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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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does the United States Constitution prohibit a state from taxing all the income of its residents—wherever earned—by mandating a credit for taxes paid on income earned in other states?

PARTIES TO THE PROCEEDINGS

The petitioner is the Comptroller of the Treasury of Maryland, Peter Franchot. The respondents are Brian Wynne and Karen Wynne.

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OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported at 431 Md. 147. Pet. App. 1-52. The opinion and order of the Circuit Court for Howard County are unreported. Pet. App. 53-129. The order and oral ruling of the Maryland Tax Court also are unreported. Pet. App. 130-41.

JURISDICTION

The Court of Appeals of Maryland issued its decision on January 28, 2013. Pet. App. 1-49. On May 17, 2013, the Court of Appeals issued an opinion clarifying its decision, denying the Comptroller's timely request for rehearing, and staying the effect of the court's judgment pending this Court's disposition of a petition for a writ of certiorari. Pet. App. 50-52. On July 30, 2013, the Chief Justice extended the time for filing the petition to and including October 14, 2013. The petition was filed on October 13, 2013 and was granted on May 27, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV, § 1.

The Maryland statutory provisions that authorize the personal income taxes and the tax credit at issue in this case are reproduced in the appendix to the petition. Pet. App. 142-44.

STATEMENT

The decision below prevents Maryland from collecting personal income taxes from its own residents to the extent that income has been earned in and taxed by another state. That ruling cannot be squared with the decisions of this Court recognizing "the rule, accepted interstate and internationally, that a sovereign may tax the entire income of its residents." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995). The lower court reached its unprecedented conclusion based on an unsound expansion of dormant Commerce Clause jurisprudence, even though the constraints on state authority imposed by that provision were never intended to "protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). In its effort to prevent multiple taxation resulting from different states' independent but overlapping taxing jurisdiction, the Court of Appeals mistakenly treated Maryland's entirely neutral tax system as discriminatory and then faulted the State for not properly apportioning a tax

based on a factor—a taxpayer's status as a Maryland resident—that is plainly not susceptible to multi-state apportionment. There is no justification for the court's erroneous decision, and it should not be permitted to stand.

1. Maryland's Individual Income Tax. For Maryland residents, the State personal income tax has two basic components. The first is a "State tax" that is imposed on the "Maryland taxable income of each individual." Md. Code Ann., Tax-General ("Tax-Gen.") § 10-102. The second is a "County tax" that is likewise imposed on the "Maryland taxable income of . . . each resident." Tax-Gen. § 10-103(a)(1). The graduated rates for the "State tax" are the same for all Maryland residents. *See* Tax-Gen. § 10-105(a), (c). The rate of the "County tax" varies from county to county and is imposed according to the Maryland county in which the taxpayer resides. *See generally Frey v. Comptroller*, 422 Md. 111, 125-27 (2011) (describing Maryland income tax scheme for individual taxpayers).[1]

The Maryland tax code defines an individual's "Maryland taxable income" as "Maryland adjusted gross income, less the exemptions and deductions allowed under this title." Tax-Gen. § 10-101(i). It then defines "Maryland adjusted gross income" as "the individual's federal adjusted gross income for the taxable year," a figure that is subject to various

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[1] Because Maryland nonresidents by definition do not reside in a Maryland county, they instead pay, in addition to the State nonresident tax, a special nonresident tax that is set at a rate "equal to the lowest county income tax rate set by any Maryland county." Tax-Gen § 10-106.1.

specified adjustments. Tax-Gen. § 10-203. Finally, the tax code defines "federal adjusted gross income" as "the individual's adjusted gross income as determined under the Internal Revenue Code." Tax-Gen. § 101(e).[2]

The Maryland tax code grants substantial, though not total, tax credits to residents for income taxes paid to other states. In particular, the State provides a full credit against the "State tax," Tax-Gen. § 10-703(a), subject to a qualification that Maryland must receive no less tax than it would receive if it directly taxed the resident taxpayer's Maryland income (as opposed to taxing all of the taxpayer's income and then giving credits), *see* Tax-Gen. § 10-703(c)(1)(ii).[3] Thus, for example, a Maryland resident earning all of her income in other states might pay no Maryland "State tax" at all.

The Maryland tax code does not, however, allow a credit against the "County tax." The statute specifically states that "a resident may claim a credit only against the State income tax for a taxable year . . . for State tax

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[2] Unlike Maryland residents, nonresidents are permitted to reduce their "federal adjusted gross income" by subtracting all income except for certain specified Maryland income, such as "(1) income derived from real or tangible personal property located in the State," and "(2) income derived from . . . (ii) an occupation, profession, or trade that is wholly carried on in the State." Tax-Gen. § 10-210(b). As a consequence, Maryland generally taxes nonresidents only on income earned in Maryland.

[3] This limitation, common among states, *see* W. Hellerstein, *State Taxation* ¶ 20.10[1] (3d ed. 2013), effectively means that, if the income is taxed by the other state at a rate higher than the Maryland State tax, no credit will be allowed for the portion of the tax paid to the other state at the higher rate.

on income paid to another state for the year." Tax-Gen. § 10-703(a). As a result, a Maryland resident earning all of her income in another state would still pay the "County tax," even if she has reduced her "State tax" obligation to zero by taking tax credits for taxes paid to other states.

2. This Litigation. Respondents Brian and Karen Wynne are a married couple with five children who resided in Howard County, Maryland in 2006, the tax year at issue. Pet. App. 8-9. Mr. Wynne held a 2.4% ownership interest in Maxim Healthcare Services, Inc. ("Maxim"), a Maryland Subchapter-S corporation based in Howard County. Pet. App. 9. Maxim provides home healthcare, medical staffing, and other services nationwide. Pet. App. 8-9, 55-56.

On their 2006 joint return, the Wynnes reported taxable net income of approximately $2.7 million, more than one-half of which represented Mr. Wynne's share of the distributions from Maxim's earnings. Pet. App. 56; J.A. 16, 58, 62. The State component of the Maryland tax (the "State tax") on that income, before allowance of any credits, was $126,636. J.A. 19, 75. However, the Wynnes claimed a credit against this component, in the amount of $84,550, for taxes that Maxim had paid to 39 other states on Mr. Wynne's share of the company's income derived from activities in those states.[4] Pet. App. 56; J.A. 19, 75, 84. Neither

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[4] Some of these states recognized Maxim's election to be taxed as an S-corporation and accorded "pass-through" treatment to its income, as the federal government and Maryland do. *See* 26 U.S.C. §§ 1361, 1366; Tax-Gen. §§ 10-102.1(b), 10-104(6). Those states required Maxim to file composite returns on behalf of their owners.

