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 Petition for a Writ of Certiorari to the Maryland Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Maryland Court of Appeals correctly held that although Maryland is permitted by the Due Process Clause to tax all of its residents' income wherever earned, the dormant Commerce Clause separately prohibits Maryland from double-taxing interstate commerce and imposing discriminatory burdens on interstate commerce through its tax code.

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INTRODUCTION

For decades, this Court has understood the Constitution to impose two distinct restrictions on the states' power to tax: The Due Process Clause prohibits states from taxing value having no connection to the state, while the dormant Commerce Clause prohibits states from imposing duplicative or discriminatory taxes on interstate commerce. The former restriction protects individual taxpayers from state overreach; the latter protects the interstate market itself from undue burdens and economic Balkanization. Thus, a tax can be fair as to individual taxpayers, but unfair to interstate commerce.

This case was litigated in the Maryland Court of Appeals based on these settled principles. Indeed, Petitioner the Maryland State Comptroller of the

Currency (Comptroller) told the court below that all taxes, even state income taxes, must comply with the dormant Commerce Clause. And he expressly represented to the Court of Appeals in his merits brief that "when a citizen has to pay multiple taxes on the same income at the same level because the income was earned in a state in which he was not a resident," that "*is not * * * permitted*." Pet'r Md. COA Opening Br. 10-11 (emphasis added). Only now, after the Court of Appeals held that Maryland's unique state income tax discriminates against interstate commerce, does the Comptroller deploy a truly novel theory: that states may burden interstate commerce all they wish, so long as they do so through a tax on their own citizens.

Reasons to deny the Comptroller's petition abound. For starters, the argument the Comptroller presses in this Court was not presented below until the reconsideration stage, *after* Maryland's high court issued its opinion. That court accordingly never considered on the merits the Comptroller's bold claim that a state's income tax on its own citizens is categorically immune from dormant Commerce Clause scrutiny. This Court should follow its customary practice and refuse to be the first tribunal to pass upon that untested argument.

Nor is there any conflict for this Court to resolve. The Comptroller compares apples and oranges when he insists that the decision below is at odds with this Court's holdings that a state may tax all its residents' income. The cases he points to—every single one—decided a distinct question: whether the *Due Process Clause* imposes any limit on the extent to which a state may tax its own residents. None of those cases addressed the question the Court of

Appeals resolved: whether the *dormant Commerce Clause* imposes independent limitations on the states' taxing authority. The court below understood that distinction. It held that Maryland's state income tax complies with the Due Process Clause but that it separately runs afoul of the dormant Commerce Clause and its concern for preserving a robust market for national trade.

There is also no conflict between the decision below and the state high court authority the Comptroller string-cites without any meaningful analysis. In most of the cited cases, there would not have been impermissible double taxation on this case's facts. And in the remaining cases, the state courts addressed issues far different from those confronted by the Court of Appeals.

Finally, the Comptroller's claim that the decision below will harm Maryland financially and cast doubt on similar taxing schemes "across the nation," Pet. 16, is misplaced. Maryland has tools available to lessen the burden of the decision below, and few jurisdictions have tax codes similar to the one the Court of Appeals found constitutionally infirm. To the extent the holding below may—or may not—influence future litigation, this Court would benefit from further deliberation by the lower courts and the joining of issues that comes only with the development of a true conflict.

The petition should be denied.

COUNTERSTATEMENT

A. Constitutional Limitations On State Taxation.

1. The Constitution places two primary limitations on states' power to tax. First, the Due Process Clause of the Fourteenth Amendment requires "some

definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax," *Miller Brothers Co.* v. *Maryland*, 347 U.S. 340, 344-345 (1954), and that the "income attributed to the State for tax purposes * * * be rationally related to the 'values connected with the taxing State,' " *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 273 (1978) (citation omitted). Applying these principles, this Court has held that a state may tax all of its residents' income wherever earned, and may tax nonresidents' income to the extent the income was earned within the jurisdiction, without running afoul of the Due Process Clause. *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 463 & n.11 (1995).

Second, the dormant Commerce Clause separately "forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco Corp. ex rel. Mead Corp.* v. *Illinois Dep't of Revenue*, 553 U.S. 16, 24 (2008). Therefore, "[i]n order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value." *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 446-447 (1979). States typically avoid this constitutionally prohibited double taxation of interstate commerce by either apportioning a taxpayer's income among the jurisdictions in which it was earned or by allowing the taxpayer a credit for taxes paid to other states. *See* W. Hellerstein, *State Taxation* ¶ 8.02 (3d ed. 2013) (*State Taxation*).

