at 467) for failing to give a credit for liabilities incurred in other jurisdictions becomes untenable, unless the court was also prepared to say that a tax credit must be provided for dividends received from taxable C corporations and other sources of investment income.

B. Residency Within a State is Sufficient Justification for Imposing a Tax on Income Received from Whatever Source.

The fundamental authority of sovereigns to tax their citizens on all of their income from whatever source derived has been established in this Court for almost a century in the context of federal taxes, *Cook v. Tait,* 265 U.S. 47, 56 (1924) and state taxes*, Shaffer v. Carter*, 252 U.S. 37, 57 (1920). *See also Curry v. McCanless,* 307 U.S. 357, 368 (1939)("the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax"). As this Court has recognized time and time again, the relationship between a resident and her government, and the attendant privileges and responsibilities embodied in that relationship, are unique. No-

table among those privileges and responsibilities is the right of residents to participate in the democratic process as citizens in determining how much tax they will pay and how those tax dollars will be spent.

Thus, in rejecting a claim that New York was barred by the Due Process Clause from taxing its residents on rents received from property in New Jersey, this Court held in *New York* ex rel. *Cohn v. Graves,* 300 U.S. 308, 312–313 (1937):

> That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil[e] itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government.... These are rights and privileges which attach to domicil[e] within the state.... Neither the privilege nor the burden is affected by the character of the source from which the income is derived.

Accord, Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 463 (1995).

The relationship between the Wynnes as residents and the state in which they have chosen to live does not change in character based upon the amount or nature of the income the Wynnes earn. Income taxes are founded on the principle—upheld many times by this Court—that taxpayers can be made to pay for the benefits of a civilized society based upon

their ability to bear those burdens. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628-29 (1981); *Goldberg v. Sweet*, 488 U.S. 252, 266-267 (1989); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280-281 (1932).

This principle has been upheld even though some residents may pay more to receive a smaller direct benefit from the state, while other residents, such as retirees or the disabled, may be entirely exempted from income tax liability but receive greater benefits. By the same token, the relationship between the Wynnes and their state of residence does not change based on the geographic sources of the income they earn. A taxpayer might earn income from investment in another state or country's bonds, *Cook v. Tait,* 256 U.S. at 56, from stocks traded on a domestic or foreign exchange, *Shaffer v. Carter*, 252 U.S. at 57, from property held in trust by a distant bank, *Curry v. McCanless,* 307 U.S. at 368, or from a rental property in a neighboring state, *New York* ex rel. *Cohn v. Graves,* 300 U.S. at 312, and yet the mutual obligations between the state and its residents remain the same. Any one of these activities carried out by a taxpayer could be considered engaging in interstate or foreign commerce.

Under the Maryland Court of Appeals' application of the "fair apportionment" standards, any of the circumstances listed above could be considered an impermissible discrimination against interstate or foreign commerce. This would presumably be true regardless of whether the underlying economic activity carried out in another state was or could be sub-

ject to tax there. But Maryland's tax is not intended to reflect the source of its residents' income.

C. The States that Tax the Wynnes on a Portion of the Income from Their Investment, Commensurate with the Protections and Benefits Provided in Those States, Do Not Duplicate or Conflict with Residency-Based Taxes.

The authority of a sovereign to impose tax on non-residents deriving income from property or businesses activities within that sovereign's borders is well-established. *Travis v. Yale & Towne Mfg. Co*, 252 U.S. 60, 72 (1920); *Whitney v. Graves,* 299 U.S. 366, 372 (1937); *Int'l Harvester Co. v. Wisconsin Dept. of Rev.,* 322 U.S. 435 (1944). The taxpayers have chosen to invest in a business operating in multiple states, enlisting the protections and benefits of governments in each of those jurisdictions. Expecting a taxpayer to pay for those protections and benefits does not offend the Commerce Clause nor was it the purpose of the "dormant" Commerce Clause to relieve those engaged in interstate commerce from paying for the costs of maintaining a civilized society. *Western Live Stock v. Bureau of Rev.*, 303 U.S. 250, 254 (1938).