Maxim nor the Wynnes reported having paid income taxes to any county or local government outside Maryland, Pet. App. 9, and the Wynnes did not attempt to claim a credit against the County component of their Maryland taxes for the taxes paid to other states that exceeded the allowable credit against the State component, Pet. App. 56.

The Comptroller determined that the Wynnes had underpaid their 2006 taxes, and issued a deficiency assessment. A hearing officer affirmed the assessment, Pet. App. 10, and the Wynnes appealed to the Maryland Tax Court. Initially, the Wynnes disputed only the Comptroller's calculation of the State component of their income tax liability and did not assert that the State's failure to extend the credit to the County component of the tax violated any State or federal constitutional provision. Pet. App. 10; J.A. 88-93.

Six months later, however, the Wynnes amended their petition to advance a new constitutional claim. Pet. App. 10; J.A. 1. As an alternative to their statutory argument, the Wynnes asserted that the Maryland tax system, as applied by the Comptroller and as construed by Maryland courts, violates the Commerce Clause of the United States Constitution. The Tax Court rejected

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Other states required Maxim to file a corporate tax return instead of or in addition to the composite return filed on behalf of Maxim's shareholders. The Maryland personal income tax credit invoked by the Wynnes allows a credit for a resident's share of the taxes paid by an S-corporation to another state, regardless of whether the state accords pass-through treatment to the entity. *See* Tax-Gen. § 10-703(c)(1), (2).

both arguments and affirmed the assessment. Pet. App. 136, 140.

The Wynnes sought judicial review in the Circuit Court for Howard County. Pet. App. 54-55; J.A. 3, 4. Abandoning their statutory argument entirely, the Wynnes argued that the dormant Commerce Clause requires Maryland to extend the credit for out-of-state tax payments that already applies to the "State tax" by making it applicable to the "County tax" as well. Pet. App. 63. The circuit court agreed, and held that the Maryland tax scheme violates the Commerce Clause because it fails to allow full credits for taxes paid to other states. The court therefore reversed the Tax Court's ruling upholding the deficiency assessment against the Wynnes. Pet. App. 126.

The Comptroller appealed. In response, the Wynnes petitioned the Court of Appeals of Maryland for review before consideration in the intermediate appellate court. The Court of Appeals granted the petition. 424 Md. 291 (2012).

The Court of Appeals then affirmed on the merits. In its view, "the failure of the Maryland income tax law to allow a credit against the county tax for a Maryland resident taxpayer with respect to pass-through income of an S corporation that arises from activities in another state and that is taxed in that state violates the dormant Commerce Clause of the federal Constitution." Pet. App. 32.

In reaching this conclusion, the Court of Appeals first brushed aside the Comptroller's contention that Maryland has a sovereign right to tax all of the Wynnes' income, regardless of where it was earned.

Although the Comptroller had argued that the Wynnes were subject to Maryland's tax "because of their status as Maryland residents and not because of their activities in intrastate or interstate commerce," Pet. App. 15, the court dismissed this contention as "a false dichotomy," Pet. App. 15. Rather, the Court opined, the Wynnes "are subject to the income tax because they are Maryland residents *and* because they have income derived from intrastate and interstate activities." Pet. App. 15 (emphasis in original). The court noted that "other states may also tax some of that same income because it derives from activities in those state[s]," and that, as a result, "this case concerns the constitutional constraint on the otherwise overlapping power to tax such income." Pet. App. 15.

Turning to the credit provision, the Court of Appeals expressed its concern that "[t]he limitation of the credit for payments of out-of-state income taxes to the State portion of the Maryland income tax can result in significantly different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities." Pet. App. 16. The court said that, as a result of this "different treatment," Pet. App. 16, "the first taxpayer may pay more in total state and local income taxes than the second," Pet. App. 16. According to the court, "this creates a disincentive for the taxpayer—or the S corporation of which the taxpayer is an owner—to conduct income-generating activities in other states with income taxes." Pet. App. 16.

The court then applied the four-part test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 270 (1977), *see* note 13 below (quoting test), and ultimately concluded that the Maryland tax scheme violates the Commerce Clause. The court rested its decision on two separate, though related, grounds. First, it found that the Maryland tax on its residents is not fairly apportioned. Pet. App. 18-27. In reaching this conclusion, the court relied primarily on the "internal consistency" test, a test that had not previously been applied to individual taxes based on residency. Applying the test in this unprecedented fashion, the court determined that, under the terms of the Maryland tax scheme, resident taxpayers earning income in multiple states would pay higher taxes than resident taxpayers with income in only one state. Pet. App. 22 ("[A] taxpayer with income sourced in more than one state will consistently owe more in combined state income taxes than a taxpayer with the same income sourced in just the taxpayer's home state."). While the court recognized that a state tax can fail to pass the internal consistency test and still be constitutional, Pet. App. 23-24 (citing *American Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429 (2005)), the court found no sufficient ground for upholding Maryland's tax on its residents, Pet. App. 23-24.

The court also concluded that Maryland's tax on its residents failed the "external consistency" test. Although the Maryland tax scheme is based on the status of residency, not on any particular income-earning activity in Maryland, the court nonetheless looked to "whether [the] tax reaches beyond that portion of value that is fairly attributable to economic

activity within the taxing state." Pet. App. 26 (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)). The court observed that, "[b]ecause no credit is given with respect to the county tax for income earned out-of-state, the Maryland tax code does not apportion income subject to that tax even when that income is derived entirely from out-of-state sources." Pet. App. 26. "Thus, when income sourced to out-of-state activities is subject to the county tax, there is a potential for multiple taxation of the same income." Pet. App. 26.

Finally, the Court of Appeals decided that the Maryland tax scheme discriminates against interstate commerce. Pet. App. 28-32. As it had in its discussion of fair apportionment, the court again focused its analysis on the idea that a Maryland resident might pay more taxes *in total* if the resident earned income in more than one state. The court thus ignored the fact that Maryland treats a resident's income exactly the same regardless of where it is earned. The court explained its finding of discrimination by stating that "[t]he application of the county tax to the out-of-state pass-through income without application of a credit for out-of-state income taxes on the same income means that Maryland shareholders—the Wynnes in this case—may be taxed at a higher rate on income earned through Maxim's out-of-state activities than on income earned though its Maryland activities." Pet. App. 30.

Judges Greene and Battaglia dissented. Rejecting the majority's novel Commerce Clause theory, they concluded that, in the absence of any constitutional violation, the question whether to grant a full credit to residents of Howard County "is an issue for the elected

officials of Howard County and the State, not this Court." Pet. App. 37.