2. Although the Due Process Clause and dormant Commerce Clause's restrictions are sometimes "closely related," *Nat'l Bellas Hess, Inc.* v. *Dep't of Revenue*, 386 U.S. 753, 756 (1967), they "pose distinct limits on the taxing powers of the States," *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305 (1992). That is because the clauses "reflect different constitutional concerns." *Id.* Whereas the Due Process Clause "ask[s] whether an individual's connections with a State are substantial enough to legitimate the State's power over him," the dormant Commerce Clause is "informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* at 312. In other words, the dormant Commerce Clause does not protect individual taxpayers as such, but "secur[es] a national 'area of free trade among the several States' " by prohibiting discriminatory state taxation. *Associated Indus. of Mo.* v. *Lohman*, 511 U.S. 641, 650 (1994) (citation omitted).

The upshot of the two clauses' distinct prohibitions and concerns is that "[a] tax may be consistent with due process and yet unduly burden interstate commerce." *Quill Corp.*, 504 U.S. at 313 n.7. The two inquiries are "analytically distinct." *Id.* at 305.

B. Maryland's Partial-Credit Scheme.

1. Maryland imposes an individual state income tax made up of two parts: a "State tax" and a "county tax." Pet. App. 4a. So in 2006, for instance, residents of Howard County paid a total Maryland state income tax rate of 7.95 percent—a "State" rate of 4.75 percent, Md. Code Ann., Tax-Gen § 10-105(a)(4)(v) (2006), and a "county" rate of 3.2 percent, *id.* § 10-103. Despite the nomenclature the

state legislature chose, both portions of the tax are state-imposed, and it is settled law in Maryland that the so-called "county" tax is in fact a state tax. *Frey* v. *Comptroller of Treasury*, 29 A.3d 475, 492 (Md. 2011).

Although both portions of Maryland's state income tax are imposed on a taxpayer's entire taxable income—regardless of where it is earned—a taxpayer may claim a credit for taxes paid to other states only against the State portion of the tax. Pet. App. 7a. The Maryland legislature set up this system quite intentionally; it "amended the income tax statutes to prohibit specifically the application of the out-of-state tax credit to county income tax." *Frey*, 29 A.3d at 492. And its choice means double taxation for residents who make money in other states.

An example illustrates the problem. Imagine that a Maryland small businessman earns $200,000 in income, half from work done in Maryland and half from work done in Virginia. And suppose Maryland's state and county income tax rates are 5 percent and 3 percent respectively (for a total of 8 percent) and Virginia's income tax rate is 8 percent. Maryland will tax him on his full $200,000 income at 8 percent, for a tax bill of $16,000. Virginia will tax him on the $100,000 he earned there at 8 percent, for a tax bill of $8,000 more. But Maryland—unlike other states—will not give him a credit for that $8,000 tax payment to Virginia. It will give him a credit for only $5,000, leaving him with $3,000 in double taxation. As the Court of Appeals explained, "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" Maryland. Pet. App. 22a.

2. Respondents Brian and Karen Wynne, longtime Maryland residents, are a married couple with five children. Pet. App. 9a. During the 2006 tax year at issue in this case, Brian Wynne owned a 2.4% stake in and was the President of Maxim Health Care Services, Inc., a national health-care services company. Pet. App. 9a, 26a-27a.

Maxim is an "S Corporation." Pet. App. 9a. S corporations are pass-through entities akin to partnerships, in that they "elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes." Internal Revenue Serv., *S Corporations*.[1] The S corporation's shareholders, in turn, "report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income rates." *Id.* That means when an S corporation earns income in multiple states, the income is attributed to its owners, who then must then pay any income tax due. Pet. App. 8a-9a. And like federal law, Maryland attributes an S corporation's income to its shareholders for income-tax purposes. Pet. App. 8a.

3. In 2006, the Wynnes earned $2,667,133 in taxable income, much of it from Brian Wynne's stake in Maxim. Pet. App. 56a. Because 39 of the states in which Maxim operates have a personal income tax, the Wynnes paid $84,550 in taxes to other states. *Id.* And yet Maryland law did not allow the Wynnes to take a credit for all those tax payments. Instead, by denying a credit against the county portion of the state income tax, Maryland taxed the Wynnes a second time on the same income.

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[1] *Available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/S-Corporations.

Critically, if Maxim had earned its income exclusively in Maryland, the Wynnes would not have been double taxed. *See* Pet. App. 22a. The Maryland tax code thus penalized the Wynnes—and, indirectly, Maxim—for making money across state lines. *Id.*

C. The Decisions Below.

1. In the Maryland Tax Court, the Wynnes challenged the constitutionality of the state's partial-credit scheme. Pet. App. 10a. They argued that the partial-credit scheme violates this Court's *Complete Auto* test, which measures whether a state tax comports with the dormant Commerce Clause. *See Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977). The Tax Court rejected their arguments in a short oral opinion. Pet. App. 135a-136a.

The Wynnes then sought judicial review in the Howard County Circuit Court, which reversed in a comprehensive written opinion. Pet. App. 53a-126a. The court held that by allowing state residents with out-of-state income only a partial credit against their state income taxes, Maryland authorizes "double taxation" and "substantially burdens its residents conducting business in interstate commerce, as compared to those conducting purely intrastate commerce." Pet. App. 54a. The court accordingly held that Maryland's tax scheme "violates the 'dormant' Commerce Clause of the U.S. Constitution." Pet. App. 126a.