The authority of a state to impose tax on all of its residents' incomes and the authority of a state to impose tax on business or property generating income within its borders are not in conflict or competition here. The states in which Maxim operates provide services and protections that benefit the Wynnes as investors. The protections extended to their investment by those states do not reduce the

benefits and privileges the Wynnes receive as residents of Maryland, including access to free primary and secondary public education, reduced college tuition and access to various public welfare benefits. *See Br. of Pet.* at 20-22.

The taxpayers make no claim that the taxes they pay in other states are not rationally related to the protections afforded to them. Maryland's decision to limit the amount by which its residents may reduce their tax obligations to the state based on obligations owed to other states has no Commerce Clause implications since its residents are not being taxed in Maryland as commercial actors; they are being taxed as residents.

D. The Commerce Clause is Not Implicated Merely Because Taxpayers Investing in Multistate Businesses May Pay Tax in Multiple States in Addition to Residency-Based Taxes.

The Maryland Court of Appeals concluded that Maryland's decision to afford its residents only a partial credit for taxes paid to other states constitutes impermissible discrimination under the dormant Commerce Clause. *Wynne*, 64 A.3d at 465-66. It came to this conclusion because a Maryland resident investing in a corporation treated as a pass-through entity for tax purposes which confined its operations to Maryland would pay less tax than a Maryland resident investing in a business operating in multiple states if those states sought to impose a source-based tax on the Maryland resident. *Id.*

The differences in potential tax burden are not a

result of Maryland's taxing policies, which make no distinction between income earned within the state and income earned elsewhere. *Cf. Fulton Corp. v. Faulkner,* 516 U.S. 325 (1996)(reduction in intangibles tax based on dividend-payors' operations within the state). The potential differences in tax burden, as noted by the dissent below, arise because the taxpayers enjoy the protections and benefits of multiple jurisdictions, and therefore should expect to pay for maintaining government in each jurisdiction. *Wynne*, 64 A.3d at 472 (Greene and Battaglia, JJ., dissenting).

The Commission maintains that the *Complete Auto* four-part test is inapplicable to a facially neutral tax imposed on a resident's income, from whatever source derived. But even if the test could be made to fit, the facts of the case do not support a finding of impermissible discrimination against interstate commerce.

Where a tax scheme facially discriminates between in-state and out-of-state activities, this Court has adopted a virtual *per se* rule of invalidity, unless the state can demonstrate compelling reasons for sustaining the tax. *Camps Newfound v. Town of Harrison,* 520 U.S. 564, 582 (1997) (*quoting Chemical Waste Mgmt. Inv. v. Hunt,* 504 U.S. 334, 342 (1992)) ("Once a state tax is found to discriminate against out-of-state commerce, it is typically struck down without further inquiry"). But where a taxing system makes no distinction between local and foreign activities, as here, this Court has required substantial evidence of actual discriminatory effects on

interstate commerce that outweigh the state's interests, even where some overlapping taxation with other state's taxing schemes is likely or inevitable. *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n,* 545 U.S. 429, 432 (2005); *Oklahoma Tax Commission v. Jefferson Lines*, 514 U.S. 175 (1995); *Goldberg v. Sweet*, 488 U.S. 252 (1989).

In the absence of such evidence, this Court has not hesitated to uphold the states' sovereign interests in maintaining their taxing authority free from undue federal interference. *Barclay's Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 318-320 (1994); *Container Corp.*, 463 U.S. at 192-193. The same lack of actual evidence of discriminatory effect coupled with the state's interests compels this Court to reverse the lower court's finding of impermissible discrimination in this case.

Any effect on interstate commerce arising from the application of Maryland's tax system, limited to its own residents, would be indirect, incidental, and completely speculative on this record. Moreover, Maryland has an overwhelming interest as a sovereign government in setting its own taxing policies, including its policy determination that its residents should bear the costs of government based on their ability to pay.