SUMMARY OF ARGUMENT

I. This Court has said on multiple occasions that states have jurisdiction "to tax all income of their residents, including income earned outside their borders." *Chickasaw Nation*, 515 U.S. at 463 n.12; *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 280-81 (1932). Unlike most taxing powers, a state's sovereign authority to tax its residents' income is neither derived from, nor confined by, the state's connection to specific income-producing activities within the state. Rather, "[d]omicil itself affords a basis for such taxation." *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937). As a result, a state "can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." *Freeman v. Hewit*, 329 U.S. 249, 255 (1946).

The states' broad taxing power over their residents' income is justified because it corresponds to the extraordinary benefits that states grant to those residents. In addition to protection of the residents' right to receive and enjoy their income, *see Lawrence*, 286 U.S. at 281, a state provides its residents with significant financial subsidies that it does not grant to persons living outside its borders. For example, Maryland and its local governments spend more than $11 billion each year to educate children who attend Maryland public schools. Last year alone, Maryland paid more than $4 billion for healthcare and related services for Maryland residents in carrying out its obligations under the federal Medicaid program, the Children's Health Program, and related services.

Sensibly enough, Maryland has designed its income tax system to assure that all Maryland residents contribute at least some income taxes to the funding of these far-reaching benefits. To accomplish that purpose, Maryland first taxes the entire net income of its residents but then, by allowing a credit against the Maryland "State tax," grants residents a substantial (though not total) credit for taxes paid to other states. This two-step system strikes a considered balance between privilege and responsibility, by substantially reducing Maryland tax payments for residents earning income outside Maryland, while still requiring those residents to pay some income tax to support State and local government programs. The decision of the Court of Appeals, however, would significantly alter that bargain. By compelling Maryland to give a full credit for tax payments to other states—that is, a credit that could be applied against the County tax as well as the State tax—the lower court's ruling would have the perverse effect of allowing certain taxpayers to enjoy all the benefits available to Maryland residents without contributing any income taxes in return.

The Court of Appeals' imposition of this one-sided arrangement is particularly unjustified, given the ability of Maryland residents to exercise their political power to change unpopular tax policies. In contrast to many state tax schemes invalidated by this Court, the tax system challenged here does not impose disproportionate burdens on nonresidents who have no political recourse in the taxing state. To the contrary, Maryland's system simply asks something more of the State's own citizens, "the insider[s] who presumably [are] able to complain about and change the tax

through [the State's] political process." *Goldberg*, 488 U.S. at 266.

II. A. Despite paying lip service to the principle that a state of residence may tax all the income of its residents, Pet. App. 3-4, the Maryland Court of Appeals rendered that principle largely meaningless by holding that the State is effectively barred from taxing its residents' out-of-state income to the extent that another state has already taxed that income. That contradictory rule is insupportable. If a state has jurisdiction to tax all its residents' income—as it does—nothing in the Constitution compels the state to subordinate its exercise of that lawful authority to the taxing authority of other states.

In reaching a contrary conclusion, the Court of Appeals was plainly motivated by a concern about exposing taxpayers to multiple taxation by different states. But the court failed to recognize that multiple taxation, while it may sometimes be the consequence of an unconstitutional tax, can also arise in situations where multiple jurisdictions have exercised their taxing powers within permissible limits. In many cases, of course, the existence of multiple taxation is a powerful signal that at least one state is exceeding its lawful taxing jurisdiction, and, in those circumstances, it is appropriate for courts to eliminate the multiple taxation by invalidating the overreaching tax. But this case involves a quite different scenario, one in which all of the taxing states are acting within the scope of their legitimate taxing authority. In that type of situation, this Court has made clear that each sovereign is free to impose its tax, even if multiple taxation occurs. *See, e.g., State Tax Comm'n of Utah v. Aldrich*, 316 U.S.

174, 181 (1942) ("[T]here is no constitutional rule of immunity from taxation of intangibles by more than one State.").

The constitutional respect for independent taxing authority, even in the face of multiple taxation, reflects several well-established principles. To begin with, it properly recognizes that different states may provide benefits to a taxpayer for which each of those states can ask a fair return. *See Curry v. McCanless*, 307 U.S. 357, 368 (1939). At the same time, as applied to taxes based on residency, it also honors the states' broad taxing jurisdiction over their residents' income, thereby giving necessary force to the understanding that states do significantly more for their residents than they do for taxpayers who simply earn income within their territory.

The rule granting latitude for multiple taxation also eliminates the insurmountable problem of deciding which of two (or more) lawful state taxes should be given priority. The Constitution does not provide an answer to that question, or even suggest what factors might reasonably be regarded as determinative. That silence is hardly surprising: it is highly unlikely that, in giving assent to the federal Constitution, the states were authorizing courts to align the states in some judicially created taxing queue, even when they act within the bounds of their proper taxing jurisdiction.

B. The Court of Appeals justified its decision on the ground that the Maryland tax system violates the negative Commerce Clause, but the court's Commerce Clause analysis was off-base in several critical respects. First of all, in arriving at its conclusion that Maryland's tax system discriminates against interstate

commerce, the court simply conducted the wrong inquiry, by looking at the taxes that the Wynnes paid (and that Maxim paid directly or on behalf of the Wynnes) to all states *in total*, rather than the taxes paid to Maryland alone. Under the correct inquiry, it is plain that Maryland's resident income tax system is completely neutral with respect to interstate commerce and makes no distinction at all between income earned in Maryland and income earned in other states. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) ("[A] law [is] discriminatory if it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." (internal quotation marks and alterations omitted)). The higher *overall* tax burden is no more than the "accidental incident of interstate commerce being subject to two different taxing jurisdictions." *Jefferson Lines*, 514 U.S. at 192 (internal quotation marks omitted).

The Court of Appeals was also wrong to find that Maryland's tax is not fairly apportioned. The Maryland tax is based on the taxpayer's status, as a Maryland resident, and, by definition, only one state can impose a valid tax based on residency within its borders. The object of taxation, residency status, is unlike the income of a unitary business, because there is no need for it to be apportioned among various taxing states in order to assure that each state is taxing only its rightful share. For the same reason, by resorting to the internal consistency test, which is useful primarily as a method for evaluating the neutrality of a particular apportionment formula, the Court of Appeals allowed itself to become distracted by an analysis that is simply beside the point in a context where no apportionment is required in the first place.

The Court of Appeals made a similar mistake in concluding that Maryland's tax is not externally consistent. The external consistency inquiry asks "whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. But a state tax based on residency is not intended to be a tax on "economic activity within the taxing state." Rather, it is a tax "on the privilege of residence in the State," *Freeman*, 329 U.S. at 255, and, as this Court has explicitly said, the state may "measure the privilege by net income, including that derived from interstate commerce." *Id.*

Finally, the Maryland resident income tax manifestly does not implicate the kind of "economic protectionism" that is the central concern of the negative Commerce Clause. *See, e.g., Department of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008). The clear purpose of Maryland's decision to provide partial credits was to make sure that all Maryland residents provide some income tax support for governmental programs, and there is no indication whatsoever that the tax scheme has actually deterred Maryland residents from earning income in other states. Moreover, if Maryland residents are displeased with their taxes, they not only have the political capacity, as eligible Maryland voters, to press for changes to the State's tax laws, but they can also appeal to Congress, which is expressly empowered to address any genuine threats to interstate commerce and which, as a legislative body, is better suited than the judiciary to undertake that task.