2. The Comptroller appealed, and the Maryland Court of Appeals accepted review before briefing in the intermediate appellate court. Pet. App. 11a.

In the Court of Appeals, the Comptroller conceded that the dormant Commerce Clause forbids double taxation of interstate commerce. Pet'r Md. COA

Opening Br. 10-11. He argued, however, that Maryland's partial-credit scheme did not run afoul of this prohibition because it did not implicate interstate commerce. *Id.* at 9-20. The Comptroller also argued that Maryland's partial-credit approach satisfied the *Complete Auto* test. *Id.* at 21-26.

The Court of Appeals disagreed across the board. The court first held, correctly, that Maryland had the raw power to tax all of the Wynnes' income under the Due Process Clause. Pet. App. 12a. But, taking as a given the Comptroller's concession that the dormant Commerce Clause requires states to avoid double taxation of interstate income, Pet. App. 33 n.26, 51a-52a, the court held that Maryland's partial-credit system implicated interstate commerce because the double-taxation it caused "may affect the interstate market for capital and business investment" by "creat[ing] a disincentive for the taxpayer * * * to conduct income-generating activities in other states with income taxes." Pet. App. 16a-17a.

The Court of Appeals then analyzed Maryland's partial-credit scheme under each step of the *Complete Auto* test and found it was neither fairly apportioned nor neutral towards interstate commerce. Pet. App. 17a-32a. The Court of Appeals therefore concluded that the "the application—or lack thereof—of the credit to the county income tax" violated the dormant Commerce Clause. Pet. App. 34a.

3. The Comptroller moved for reconsideration and for a stay pending a petition for certiorari. Pet. App. 51a. And in his reconsideration motion, the Comptroller reversed course on practically every point of consequence. He admitted that Maryland's partial-credit scheme results in double taxation. Pet'r Md. COA Reconsideration Mot. 2. He also admitted that

this double taxation "make[s] it more difficult to conduct a business that crosses state lines." *Id.* at 3. But he nonetheless asserted—for the first time—that the dormant Commerce Clause does not constrain Maryland's power to double-tax its own residents' interstate income. *Id.* at 2, 5.

The Court of Appeals denied reconsideration. Pet. App. 50a-52a. But it agreed to stay its judgment pending this Court's disposition of the Comptroller's certiorari petition. *Id.*[2]

REASONS FOR DENYING THE WRIT

I. THE COMPTROLLER'S ARGUMENTS WERE NOT PRESSED OR PASSED UPON BELOW.

In this Court, the Comptroller presses the novel argument that a state's income tax on its own residents is categorically immune from dormant Commerce Clause scrutiny. Pet. 9-12. But the Comptroller did not make that argument below until the reconsideration stage, and expressly conceded the opposite in his merits brief. Because this Court does not " 'ordinarily consider' " arguments " 'neither raised before nor considered by' " the court below, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (citation omitted), the petition should be denied.

1. It is axiomatic that this Court is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005). Thus an issue "not raised

[2] On reconsideration, the Court of Appeals clarified that its decision requires only that Maryland remedy the double-taxation imposed by its partial-credit scheme, leaving the Comptroller to choose among credits, apportionment, or some other method. Pet. App. 51a-52a. The Comptroller's suggestion (Pet. i) that the decision below requires "a credit for taxes paid on income earned in other states" is simply not true.

[in the lower court] is not properly before" this Court. *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *see also United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue "which was raised for the first time in the petition for certiorari"). The reason for the rule is straightforward: This Court prefers to have "the benefit of thorough lower court opinions to guide [its] analysis of the merits." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012); *see also Wellons* v. *Hall*, 558 U.S. 220, 225-226 (2010) (per curiam).

Here, the Comptroller did not present the argument he now presses—that States have constitutional carte blanche to double-tax their citizens—to the Maryland Court of Appeals when that court was adjudicating the merits. Quite the contrary: The Comptroller told the Court of Appeals in his merits brief that "when a citizen has to pay multiple taxes on the same income at the same level because the income was earned in a state in which he was not a resident," that "*is not * * * permitted*." Pet'r Md. COA Opening Br. 10-11 (emphasis added). The Comptroller instead contested whether Maryland's tax scheme even implicated interstate commerce and, if it did, whether the scheme satisfied this Court's commerce-clause test from *Complete Auto. Id.* at 9-26.

Having lost those arguments below, the Comptroller now seeks to change horses. But this Court ordinarily does not permit "a petitioner to assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion [this Court is] reviewing." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417

(2001). It should not allow the Comptroller to do so here.