In *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, *supra*, this Court was confronted with an analogous tax imposed entirely on intrastate activity: a $100 annual permit fee for registering each truck engaged in intra-state activity. The petitioners were engaged in both intrastate and interstate

hauling, and complained that if every state imposed a similar flat tax on purely intrastate activity, a trucking company electing to operate its trucks in multiple states would bear a higher tax burden than trucks electing to confine their activities to a single state. *Id.* at 432. Although this Court had previously struck down un-apportioned "axle taxes" that were borne more heavily by interstate trucking companies, *see Am. Trucking Assn's, Inc. v. Scheiner,* 483 U. S. 266 (1987), the Court upheld Michigan's tax for three reasons, all of which apply with far greater force in this case.

First, Michigan's tax on intrastate hauling, like Maryland's tax on its residents for the privilege of exercising the rights of domicile, fell exclusively on local activity. *Id.* at 434. In that circumstance, the Court held that the state's sovereignty interests in determining its own taxing policies are especially strong and outweigh merely incidental effects on interstate commerce. This Court wrote:

> [Michigan's tax] does not facially discriminate against interstate or out-of-state activities or enterprises. The statute applies even-handedly to all carriers that make domestic journeys. It does not reflect an effort to tax activity that takes place, in whole or in part, outside the State. Nothing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause.
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> Although we have long since rejected any suggestion that a state tax … affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a local or intrastate activity, *Commonwealth Edison Co. v. Montana*, 453 U. S. 609, 615 (1981), we have also made clear that the Constitution neither displaces States' authority to shelter [their] people from menaces to their health or safety, *D. H. Holmes Co. v. McNamara,* 486 U. S. 24, 29 (1988) (internal quotation marks omitted), nor unduly curtail[s] States' power to lay taxes for the support of state government. *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, 48 (1940).

Id. Second, the Court noted that the record failed to reflect a "significant practical burden" on interstate commerce. *Id.* at 435.

In the present case, there is likewise a complete absence of evidence that Maryland's partial tax credit impedes interstate commerce by encouraging Maryland residents to confine their investments to property interests in Maryland or businesses operating solely in Maryland. The effects of Maryland's decision to limit its credit for taxes paid to other states on the investment and business decisions of Maryland residents are completely hypothetical and speculative.

The Maryland Court of Appeals apparently concluded that evidence of actual discriminatory effects on interstate commerce was unnecessary because

Maryland's taxing system was "internally inconsistent." As this brief explains, Maryland's taxing system meets the internal consistency test because it falls on residents, not commerce, for the privileges of Maryland domicile. No other state can impose a tax on Maryland's residents on this basis.

Even if Maryland's tax on its own residents could be described as internally inconsistent, absent evidence of a significant effect on interstate commerce, it does not follow that the tax must be struck down under the Commerce Clause. This Court so held in *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, after discussing the taxpayer's failure to provide evidence of discriminatory effects:

> Petitioners add that Michigan's fee fails the internal consistency test, a test that we have typically used where taxation of interstate transactions are at issue … We must concede that here, as petitioners argue, if all States did the same, an interstate truck would have to pay fees totaling several hundred dollars, or even several thousand dollars, were it to "top off" its business by carrying local loads in many (or even all) other States. But it would have to do so only because it engages in *local* business in all those States.

545 U.S. at 436-438.

The final consideration cited in *Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, was fairness. 545 U.S. at 429. In the present case, the taxpayers concede that Maryland's tax on their in-

come is fairly related to benefits and services provided by the state. *Wynne*, 64 A.3d at 463. Nor do the taxpayers contest that the states in which Maxim operates also provide benefits and services for which they can ask something in return.

By virtue of the taxpayers' election of S corporation status for Maxim, Inc., the taxpayers have avoided the economic burden of entity level taxation at the state and federal level. The election of S corporation status, however, has not lessened the separate obligations of the state of Maryland and other states to protect the Wynnes and their business interests.

II. Imposing a Tax Credit Obligation on States Whenever Income is Taxed on a Residency Basis and a Source Basis Would Cause Profound and Unpredictable Disruption of State Taxing Systems.

This Court has upheld the concept that residents of a state (or the United States) can be required to pay tax on income received from whatever source without necessity of a legislative deduction or exemption system under the Due Process Clause. *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). Imposition of a different standard under the Commerce Clause based on notions of impermissible "double taxation" would trigger an onslaught of challenges to myriad state and local taxes which could be considered duplicative or overlapping in some fashion and would involve the courts in second-guessing state and local policy decisions.