ARGUMENT

For nearly a century, this Court has recognized that states have jurisdiction "to tax all income of their residents, including income earned outside their borders." *Chickasaw Nation*, 515 U.S. at 463 n.12; *New York ex rel. Cohn*, 300 U.S. at 313; *Lawrence*, 286 U.S. at 281. This broad taxing authority—which extends beyond a sovereign's usual power to tax property or activities within its territory—rests on two fundamental understandings: first, that a state provides unique benefits to its residents that are not shared by nonresidents; and, second, that residents have the political capacity to redress unwanted taxation at the ballot box.

The decision below takes no account of these fundamental attributes of a sovereign's relation to its own residents. By requiring Maryland to grant a full credit for income taxes paid to other states—that is, to extend the existing credit so that it can be used to offset a resident's County income tax obligation as well as the State income tax—the lower court's ruling wrongly demands that Maryland yield in the exercise of its taxing power to other sovereigns, even though Maryland provides extensive benefits (free public schooling, public assistance, etc.) that those other sovereigns do not provide to Maryland residents. To make matters worse, in creating this judicially imposed rule of deference to other states, the Court of Appeals incorrectly imported constitutional rules restricting multiple taxation into a domain where those restrictions do not apply—that is, where each state is exercising an independent, and wholly legitimate, basis for imposing its tax. Nothing in the Constitution

justifies this sharp curtailment of Maryland's taxing powers, and the decision below should be reversed.

I. A State Has Jurisdiction to Tax All the Income of its Residents, Even If That Income Is Earned in Other States.

A. A State Has Broad Taxing Authority over its Residents.

This Court has repeatedly acknowledged the "well-established principle of interstate and international taxation—namely, that a jurisdiction, such as [a state], may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Chickasaw Nation*, 515 U.S. at 462-63 (emphasis in original); *see also Aldrich*, 316 U.S. at 179; *Curry*, 307 U.S. at 368; *Guaranty Trust Co. of New York v. Virginia*, 305 U.S. 19, 23 (1938); *New York ex rel. Cohn*, 300 U.S. at 313; *Lawrence*, 286 U.S. at 281; *Maguire v. Trefry*, 253 U.S. 12, 17 (1920); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). As the Court long ago observed, "[i]t is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by [the state] on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, *regardless of the place where it is carried on*." *Lawrence*, 286 U.S. at 280-81 (emphasis added).

A state's authority to tax its residents' income has been given broad scope because it arises from the state's relationship with the *person* who "recei[ves] and enjoy[s]" the income, *id*. at 281, rather than being dependent on the state's connection to particular income-producing activities within its territory. As this Court has explained, "[d]omicil itself affords a basis for

such taxation." *New York ex rel. Cohn*, 300 U.S. at 313.[5] "The tax . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received." *Lawrence*, 286 U.S. at 281. "These are rights and privileges incident to [the taxpayer's] domicile in the state, and . . . the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship" to those rights and privileges of residence. *Id.*; *accord New York ex rel. Cohn*, 300 U.S. at 313.

It is precisely because domicile furnishes an independent ground for taxation that a state's taxing authority with respect to its own residents is undiminished by the fact that a resident's income may have been earned from sources or activities beyond that state's boundaries. This Court has made clear that "[n]either the privilege nor the burden" associated with residency "is affected by the character of the source from which the income is derived." *New York ex rel. Cohn*, 300 U.S. at 313. Thus, "[a] state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power." *Id.* Likewise, a state "can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." *Freeman*, 329 U.S. at 255.

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[5] For purposes of taxes on individuals, this Court has generally regarded the terms "residence" and "domicile" (or "domicil") as interchangeable. *See, e.g., New York ex rel. Cohn*, 300 U.S. at 313 (referring without distinction to "domicil" and "privileges of residence").

B. A State Has Special Obligations to its Residents.

A state's broad taxing power over its residents' income is a natural counterpart to the special obligations that states assume with respect to those residents. As this Court has explained, "[e]njoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from responsibility for sharing the costs of government." *Lawrence*, 286 U.S. at 279. More specifically, "[t]he obligation of one domiciled within a state to pay taxes there[] arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government *and to distribute its burdens equitably among those who enjoy its benefits*." *Id.* (emphasis added).

The obligations of states to their residents have only grown, both in kind and in degree, with changes in the role of state governments. Today, it is common for states to provide their residents with a host of financial benefits that are unavailable to nonresidents. For example, only Maryland residents are entitled to attend Maryland's public schools, *see* Md. Code Ann., Educ. § 7-101(b); are qualified for preferential admission and reduced tuition at Maryland public universities and colleges, *see Frankel v. Board of Regents*, 361 Md. 298, 302-03 (2000); Univ. Sys. of Md. Policy III-4.0; are eligible for a broad array of public-assistance programs, *see, e.g.,* Code Md. Regs. 07.03.07.03(A)(1), 07.03.17.08(A)(2), 07.03.21.03(A)(1); and can obtain health benefits under the State's expanded Medicaid program, *see* Code Md. Regs.

10.09.24.05-3(A). In comparison, Maryland residents have no right to demand similar benefits from states where they may earn income but do not reside.

The cost of these state programs benefiting Maryland residents is substantial. With respect to education, in Fiscal Year 2012, the State expended approximately $5.75 billion, and local governments spent nearly as much, $5.44 billion, to fund public schools serving Maryland children. *See* Maryland State Department of Education, *The Fact Book 2012-2013*, at 21.[6] In addition, nearly a quarter of a million Maryland residents attended Maryland public institutions of higher education last year alone. *See* Maryland Higher Education Commission, *Report on Enrollment by Place of Residence* (May 2014), at 60-61.[7] Those students benefit from significantly reduced tuition rates; undergraduate tuition at the University of Maryland at College Park, for example, is more than $20,000 lower for residents than for nonresidents. *See Higher Education—Fiscal 2015 Budget Overview*, at 12.[8] Maryland will spend more than $1.8 billion on its

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[6] Available at http://www.marylandpublicschools.org/MSDE/divisions/bus_svcs/fb.htm.

[7] Available at http://www.mhec.state.md.us/publications/research/index.asp.