2. The Comptroller may argue that the Court of Appeals nonetheless "passed upon" the question he now advances because the court necessarily concluded that the Commerce Clause did apply. *See United States* v. *Williams*, 504 U.S. 36, 41 (1992). But this Court has held that where a lower court applies a legal principle and there was "never 'any real contest' upon the point" between the parties, the larger principle has not been passed upon for purposes of this Court's review. *Illinois* v. *Gates*, 462 U.S. 213, 222-223 (1983) (citation omitted). So, for instance, where a state court applied the exclusionary rule in a criminal case and the parties never questioned its applicability, this Court would not entertain a challenge to the exclusionary rule's scope in the first instance. *Id.*

That is the case here. The Court of Appeals relied on the Comptroller's concession regarding the dormant Commerce Clause, taking it as a given that the dormant Commerce Clause prohibits double taxation. *See* Pet. App. 33 n.26. The issue was therefore not passed upon for purposes of this Court's review.

Nor did the Maryland Court of Appeals "pass upon" the Comptroller's late-breaking argument when it denied his motion for reconsideration. Reconsideration in Maryland is discretionary, *see Wilson-X* v. *Dep't of Human Resources*, 944 A.2d 509, 514 (Md. 2008), and denial of discretionary review is not a decision on the merits, *see Rypma* v. *Stehr*, 511 A.2d 527, 529 n.1 (Md. Ct. Spec. App. 1986). The Maryland Court of Appeals has therefore never passed upon the merits of the question the Comptroller now

presents. This Court should deny the petition for that reason alone.

II. THE DECISION BELOW ACCORDS WITH THIS COURT'S DUE PROCESS AND DORMANT COMMERCE CLAUSE CASES.

The Comptroller argues that the Court of Appeals' decision is contrary to this Court's cases holding that "a State may tax all of the income of its resident taxpayers, wherever earned." Pet. 9. But the Comptroller's so-called conflict is no conflict at all. That is because every decision cited by the Comptroller evaluated the scope of a state's taxing power under the Due Process Clause. The question posed by this case—and answered by the Court of Appeals—is whether Maryland's tax scheme violates the Commerce Clause's separate constitutional mandate. Because the Comptroller can point to no conflict on that question, further review is unwarranted.

1. The linchpin of the Comptroller's petition is this Court's supposed holding that the states may "tax *all* of the income of its resident taxpayers, wherever earned." Pet. 9. But the Comptroller stops reading his cited cases too soon. What they actually hold is that *as a matter of the Due Process Clause*, a state may tax all of the income of its resident taxpayers, wherever earned. In each case, the Court's holding referred to the scope of the Due Process Clause, not the dormant Commerce Clause's distinct limitations.

In *People ex rel. Cohn* v. *Graves*, 300 U.S. 308, 313 (1937), for instance, this Court held that "[a] state may tax its residents upon net income from a business whose physical assets [are] located wholly without the state." But the Court explicitly "limit[ed

its] review to the question considered and decided by the state court, whether there is anything in the Fourteenth Amendment which precludes the State of New York from taxing the income merely because it is derived from sources" outside of New York. *Id.* In *Lawrence* v. *Tax Commission of Mississippi*, 286 U.S. 276, 281 (1932), this Court held that a state may impose an income tax "on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of the business, regardless of the place where it is carried on." But what the Comptroller fails to mention is that the taxing statute "was challenged on the ground that in so far as it imposes a tax on income derived wholly from activities outside the state, it deprived [the challenger] of property without due process of law." *Id.* at 279. And in *Guaranty Trust Co. of New York* v. *Virginia*, 305 U.S. 19, 22-23 (1938), although the Court held that "[t]he mere fact that another state lawfully taxed the funds from which the payments were made did not necessarily destroy [the state's] right to tax something done within its borders," the petitioner's challenge was only that "both the Equal Protection and Due Process clauses forbid the challenged exactment."

The list goes on. In each case, the party challenging the tax brought claims grounded in the Fourteenth Amendment, not the dormant Commerce Clause.[3] Even in *Chickasaw Nation*, which the

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[3] *State Tax Comm'n of Utah* v. *Aldrich*, 316 U.S. 174, 174 (1942) ("sole question" presented was whether the state "is precluded by the Fourteenth Amendment from imposing a tax."); *Curry* v. *McCanless*, 307 U.S. 357, 372 (1939) (finding "nothing in the history of the Fourteenth Amendment" that prohibited challenged tax); *Maguire* v. *Tefry*, 253 U.S. 12, 15 (1920) (the

Comptroller apparently views as his best authority (Pet. 9-11), the dormant Commerce Clause was not at play. This Court went out of its way to emphasize that the Indian Tribe's challenge to Oklahoma's tax there was a "narrow one" because the Tribe did not "complain that Oklahoma fails to award a credit against state taxes for taxes paid to the Tribe." 515 U.S. at 464 n.13. In other words, there was no claim of double taxation—and thus no dormant Commerce Clause issue—present in that case. *Id.*