Although the states do generally afford a credit for taxes paid to other states as a political choice, the extent of those credits varies significantly among the states. CCH, Smart Charts, 16-825, *Credit for Taxes Paid to Another State*. States may currently limit credits on a number of bases, including whether the tax paid is a similar type of imposition to the tax imposed by the state (i.e., a tax on "income"), whether the tax is paid by the same taxpayer in the same period or on the same income, and whether the tax is imposed by a state to which the income was properly sourced.[4] As it pertains to this case, states may also limit the credit given to shareholders of corporations exempted from tax as Subchapter S corporations, allowing only a credit for taxes paid by the shareholders themselves, and not by the entity.[5]

Therefore, if the Maryland court's decision is upheld, it will be necessary for the courts of the state where a credit is claimed to determine whether other states' income, excise, franchise, or gross receipts taxes paid by resident individuals, or the entities in which they have invested, are equivalent to the tax against which the credit is claimed. *See, e.g.,* In re *Allcat Claims Svcs., LLP*, 356 S.W.3d 455 (Tx. 2011)(holding franchise tax on partnership was not personal income tax under Texas law); *Cf., Trinova Corporation v. Michigan Dept. of Treasury,* 498 U.S.

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[4] *See, e.g.,* KY. REV. STAT. ANN. § 141.070(1); ALA. CODE § 40-18-21(a)(1); COLO. REV. STAT § 39-22-108; IOWA CODE § 6-3-3-3(a); 45 IOWA ADMIN. CODE r. 3.1-1-7.

[5] *See, e.g., Boone v. Chumley*, 372 S.W.3d 104 (Tenn. Ct. App. 2011)(holding that credit for taxes paid did not extend to entity-level taxes);N.Y. TAX LAW § 620(d).

358 (1991)(discussing nature of Michigan's Single Business Tax).

Another immediate consequence of a holding affirming the Maryland court could be the necessity of determining whether credits must be granted for local taxes and foreign country taxes paid. *Cf. Kraft General Foods, Inc. v. Iowa Dep't of Rev.*, 505 U.S. 71 (1992)(state's reliance on federal dividend treatment for sourced-based taxation system discriminated against foreign commerce).

The nature of these questions and the absence of clear guidelines would inevitably involve the courts in making legislative and policy judgments in an area of significant importance to the states, that is, how residents will be taxed. This Court has declined to exercise that type of role in the past. *Moorman*, 437 U.S. at 280; *Am. Trucking Assoc. v. Michigan*, 545 U.S. at 18; *Goldberg v. Sweet*, 488 U.S. at 261 (1989). This Court's reluctance to "constitutionalize" state tax policy choices stems not only from a desire to respect legislative boundaries but also from a respect for state sovereignty. *See, e.g., National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995), quoting *Dows v. City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."); *Mobil Oil v. Vermont,* 445 U.S. 425 (1980)(declining to impose single method of dividend taxation); *Wisconsin v.*

J.C. Penney Co., 311 U.S. 435, 444 (1941); *Tully v. Griffin*, 429 U.S. 68, 73 (1976). *Cf., Dep't of Rev. of Oregon v. ACF Industries, Inc.,* 510 U.S. 332, 345 (1994)(noting that federalism concerns "compel" narrow construction of federal statutory restrictions of state tax authority).

For almost a century, this Court has upheld the authority of states to impose taxes on all the income of their residents, regardless of source, despite the unquestioned authority of other states to also tax a portion of the same income on a source basis. Upholding the Maryland Court of Appeal's determination that the state of residence must yield its authority when other states chose to impose tax would open the floodgates to a wave of litigation over what constitutes duplicative taxation requiring a credit. In the longer term, upholding that decision would undermine the states' ability to adopt tax policies that would raise revenues based on the ability of residents to pay for government services.

CONCLUSION

For the reasons set forth above, *amicus* Multistate Tax Commission urges this Court to reverse the decision of the Maryland Court of Appeals and affirm the authority of states to tax the total incomes of their residents in a non-discriminatory manner.

Respectfully submitted,

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August 5, 2014