[8] Available at http://mgaleg.maryland.gov/pubs/budgetfiscal/2015fy-budget-docs-operating-HIGHED-Higher-Education-Overview.pdf.

higher education system in the current fiscal year. *See id.* at 2.[9]

Maryland also expends substantial sums on social service programs related to health and welfare for low-income residents. Last year, the State spent more than $4 billion in State general and special funds (exclusive of federal matching funds) on the State's Medicaid program, the State's Children's Health Program, and other programs to pay for needed medical and habilitative services for Maryland residents. *See* Maryland Department of Budget and Management, *FY 2015 Budget Book*, Vol. II, pp. 186, 216, 233, 251.[10] Each month, a quarter of a million needy Maryland residents benefit from the State's food supplement program, at an annual cost in excess of $1.1 billion. *See* Maryland Department of Human Resources, *Family Investment Administration 2014 Statistical Report*.[11] Approximately 45,000 Maryland children receive benefits each month under Maryland's Temporary Cash Assistance Program (the State's program implementing the federal Temporary Assistance to

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[9] Local governments in Maryland also make substantial expenditures to fund institutions of higher education. Howard County, for instance, will spend more than $31 million for this purpose in its current budget. *See* Howard County, *Fiscal Year 2015 Approved Operating Budget Detail*, at 53 (available at http://www.howardcountymd.gov/current_budget.htm.

[10] Available at http://www.dbm.maryland.gov/agencies/operbudget/Documents/2015/Proposed/hlthhosp.pdf.

[11] Available at http://www.dhr.state.md.us/documents/Data%20and%20Reports/FIA/Statistical%20Reports/Statistical-Reports-2014.pdf.

Needy Families program), at an annual cost of $144 million. *See id.*

It is not too much to ask, then, for Maryland residents to contribute more to the support of these State programs than is asked from nonresidents who merely earn income in Maryland and who do not benefit to the same extent from the programs and services provided by the State and its local governments. As the Court has explained, "[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. Here, Maryland has chosen to steer a middle course. Under the Maryland tax structure, the State first exercises its constitutional authority to tax all the income of its residents, but it then provides credits against the Maryland "State tax" for income taxes paid to other states. As a result, a Maryland taxpayer earning income elsewhere routinely pays much less tax to Maryland than a Maryland taxpayer earning all of her income in Maryland. By declining to grant a credit against the "County tax" as well, the State assures that all resident taxpayers nevertheless contribute at least *some* income tax to fund the government programs from which they benefit.

The decision below would work radical changes to that rational compromise. Under the Court of Appeals' theory, a Maryland resident earning all of her income in other states might well have no obligation to pay any Maryland income tax at all—neither the "State tax" nor the "County tax"—with the full amount of her income taxes instead being remitted to states in which the

income was earned. Yet, despite that lack of contribution to the Maryland treasury, this resident whose income had thus been exempted from taxation in Maryland would still be entitled to claim all the advantages of residence, by sending her children to Maryland public schools or applying for various forms of public assistance that are reserved for Maryland residents. *See Comptroller v. Blanton*, 390 Md. 528, 536 n.9 (2006) (noting "possible absurd result of the [taxpayers] paying little or no local tax for 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" (internal quotation marks omitted)). That all-take-and-no-give arrangement is antithetical to the traditional expectation that state residents will bear heightened responsibilities in return for the privileges associated with residence. It is hard to discern the justification for imposing a constitutional requirement that would compel states to accommodate residents who prefer to accept the benefits of residency while avoiding the corresponding responsibilities.

C. State Residents Have the Political Capacity to Change Tax Policy.

Any asserted justification for imposing this sort of constitutional mandate is even more questionable in light of a second distinctive feature of the relationship between states and their residents: the power of state residents to eliminate unpopular taxes through political means. If Maryland residents think that the State is taxing them too onerously, they can give direct effect to their views by voting for various forms of lower taxes, including more generous credits for out-of-state

tax payments. After all, state legislators are hardly impervious to voters' opinions about high taxes. Almost two centuries ago, this Court pointedly remarked that, "[i]n imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).[12]

Residents aggrieved by their own state's taxes thus are situated differently from nonresidents with no effective voice in legislative decisions. As this Court has observed, when a state law "is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South-Central Timber Dev. Inv. v. Wunnicke*, 467 U.S. 82, 92 (1984). But the opposite is true here. The Maryland residency tax is, on its face and in operation, a tax on Maryland's own citizens, "the insider[s] who presumably [are] able to complain about and change the tax through [the State's] political process." *Goldberg*, 488 U.S. at 266. The court below thus not only misapplied an important body of constitutional law, but needlessly imposed a judicial solution to what is, at most, a political problem.

For their part, the Wynnes have suggested that, instead of giving only partial credits for out-of-state income taxes, Maryland should give full credits and

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[12] Individual residents differ in this respect from domiciliary corporations, which do not possess the capacity to affect change by voting (and are typically eligible for far fewer across-the-board public assistance programs).

then raise other taxes (for example, local property taxes) to replace the lost revenue. *See* Br. in Opp. 23. But that kind of revision would do nothing to address the prospect that some resident taxpayers would receive a free ride insofar as Maryland income taxes are concerned. Furthermore, the best way for Maryland to raise revenue from its residents is a classic matter for legislative judgment. As this Court has said, "[b]ecause state legislatures must draw some distinctions in light of 'local needs,' they have considerable discretion in formulating tax policy." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998); *see also Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (acknowledging "the large area of discretion which is needed by a legislature in formulating sound tax policies"). Thus, questions about the appropriate structure of Maryland's tax system should be left to Maryland officials and their constituents, unless that democratically established system offends some overriding constitutional principle. The Constitution contains no such command for altering the tax scheme designed by Maryland's elected representatives.

II. The Constitution Does Not Require a State to Subordinate its Own Legitimate Taxing Authority to the Taxing Authority of Other States.

The Court of Appeals acknowledged that Maryland has jurisdiction to tax all its residents' income. *See* Pet. App. 12. But the court's decision rendered that principle a virtual nullity by requiring Maryland to give credits against both State and County taxes for income taxes that residents have paid to other states.

According to the Court of Appeals, if multiple taxation would otherwise result, the Commerce Clause compels a state of residence to forgo its taxes on out-of-state income in favor of states where the income was earned. Nothing in the court's opinion supports that unprecedented holding. The Constitution contains no such rule of enforced priority, and the Court of Appeals' attempt to invent one should be rejected.

A. The Constitution Does Not Impose an Absolute Prohibition on Multiple Taxation.

To start with, it is noteworthy that the mandatory-credit rule announced by the Court of Appeals is directly at odds with the view recently expressed by this Court in *Chickasaw Nation*. There, this Court reaffirmed that "sovereigns have authority to tax all income of their residents, including income earned outside their borders. . . ." 515 U.S. at 463 n.12. But the Court's discussion of sovereign taxing power did not end there. Having pointed out that sovereigns "sometimes elect not to do so [that is, tax all their residents' income], and [that] they commonly credit income taxes paid to other sovereigns," the Court stated unequivocally: "'If foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and *not one compelled by jurisdictional considerations*.'" *Id.* (quoting American Law Institute, *Federal Income Tax Project: International Aspects of United States Income Taxation* 6 (1987)) (emphasis added). These observations convey the Court's appreciation of a sovereign's broad taxing power that the decision below necessarily repudiates.