The Comptroller insists the opposite, citing a footnote in *Chickasaw* that allegedly held that credits for income taxes paid to other sovereigns " 'is an independent policy decision' " and not constitutionally required. Pet. 11 (citing 515 U.S. at 463 n.12). But the footnote the Comptroller splices together snippets from says no such thing. What it says is that " '[i]f foreign income of a domiciliary taxpayer is *exempted*, this is an independent policy decision, and not one compelled by jurisdictional considerations.' " *Chickasaw Nation*, 515 U.S. at 463 n.12 (emphasis added; citation omitted). The footnote thus refers to a state's policy discretion to forgo some of its Due Process Clause authority to tax all of a resident's income, *not* the dormant Commerce Clause's demand that states avoid double taxation through credits or some other mechanism.

Perhaps realizing the limitations of what his cases say, the Comptroller appeals to what they *don't* say.

"contention" at issue was "that the imposition of the tax was a denial of due process of law within the protection of the Fourteenth Amendment"); *Shaffer* v. *Carter*, 252 U.S. 37, 58 (1920) (concluding that "nothing * * * in the Fourteenth Amendment prevents the states from imposing double taxation * * * so long as the inequality is not based up on arbitrary distinctions").

He argues that Maryland must be permitted to double-tax as it pleases because his cited cases "did not so much as hint" that the dormant Commerce Clause limited the taxes at issue. Pet. 12. But the reason this Court did not mention the dormant Commerce Clause is because the petitioners did not argue that the taxes at issue violated the dormant Commerce Clause. This Court's silence is of no help to the Comptroller. *See Stone* v. *Powell*, 428 U.S. 465, 481 n.15 (1976) (rejecting argument that the Court's prior cases resolved an issue because "the issue * * * was not presented" in the prior cases and "only in the most exceptional cases will [this Court] consider issues not raised").

2. With the Comptroller's cases appropriately cabined to the Due Process Clause, there is no conflict between them and the decision below. The Wynnes conceded—and the Court of Appeals held—that Maryland has the "authority to tax their income, wherever earned, under the Due Process Clause." Pet. App. 12a. The Court of Appeals' focus was exclusively on the dormant Commerce Clause and its independent restrictions on state taxation. *See id.* And the Comptroller does not even assert a conflict between the decision below and any of this Court's many dormant Commerce Clause cases striking down a state's taxes on its own citizens. *See, e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997) (striking down discriminatory tax imposed on in-state camp); *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996) (striking down discriminatory tax imposed on in-state securities holders).

Indeed, Professor Hellerstein—the leading authority on state and local taxation[4]—addressed the decision below in the most recent update to his *State Taxation* treatise and concluded that the Court of Appeals properly held that "a state taxing income on a residence basis must, as a matter of Commerce Clause doctrine, yield to a state that has the power to tax income on a source basis to avoid the risk of multiple taxation." *State Taxation* ¶ 20.10[2][b] n.783.10. There is not only no conflict between the Court of Appeals' decision and this Court's cases; the Court of Appeals' decision is correct. The petition should be denied.

III. THE COMPTROLLER'S ASSERTED SPLIT AMONG STATE HIGH COURTS IS ILLUSORY.

The Comptroller similarly misses the mark in arguing that the decision below conflicts with the decisions of multiple state courts of last resort. Pet. 13-14. Like the Comptroller's claims of conflict with this Court, his string-cite of state high court decisions conflates distinct doctrines and ignores key factual differences between those cases and this one. The split is illusory, and the petition should be denied.

1. Most of the Comptroller's cited cases are inapt because if the Wynnes resided in the states at issue,

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[4] Professor Hellerstein's treatise (and related law review articles) are cited in virtually every one of this Court's dormant Commerce Clause taxation cases. *See, e.g.*, *MeadWestvaco*, 553 U.S. at 25; *Am. Trucking Ass'ns, Inc.* v. *Schneiner*, 483 U.S. 266, 289 (1987); *Maryland* v. *Louisiana*, 451 U.S. 725, 758 n.28 (1981). His extensive work has led the Second Circuit to call him "[t]he leading commentator on the subject" of the constitutionality of state taxing schemes. *Barringer* v. *Griffes*, 1 F.3d 1331, 1336 (2d Cir. 1993).

the Wynnes could have credited their taxes paid to other states against their state income-tax bill. There would therefore be no double taxation and no dormant Commerce Clause violation.

Minnesota, for instance, grants resident taxpayers—regardless of whether they are domiciled in the state—a credit for taxes paid to other states. *See* Minn. Stat. § 290.06(22). Thus, in both cases the Comptroller cites (Pet. 13), the Minnesota Supreme Court emphasized that Minnesota's taxation of nondomiciliary residents' entire income did not offend the constitution because the Minnesota tax code "protect[s] residents from multiple taxation by allowing a credit for income taxes paid to the domicile jurisdiction to offset Minnesota income tax liability." *Stelnzer* v. *Comm'r of Revenue*, 621 N.W.2d 736, 740 n.1 (Minn. 2001); *see also Luther* v. *Comm'r of Revenue*, 588 N.W.2d 502, 510 (Minn. 1999) (explaining that "even if the risk of multiple taxation of individual taxpayers was a due process concern, no such taxation would result here because Minnesota provides a credit for income tax paid to a nondomiciliary resident's state of domicile").