Even if one were inclined to dismiss those observations as irrelevant, as the Wynnes have urged,

see Br. in Opp. at 15; Supp. Br. in Opp. at 9, the decision below, when examined on its own merits, is ill-founded. Although the Court of Appeals ultimately invalidated Maryland's tax scheme based on a multi-part Commerce Clause analysis, the court's ruling was plainly driven by an assumption that taxpayers should be sheltered from multiple taxation. Pet. App. 4, 15, 16, 18, 22, 26, 30. The problem with that assumption is that multiple taxation is not always unconstitutional. To be sure, multiple taxation will often arise out of a state's attempt to exceed its valid taxing jurisdiction, and, in those circumstances, the Constitution does protect taxpayers from multiple taxation, by invalidating the unlawful tax. *See Jefferson Lines*, 514 U.S. at 184-85 (prohibited "multiple taxation . . . is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it"). Still, in other, quite different, situations, the various taxing states are all acting within the bounds of their legitimate taxing powers, and in those situations, the Constitution permits each state to levy its own tax without giving way to the other states, multiple taxation notwithstanding.

This Court could hardly have made that principle any clearer. For example, in rejecting an argument that a state of residence could not tax intangibles physically held in (and taxed by) another state, the Court instructed: "[I]t is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax, and consequently that there are many circumstances in

which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles." *Curry*, 307 U.S. at 368. Elaborating on the same principle in *Curry*, the Court declared, unambiguously, that "income may be taxed *both* by the state where it is earned *and* by the state of the recipient's domicile," *id.* (emphasis added); this is so, the Court explained, because "[p]rotection, benefit, and power over the subject matter are not confined to either state," *id.*

The Court had emphasized the same point just the year before in *Guaranty Trust*. There, the Court expressly permitted overlapping taxation of income where one state was taxing on the basis of residency and a second state was taxing on the basis of situs. *See* 305 U.S. at 21 (noting that New York had taxed income of a New York trust and that Virginia had taxed income from the trust received by a Virginia resident). In explaining its decision, the Court stated: "Here, the thing taxed was receipt of income within Virginia by a citizen residing there. The mere fact that another state lawfully taxed funds from which the payments were made did not necessarily destroy Virginia's right to tax something done within her borders." 305 U.S. at 23.

To make the constitutional rule even more certain, the Court subsequently overruled a number of prior decisions that had "read into the Fourteenth Amendment a rule of immunity from taxation by more than one state." *Aldrich*, 316 U.S. at 176 (internal quotation marks omitted). Reviewing the relevant precedent, the Court found no absolute bar to multiple taxation by separate sovereigns, and pronounced that "the rule of immunity against double taxation espoused

by [those cases] had long been rejected in other cases." *Id.* at 179. The Court thus "repeat[ed]" what it had already said in *Curry*: "[T]here is no constitutional rule of immunity from taxation of intangibles by more than one State." *Id*. at 181.

This judicial respect for the taxing authority of independent sovereigns reflects several familiar principles. As applied to overlapping taxes based on residence and source of income, for example, the doctrine fully accounts for the fact that all of the taxing states have conferred benefits on the taxpayer for which the states can justifiably ask something in return. *See Curry*, 307 U.S. at 368. At the same time, this doctrine remains faithful to the fundamental proposition, established in *Lawrence* and a number of other cases, that a state can tax its residents' entire income, even if some or all of it is earned in other states. Taking the two points together, therefore, the constitutional acceptance of dual taxing authority fits closely with the historical understanding that, even though taxpayers may enjoy benefits conferred by more than one state, residents receive special privileges from, and thus have special obligations to, their home states.

Equally important, the acknowledgement that sovereigns may independently exercise their valid taxing powers resolves—or, more precisely, eliminates—the otherwise intractable problem of deciding which of two legitimate state taxes should take precedence over the other. Nothing in the Due Process Clause or the Commerce Clause provides tools for answering that question. The Constitution contains no hierarchy of taxing jurisdictions, no provision

specifying that a state in which a taxpayer earns income has greater taxing authority than a state in which the taxpayer resides, and no provision establishing that the opposite is true. Absent any constitutional basis for such ranking, the courts may not invalidate a perfectly constitutional state tax just to prevent multiple taxation. *See Aldrich*, 316 U.S. at 181 ("It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views as to policy, whether the state laws deal with taxes or any other subjects of social or economic legislation.").

This case provides a ready illustration of the which-state-gets-priority dilemma. If Maryland, as the state of residence, may constitutionally tax all of its residents' income, it is far from obvious why, in the event of overlapping taxation, the *Maryland* tax must give way in favor of taxes paid to other states. Were the question to be resolved by some sort of balancing test, it would be clear that Maryland provides far more benefits to its residents than the states where they merely go to work. And multiple taxation could be avoided just as readily, of course, if the Court of Appeals' new rule of primacy were simply reversed, obligating states that tax nonresidents on income earned in those states to provide credits for taxes paid to the state of residence.

The Court of Appeals' impulse to eradicate multiple taxation even when it results from concededly valid, but overlapping, exercises of state taxing power creates a conundrum involving the prospect of asymmetrical state taxing power. If, as the court's analysis suggests, the core constitutional problem is multiple taxation,

then overlapping taxing authority presumably is unobjectionable in situations where one state simply refrains from exercising its authority. If so, then Maryland *could* tax its residents on income from another state so long as the other state did not tax that income. The validity of Maryland's tax would turn on policy choices made by the other state. But the taxing powers of a sovereign state do not just vanish and reappear according to how other states choose to tax. Indeed, a theory making a state's power to raise essential revenues contingent on the taxing choices made by other states would severely diminish one of the core attributes of sovereignty, thereby putting the viability of state programs in serious jeopardy.

B. The Commerce Clause Does Not Invalidate Maryland's Tax System.

In the absence of a universal principle barring multiple taxation, the Court of Appeals essentially fashioned one of its own, assembling it from parts drawn from negative Commerce Clause jurisprudence. Applying the four-part test set forth in *Complete Auto Transit*,[13] the court concluded that Maryland could not tax its residents on all of their income (at least if it was taxed by another state) for two related reasons: first, because the Maryland tax scheme discriminates against interstate commerce and, second, because the

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[13] Under that test, a state tax does not offend the Commerce Clause if it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." 430 U.S. at 279. The Wynnes concede that Maryland's tax scheme satisfies the first and last parts of the test. *See* Pet. App. 17-18 (noting respondents' concession).

Maryland tax is not fairly apportioned. But, even assuming that the *Complete Auto* framework applies to individual income taxes based on state residency—hardly a self-evident proposition—the court's analysis was wrong on both counts.

1. Discrimination. The Maryland tax scheme challenged here does not exhibit any of the features that this Court has found to constitute discrimination under the dormant Commerce Clause. "States are barred from discriminating against foreign enterprises competing with local businesses," *Jefferson Lines*, 514 U.S. at 197, and this Court accordingly has routinely struck down state tax laws on that ground, *see, e.g., South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169-70 (1999) (invalidating franchise tax favoring local corporations over out-of-state corporations); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278-80 (1988) (invalidating tax credit for all in-state ethanol producers but only some out-of-state producers); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (invalidating statute imposing lower tax rate on domestic insurance companies than on out-of-state insurance companies). But there is no disfavoring of out-of-state taxpayers here. Nonresidents are taxed in Maryland only insofar as their income is earned from sources or activities in Maryland. *See* Tax-Gen. § 10-210. That is an unbiased, and entirely permissible, method of assuring that out-of-state individuals and businesses contribute to the operation of Maryland's government. *See Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 102 (1994) (noting "settled principle that interstate commerce may be made to pay its way").

The Court of Appeals rested its decision on a determination that Maryland discriminates not against out-of-staters, but against interstate commerce itself, on the ground that some Maryland residents will pay more taxes if they do business in other states than if they confine their income-producing activities to Maryland. *See* Pet. App. 16 (referring to "different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities"). But, by focusing on the *combined* taxes paid by a Maryland resident—that is, the cumulative taxes paid to all states—the court was conducting the wrong inquiry. No one disputes that Maryland residents may pay greater taxes overall if they do business in other states, but that cumulative burden cannot possibly be attributed to discrimination by Maryland. Rather, it is a natural consequence of the fact that, in our political system, taxpayers are sometimes subject to the taxing authority of distinct sovereigns, each of which has a constitutionally sufficient basis for levying a tax on persons or activities within its borders. As the Court remarked in *Jefferson Lines*, "[t]he multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the accidental incident of interstate commerce being subject to two different taxing jurisdictions." 514 U.S. at 192 (internal quotation marks omitted); *see also American Trucking Ass'ns*, 545 U.S. at 438 (taxpayer paid higher overall taxes to various states "only because it engages in local business in all those States"); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 279 (1978) (finding no "discriminat[ion] against interstate commerce" where higher taxes were "the consequence of the combined effect" of two different states' statutes).

In undertaking its discrimination inquiry, therefore, the Court of Appeals should have asked a quite different question: whether the Maryland tax scheme *itself* is discriminatory. The obvious answer is no. *See Fulton Corp.*, 516 U.S. at 331 ("[A] law [is] discriminatory if it taxes a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." (internal quotation marks and alterations omitted)); *see also United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 530 U.S. 330, 338 (2007); *Oregon Waste Sys.*, 511 U.S. at 99. As its provisions clearly demonstrate, the Maryland income tax system is structured so that residents are taxed evenhandedly on all of their income, regardless of its origin. Thus, in defining a resident's income for purposes of its tax, Maryland is strictly neutral with respect to whether that income was generated through intrastate or interstate activities.

As support for its finding of discrimination, the Court of Appeals relied on a handful of cases from this Court that struck down state taxes disadvantaging interstate commerce. *See Fulton Corp.*, 516 U.S. at 330, 346; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 73-75 (1963); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 575-82 (1997). Those decisions actually serve to highlight the problem with the Court of Appeals' approach. In each of the cited cases, the critical fact demonstrating discrimination was that certain taxpayers might pay less tax *to the taxing state*, precisely because that state's tax scheme openly favored in-state commerce. Thus, in *Fulton Corp.*, North Carolina taxpayers were entitled to pay a reduced intangible tax on their

ownership of corporate stock to the extent that the corporation conducted business in North Carolina. *See* 516 U.S. at 327-28. In *Halliburton*, Louisiana taxpayers liable for a use tax on certain equipment received a tax break if the equipment was assembled in Louisiana rather than out of state. *See* 373 U.S. at 67. And, in *Camps Newfound*, Maine granted favored tax treatment to charitable institutions that primarily served Maine residents, rather than residents from other states. *See* 520 U.S. at 568-69. Here, by contrast, Maryland gives its residents no preference whatsoever for conducting in-state activities: they are subject to tax on all their income, wherever it is earned, and the available credits have the opposite effect of lowering Maryland taxes for those residents who earn income out of state.

The absence of preferential treatment of this sort distinguishes a wide variety of other Commerce Clause cases as well. *See, e.g., Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 654 (1994) (invalidating use tax for storage of goods purchased out of state insofar as it exceeded sales tax on goods purchased in state); *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 248 (1987) (invalidating exemption from manufacturing tax for manufacturers selling in state); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (invalidating tax exemption for certain locally produced alcoholic beverages); *Armco, Inc. v. Hardesty*, 467 U.S. 638, 641-44 (1984) (invalidating tax exemption granted to local manufacturers). In all of those cases, the Court struck down state tax provisions that lowered that state's taxes for taxpayers conducting in-state activities, while denying the same opportunity to taxpayers engaged in interstate commerce. The non-

discrimination principle applied in those cases cannot be turned upside-down to invalidate tax provisions that, insofar as the taxing jurisdiction is concerned, actually give an advantage to taxpayers with income from interstate business activities. That is simply not actionable discrimination within the meaning of the Commerce Clause.[14]

2. Fair Apportionment. The Court of Appeals' fair apportionment analysis was equally misconceived, albeit for a different reason. In asking whether Maryland was taxing its proper share of the Wynnes' income, the court simply assumed that an individual tax based on residency had to be apportioned among different states. But there are no grounds for that assumption. When a state bases its taxing jurisdiction on an individual's residency, the state is necessarily taxing a status—being a resident—that no other state has jurisdiction to tax. As a result, the question of fair apportionment among competing states simply does not arise. *See generally Tyler Pipe*, 483 U.S. at 251 (upholding unapportioned state wholesale tax because "the activity of wholesaling . . . must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax").

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[14] Maryland will receive fewer tax revenues if a resident earns income in other states, but that is the inevitable consequence of the tax *credit*, not the *tax*. The Court of Appeals did not hold that the Maryland tax credit violates the Commerce Clause, nor could it coherently have done so. Insofar as taxes paid to Maryland are concerned (the proper inquiry), the Maryland tax system plainly *favors* taxpayers with income derived from sources in other states; this type of preferential treatment is the complete opposite of the kind of favoritism the Commerce Clause condemns.