Connecticut and New York, too, would provide a state income tax to the Wynnes in these circumstances. Their high courts have noted that although their respective states' tax codes do not allow a credit for taxes paid to other states on *intangible* income—such as dividends and interest—they *do* allow a credit on income derived from interstate businesses like the Wynnes' income from Maxim.

In Connecticut, " 'the credit against Connecticut income tax is allowed for income tax imposed by another jurisdiction upon * * * income from a business, trade or profession carried on in other jurisdic-

tion.' " *Chase Manhattan Bank* v. *Gavin*, 733 A.2d 782, 804 nn.26-27 (Conn. 1999) (quoting Conn. Agencies Regis. § 12-704(a)-4(3)). The same is true in New York. " '[T]he resident credit against ordinary tax is allowable for income tax imposed by another jurisdiction upon compensation for * * * income from a business, trade, or profession carried on in the other jurisdiction.' " *Tamagni* v. *Tax Appeals Tribunal*, 695 N.E.2d 1125, 1129 (N.Y. 1998) (quoting N.Y. Comp. Codes R. & Regs. Tit. 20, § 120.4(d)).

In both states, the credit for income derived from interstate activities "protects residents actually engaged in interstate commerce from double taxation by ensuring that they are taxed only once upon income derived from interstate activities." *See id.* But that is the very protection that Maryland's partial-credit scheme denies. Pet. App. 32a.

2. *Tamagni* is distinguishable for another reason as well. There, only intangible income was at issue. 695 N.E.2d at 1129. That is critical because under this Court's cases, intangible income has no situs; that is, the income is not considered to be from any particular geographic source. *See Aldrich*, 316 U.S. at 179-180. As a consequence, the *Tamagni* court concluded that the potential for multiple taxation of the taxpayer's intangible income did not implicate the dormant Commerce Clause. Because the income was not earned in a state other than New York, New York's denial of a credit was not a tax affecting interstate income. 695 N.E.2d at 1130.

This case is worlds apart. Under Maryland law, the Wynnes' pass-through income from Maxim is deemed earned in the states Maxim earned it. Pet. App. 8a. It therefore implicates the dormant Com-

merce Clause, and, as the Court of Appeals recognized (Pet. App. 16a n.15), *Tamagni* is inapplicable.

3. The Comptroller's remaining state high-court cases are similarly off-base. *Idaho Tax Commission* v. *Stang*, 25 P.3d 113, 116 (Idaho 2001), for instance, does not split with the decision below because the taxpayers' only dormant Commerce Clause argument was that Idaho lacked a sufficient nexus with their income. Here, by contrast, the Wynnes conceded that Maryland had the necessary connection to their Maxim income; they argued only that Maryland's income tax was discriminatory and not fairly apportioned. Pet. App. 17a-18a. The two cases do not address the same issues, and there therefore can be no conflict between them. *See MeadWestvaco*, 553 U.S. at 25 (noting the distinction under the dormant Commerce Clause between "whether the State may tax" and "what it may tax").

In *In re Barton-Dobenin*, 9 P.3d 9 (Kan. 2000), the Kansas Supreme Court denied a credit to resident taxpayers, but considered only the dormant *foreign* Commerce Clause—a clause about which the court confessed it had "very little guidance." *Id.* at 15. Moreover, the Kansas court based its holding on its view that the taxpayers there had not carried their evidentiary burden to prove that the Kansas tax "implicate[d] foreign commerce." *Id.* at 16. The Comptroller, however, does not contest the Court of Appeals' finding that Maryland's partial-credit scheme "may affect the market for capital and business investment." Pet. App. 16a-17a. And even if he did, this Court does not use its discretionary docket to second-guess fact-specific conclusions of that sort. *See* Sup. Ct. R. 10.

Finally, the Oregon Supreme Court in *Keller* v. *Department of Revenue*, 872 P.2d 414 (Or. 1994) denied taxpayers a credit against their Oregon income taxes on a tax paid to Washington state because it held that the Washington state tax was an excise—not income—tax. *Id.* at 415. Accordingly, there was no double-taxation of the taxpayers' non-Oregon income because the Washington state tax was not *on* the taxpayers' income. *Id.* at 415-416 (rejecting the taxpayers' dormant Commerce Clause arguments because "they proceed from the faulty premise that the Washington [excise] tax is an income tax"). But the taxes the Wynnes paid to other states are indisputably income taxes, Pet. App. 9a, and there is therefore no split between *Keller* and the decision below.

4. The Comptroller and his *amici* also argue that the decision below splits with various state intermediate appellate court decisions. Pet. 14 (citing *Zunamon* v. *Zehnder*, 719 N.E.2d 130 (Ill. App. Ct. 1999)); IMLA Br. 8 (citing *Christman* v. *Franchise Tax Board*, 134 Cal. Rptr. 725, 732 (Ct. App. 1976), and *Boone* v. *Chumley*, 372 S.W.3d 104 (Tenn. Ct. App. 2001)). This Court, however, reserves its review for splits among state courts of last resort, not lower state courts. *See* Sup. Ct. R. 10(b); *Huber* v. *New Jersey Dep't of Envtl. Prot.*, 131 S. Ct. 1308, 1308 (2011) (Alito, J., statement respecting denial of certiorari).

In any event, all three cases are distinguishable. The uncredited tax at issue in *Zunamon* was a "replacement" tax designed to equalize taxation between corporations that did not pay Illinois' personal property tax and individuals who did. 719 N.E.2d at 136. Such a tax might be deemed "compensatory"

and exempted from dormant Commerce Clause scrutiny. *See Oregon Waste Sys., Inc.* v. *Dep't of Envtl. Quality*, 511 U.S. 93, 102-103 (1994) (describing the compensatory-tax doctrine). But the Comptroller has not suggested Maryland's partial-credit scheme is a compensatory tax, Pet. App. 32a n.25, and therefore *Zunamon* does not conflict with the Court of Appeals' decision.

Christman and *Boone*, meanwhile, are inapt because they both involved taxation of dividends, not pass-through income. Indeed, the Comptroller's *amici* concede (IMLA Br. 8 n.4), that *Christman* treated the S-corporation distributions at issue as dividends, not pass-through income. 134 Cal. Rptr. at 732; *see also Valentino* v. *Franchise Tax Bd.*, 105 Cal. Rptr. 2d 304, 310 (Ct. App. 2001) (distinguishing *Christman* on this basis). In *Boone*, too, the Tennessee Court of Appeals emphasized that Tennessee's state income tax fell *only* on the portion of the S-corporation's distributions that were declared as dividends, *not* the full amount of income passed through to the taxpayers. 372 S.W.3d at 111-112. Those distinctions are crucial because—as we've explained—dividends are different for dormant Commerce Clause purposes. *Supra* 19-20. Further review is unwarranted.

IV. THIS COURT'S REVIEW IS UNNECESSARY AT THIS TIME.

The Comptroller's predictions of fiscal ruin for Maryland's counties and nationwide chaos in state and local taxation (Pet. 15-17) likewise do not support this Court's review. The actual impact of the decision below on Maryland's finances is uncertain and Maryland has tools available to mitigate any impact on its counties' coffers in the future. Moreo-

ver, contrary to the Comptroller's claims (Pet. 16), many jurisdictions *do* allow a credit for taxes paid to other states. And to the extent some jurisdictions have credit schemes similar to Maryland's, this Court should wait to see if a real split among the states develops.

1. The Comptroller's principal reason for claiming this case is one of national importance is that under the Court of Appeals' decision, Maryland will have to forgo $45 to $50 million per year in tax revenue and potentially refund up to $120 million in unlawfully levied taxes. Pet. 15. Of course, the magnitude of an unconstitutional tax is no basis to uphold it. *See C & A Carbone, Inc.* v. *Town of Clarkstown, N.Y.*, 511 U.S. 383, 393-394 (1994) ("[R]evenue generation is not a local interest that can justify discrimination against interstate commerce."). Regardless, Maryland's predictions of local fiscal hardship can be mitigated in the future and Maryland's obligation to pay refunds may not be as great as the Comptroller predicts.

As for future tax revenue, Maryland may always petition Congress to allow its discriminatory partial-credit system. *See Lewis* v. *BT Inv. Managers*, 447 U.S. 27, 44 (1980) (Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy"). And even without congressional action, Maryland can recoup the funds lost by the elimination of its partial-credit scheme by increasing sales or property taxes—which are not subject to credit or apportionment—or by raising all residents' county tax rates. *See* Pet. App. 33a n.26.

Such increases may prove locally unpopular. But that is the point of the dormant Commerce Clause:

Understanding it is more politically palatable to raise revenue by imposing higher taxes on interstate commerce, the Clause takes the choice from the states and places it with Congress, which legislates in the national interest. *See Carbone*, 511 U.S. at 393-394 (legitimate desire to fund local services does not justify imposition of discriminatory burdens on interstate commerce); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) (a "presumably legitimate goal" may not "be achieved by the illegitimate means of isolating the State from the national economy"). That Maryland may have to make hard choices to replace the income lost from the Court of Appeals' elimination of its discriminatory taxing scheme is consistent with this Court's cases and does not support further review.