That should be the end of the matter. But, even if Maryland's tax on its residents' income were subject to fair apportionment analysis, the Maryland tax scheme satisfies any reasonable definition of fairness. A state's jurisdiction to tax residents' out-of-state income is grounded in the fact that the state grants its residents numerous opportunities and benefits that no other state provides to them. Here, while Maryland does ask that all of its residents pay some income taxes by way of support, the State ultimately takes only a minority share of any overlapping income taxes and voluntarily gives other states priority (through the allowed credits) for considerably more than one-half of the overlapping amount. Thus, if both sides of the equation are taken into account, Maryland cannot be said to have taken more than its fair share of the overall income taxes that its residents must pay.

The Court of Appeals concluded that Maryland's income tax is not fairly apportioned primarily because the court believed that the tax is not "internally consistent." But this Court has never applied the internal consistency test to a state tax based on an individual's residency, and, at least with respect to the type of claim asserted here, it would make little sense to do so. When different states are asserting jurisdiction over part of an indivisible whole (for example, the total income of a unitary multistate enterprise or the enterprise value of a railroad's rolling stock), the internal consistency test provides a workable method for determining whether a state's apportionment formula assigns it a disproportionate share. *See, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 31 (1988) ("This Court has repeatedly emphasized that the function of an apportionment

formula is to determine the portion of a unitary business' income that can be fairly attributed to in-state activities."); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 219 (1980); *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 446 (1980). That kind of inquiry has no role to play in the present context, where Maryland's taxing authority rests on one kind of lawful jurisdiction (namely, jurisdiction over the taxpayers as Maryland residents), and the taxing authority of other states rests on a different kind of lawful jurisdiction (namely, jurisdiction over the taxpayers' income-producing activity within those states' borders).[15]

The Court of Appeals' analysis of "external consistency" suffers from a similar flaw. As the court noted, the external consistency inquiry looks to "'whether a state's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state.'" Pet. App. 26 (quoting *Jefferson Lines*, 514 U.S. at 185). But a state tax based on residence is not—and does not purport to be—a tax on "economic activity within the taxing state." Rather, it is a tax on "the privilege of residence in the State." *Freeman*, 329 U.S. at 255. Thus, assuming that the taxpayer is in fact a resident, *see* note 15 above, the state need not limit its tax to in-state economic activity but may "measure the privilege by net income,

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[15] A state tax based on residency might be subject to internal consistency analysis if the state applied the tax so that it had an impact on taxpayers who actually lived in other states. There is no such claim of inconsistency here. The Wynnes are unquestionably Maryland residents, and Maryland has based its authority to tax them on th basis of their status as residents.

including that derived from interstate commerce." *Id.*; *see generally Curry*, 307 U.S. at 366 ("A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent.").

3. Economic Protectionism. For the reasons discussed above, the Court of Appeals' decision falls short on its own terms. But the real problem with the court's analysis is that the court was trying to pound a square peg into a round hole. This Court has emphasized that the primary concern of the negative Commerce Clause is "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Davis*, 553 U.S. at 337-38 (internal quotation marks omitted). Correspondingly, the Court has stressed that "[t]he dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." *General Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997).

Given these objectives, it should be obvious that state income taxes on individual residents—a traditional means of raising revenue to pay for benefits enjoyed by those same residents—will seldom raise a threat of forbidden economic competition among the states. Not surprisingly, no indication of "economic protectionism" is present here. The Maryland tax scheme does not burden "out-of-state competitors," and Maryland residents earning income across state lines pay *less* income tax to Maryland than residents whose income is earned solely in Maryland. Whatever the term "economic protectionism" might encompass, it cannot sensibly reach a state tax system that provides

more favorable treatment to those taxpayers who engage in interstate commerce.

The Court of Appeals thought otherwise, finding that the Maryland tax scheme "creates a disincentive for the taxpayer . . . to conduct income-generating activities in other states with income taxes." Pet. App. 16. But, as we have pointed out, it is impossible to attribute the multi-state income tax burden to Maryland alone. Furthermore, there is no reason to suppose that the Maryland General Assembly, in choosing to allow partial but not full credits for out-of-state taxes, had a goal of discouraging out-of-state work. To the contrary, it is perfectly clear that the Legislature's guiding motivation was a desire to make sure that Maryland residents, wherever they worked, paid at least some income tax to support government programs, particularly those administered by the State's local governments.[16] Finally, neither the Court of Appeals nor the Wynnes have offered any reason for believing that the State's tax policy—which has been in effect for more than 40 years—has *in fact* deterred Maryland residents from working elsewhere. Thus, any fears about "economic protectionism" in this context are purely theoretical.

4. Political Solutions. The lower court's effort to prevent multiple taxation of Maryland residents not

[16] Reacting to the decision in *Stern v. Comptroller*, 271 Md. 310 (1974), which had held, on statutory grounds, that the credit for out-of-state taxes applied to both the State tax and the County tax, the General Assembly enacted emergency legislation to repeal the credit against the County tax. *See Blanton*, 390 Md. at 541-42. That change eliminated the possibility that a Maryland resident could avoid paying any Maryland income taxes whatsoever.

only lacks a basis in the Constitution, it improperly interferes with political decisionmaking. Maryland resident taxpayers are fully entitled to participate in the give-and-take of Maryland's political process, and Maryland residents who are dissatisfied with the State's tax policies can vote for different ones. The availability of that political recourse affects the legal calculus as well. Precisely because state residents are "able to complain about and change [a challenged] tax through [their state's] political process," this Court has emphasized that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg*, 488 U.S. at 266.

The political sphere in which democratic debates about tax policy can be conducted is not confined to State and local government forums. The Commerce Clause, after all, is first and foremost a positive grant of authority to Congress, and Congress remains free, within the proper bounds of that authority, to address any genuine concerns about harm to interstate commerce. Indeed, to the extent that competing state interests prevent the states from devising solutions to policy problems involving state taxation of personal income, Congress is well-positioned, given its national perspective, to weigh taxpayer complaints about multiple taxation against the states' compelling need to fund the benefits extended to their residents. *See Patsy v. Board of Regents of Florida*, 457 U.S. 496, 513 (1982) ("The very difficulty of these policy considerations, and Congress' superior institutional competence to pursue th[e] debate, suggests that legislative not judicial solutions are preferable.").

The democratic process provides ample space for the clash of competing contentions about Maryland tax policy in general and about the tax credit at issue here in particular. But the answer to those contested policy questions is not to be found in the Constitution, and the Maryland Court of Appeals erred in invoking the dormant Commerce Clause as a basis for creating a judicially-enlarged tax credit as a substitute for the one selected by the Maryland General Assembly.

CONCLUSION

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

Respectfully submitted,

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