As for the Comptroller's fear that he will have to refund $120 million in illegally levied taxes (Pet. 15), it is premised on an untested hypothesis: that every person entitled to a refund will claim one.[5] In any event, the supposed burden of retroactive refunds is a result of Maryland's decision to allow its taxpayers to claim a refund for unlawfully collected taxes for up

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[5] The Comptroller's refund fears also assume that the Court of Appeals' decision will be retroactive. Although that is an accurate assumption, *see McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 22 (1990), the Comptroller neglects to mention that he has staked out the opposite position before the Maryland Court of Appeals. *See* Pet'r Md. COA Reconsideration Reply 12-13 (arguing that the Court of Appeals' decision should not be retroactive for taxpayers other than the Wynnes). Because the specter of refunds looms so large in the Comptroller's petition and the brief of his *amici*, this Court should wait to see whether the Maryland courts adopt the Comptroller's view on retroactivity before considering the otherwise idiosyncratic issue in this case.

to three years. *See* Md. Code Ann., Tax-Gen § 13-1104(c). Maryland was not required to provide such a generous refund window, *see McKesson Corp.*, 496 U.S. at 45, but having decided to allow it as a matter of policy, it can hardly support review by this Court. Moreover, Maryland may also have some additional tools to reduce the impact of any retroactive refunds on its counties, *see id.*, to the extent they are consistent with Maryland law. But Maryland's need to pay refunds to those it has unlawfully taxed does not make this straightforward case one of national importance.

2. Similarly, the Comptroller's fear (Pet. 16-17) that the decision below will imperil taxes levied by other jurisdictions is both premature and unfounded.

It is premature because the Maryland Court of Appeals' decision applies only in Maryland. For that reason, the Comptroller admits that the decision below will affect other states' taxes only if "[t]he premise embraced by the Court of Appeals" is "adopted by other courts." Pet. 16. Therefore, even assuming that the Comptroller is correct (Pet. 16-17) that the decision below renders "tax schemes in other jurisdictions around the nation * * * constitutionally suspect"—and he is not—this Court should permit the question presented to percolate before accepting it for review. *See* E. Gressman, *et al.*, *Supreme Court Practice* § 6.37(i)(1), p. 504 (9th ed. 2007) ("The more important an issue is, the more the Court would benefit by allowing the issue to percolate so it can avail itself of the wisdom of other courts before settling a momentous matter").

The Comptroller's fear is also unfounded because at the state level, "every state with a broad-based personal income tax provides a credit for taxes that

their residents pay to other states." *State Taxation* ¶ 20.10.[6] The Comptroller is thus left to fret about the possible consequences at the local level. Pet. 16.

But even those fears are overblown. Of the 4,943 local income taxes identified by the Comptroller's cited source, almost half—2,469—are in Pennsylvania. *See* J. Henchman & J. Sapia, *Tax Foundation Fiscal Fact No. 280*, at 1 (2011).[7] And Pennsylvania, contrary to the Comptroller and his *amici*'s claim, allows the "payment of any tax on income to any state other than Pennsylvania or to any political subdivision located outside [Pennsylvania] to * * * be credited to and allowed as a deduction from the liability of [the resident] for any other tax on [income] imposed by any *political subdivision* of" Pennsylvania. 53 Pa. Stat. Ann. § 6924.317 (emphasis added). The Philadelphia website quoted by the Comptroller's *amici* (IMLA Br. 17-18) refers to the denial of credits to *non-residents*, who do not need credits from Philadelphia to avoid double taxation because the city can tax non-residents only on in-

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[6] *Amici*'s citation (IMLA Br. 16, 18) to Wisconsin, North Carolina, and Massachusetts' credit rules are not to the contrary. It is irrelevant that Wisconsin and North Carolina do not allow credits for taxes paid to localities because the "county" portion of Maryland's state income tax is a state—not local—tax. Pet. App. 13a. Moreover, the gross receipt taxes Massachusetts declines to credit are not taxes on income. Mass. Dep't of Revenue, Directive 08-7: Gross Receipts-Based Taxes (Dec. 18, 2008), *available at* http://www.mass.gov/dor/businesses/help-and-resources/legal-library/directives/directives-by-decade/2000-2009-directives/directive-08-7-gross-receipts-based-taxes-.html. Thus, as with *Keller*, disallowing a credit does not result in Massachusetts double-taxing income. *Supra* 21.

[7] *Available at* http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff280.pdf.

come earned within its borders. Phila. Income Tax Reg. § 207. Indiana's 91 county-level income taxes, meanwhile, allow residents to credit taxes paid to other counties, significantly reducing the threat of multiple taxation. *See* Ind. Code § 6-3.5-6-23(a).

To the extent there may be some local jurisdictions that have a partial-credit scheme like Maryland's, those states' high courts should be permitted to weigh in before this Court accepts review. In short, if the holding below is truly as novel as the Comptroller claims (Pet. 16), this Court should wait to see if it spreads before passing upon it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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