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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 Maryland Court of Appeals

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether a state tax that exposes interstate commerce to double taxation is saved from invalidation under the Commerce Clause merely because the State imposes the tax upon its own residents.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause provides: "The Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * * ." U.S. Const. art. I, § 8, cl. 3. Relevant Maryland Code provisions are reprinted in the addendum to this brief.

INTRODUCTION

This case begins and ends with a settled rule: States cannot burden interstate commerce by subjecting it to double taxation (or the risk thereof) that intrastate commerce does not bear. *MeadWestvaco Corp.* v. *Illinois Dep't of Revenue*, 553 U.S. 16, 24 (2008); *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); Jerome R. Hellerstein, Walter Hellerstein & John A. Swain, *State Taxation* ¶ 8.02 (3d ed. 2014) (*State Taxation*). The Court has applied that rule many times to strike down State taxes—including taxes on the State's own residents—that create a risk of duplicative taxation. Those cases control this one. Maryland has broken from its sister States and amended its tax code in a way that punishes its residents for making money across state lines; those residents, many of them small businesspeople, are taxed twice on the same income. All parties agree that that atypical tax scheme subjects interstate commerce to double taxation—indeed, the Comptroller of Maryland came right out and admitted it below. The tax scheme also fails the internal-consistency test this Court uses to ferret out duplicative tax burdens on interstate commerce. The Comptroller effectively admits that, too, by refusing to apply the test in his brief.

Maryland's tax therefore is obviously invalid if the usual Commerce Clause rules apply. The only question for this Court, then, is whether they do. The answer is yes. A state tax is "subject to the strictures of the Commerce Clause" if it "substantially affects interstate commerce," *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 614 (1981), and this tax does. The State's tax scheme discourages interstate commerce by penalizing tens of thousands of small businesspeople and business owners for operating across state lines. That is a far more substantial effect than the cases require.

Rather than contest any of this, the Comptroller ignores most of the Commerce Clause jurisprudence and asks this Court to adopt a brand-new limitation on the Clause's coverage: The Clause protects interstate commerce *unless* that commerce is engaged in by individuals resident in the taxing State. That proposal is, frankly, astonishing. It punishes residents for doing business across state lines. It removes a broad swath of this Nation's interstate commerce from the Commerce Clause's protection. And it flatly contradicts precedent: The Comptroller says Maryland can double-tax at will because its tax is "based on the status of residency," Comptroller Br. 9, but this Court has long rejected the idea that such formalistic labels matter and instead has simply asked whether the tax substantially affects interstate commerce. The Comptroller also says Maryland has the sovereign power to tax all its residents' income wherever earned, but that is a non sequitur: Respondents agree that Maryland has the sovereign power to impose its tax, but even taxes within the State's "sovereign power" must yield when they offend the Commerce Clause. *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 449 (1823) (Marshall, C.J.). The Comptroller's invocation of state sovereignty distracts from the actual issue presented.

The Comptroller's approach, in short, amounts to the triumph of buzzwords over precedent. It should be rejected. The rule he proposes would authorize every State to do what the Commerce Clause forbids: "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trades within the State * * * rather than 'among the several States.'" *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 286-287 (1987) (quoting U.S. Const. art. I, § 8, cl. 3). Moreover, it would create a bizarre situation in which C corporations—the Nation's biggest and wealthiest companies—are protected from double taxation, while S corporations, other pass-through entities, and the Nation's millions of unincorporated small businesspeople are not. That result is both unjust and doctrinally unsound. Individuals can, and do, engage in interstate commerce just as large corporations do. The Commerce Clause cannot protect one form of interstate commerce and not the other. The decision below should be affirmed.

COUNTERSTATEMENT

A. Maryland's Partial-Credit Scheme

1. Like 40 other States, Maryland imposes a broad-based income tax on its residents who are natural persons. National Conference of State Legislatures, *State Personal Income Taxes* (2012).[1] The tax is levied on all of a resident's income, wherever earned, with some adjustments. Md. Code Ann., Tax-Gen. §§ 10-101(e) & (i), 10-102, 10-103(a), 10-203. It consists of two parts: a so-called "State income tax," whose rate depends on the taxpayer's income, and a so-called "county income tax," whose rate depends on the county where the taxpayer resides. *Id.* §§ 10-105(a), 10-106. Notwithstanding these labels, both are legally deemed state taxes and collected by the Comptroller. *Frey* v. *Comptroller of Treasury*, 29 A.3d 475, 492 (Md. 2011); Pet. App. 5.

Also like many States, Maryland taxes nonresidents on the income they earn within Maryland's borders. Md. Code Ann., Tax-Gen. §§ 10-102, 10-203, 10-210; Comptroller Br. 4 n.2. Nonresidents pay the same "State" income-tax rate as residents. Md. Code Ann., Tax-Gen. § 10-105(a). They also pay either the "county income tax" where they work, *id.* § 10-

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[1] *Available at* http://goo.gl/h60JHi.

103(a)(4), or a "special nonresident tax" in lieu of the "county income tax," *id.* § 10-106.1. The "special nonresident tax" is set equal to the lowest "county" income-tax rate. *Id.*

2. When residents earn income out of State, that income may be subject to taxation by both the State where they earned it and the State where they reside. *See State Taxation* ¶ 20.04[1][a]. To eliminate this risk of multiple taxation, States with broad-based income taxes typically grant their residents a full credit for taxes paid on out-of-state income to other States. *See id.* ¶ 20.04[2].

Not Maryland. Maryland residents may claim a credit against the "State" portion of Maryland's tax on income earned out of State. Md. Code Ann., Tax-Gen. § 10-703(a), (c)(1). But they may not claim any credit against the "county" portion. Pet. App. 7. As a result, Maryland residents are taxed twice at the state level on income they earn in other States: Even if they have already paid tax on that income to the State where it was earned, they must still pay the full "county" portion of Maryland's tax on the same income. The Maryland General Assembly established this scheme 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; Pet. App. 7.

B. Maxim Healthcare and the Wynnes

1. Maxim Healthcare Services, Inc., is a national healthcare services company headquartered in Howard County, Maryland. Pet. App. 55. Maxim does business nationwide, and in 2006—the tax year at issue—it earned income in nearly every State. J.A. 10, 77; Pet. App. 9.

Maxim is an "S corporation." J.A. 10. Unlike traditional C corporations, which include publicly traded companies such as General Electric or Apple, S corporations are pass-through entities akin to partnerships. That means they "elect to pass corporate income, losses, deductions and credit through to their shareholders" for tax purposes. IRS, *S Corporations*.[2] Their shareholders, in turn, "report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates." *Id.* Under federal and Maryland law, an S corporation shareholder's income is treated "as if [it] were realized directly from the source from which realized by the corporation, or incurred in the same manner as incurred by the corporation." 26 U.S.C. § 1366(b); *see* Pet. App. 8; William R. Christian & Irving M. Grant, *Subchapter S Taxation* ¶ 1.17 (4th ed. 2000). As a result, when an S corporation does business and earns income in multiple States, the income is attributed to its owners and those owners must pay taxes in many States, just like partners in a law firm.[3]

[2] *Available at* http://goo.gl/FvIDAL.

[3] *Amicus* the Multistate Tax Commission suggests (Br. 4, 10, 11) that S corporation income is "investment" income, akin to stock dividends. That is incorrect for the reasons just explained. And if Maryland *did* treat residents' S corporation income as investment income, it would make the State's tax scheme even more discriminatory than it currently is. Maryland treats *non*residents' S corporation income as personally earned by the nonresident in Maryland. *See* Pet. App. 8. If Maryland were to treat *residents'* S Corporation income differently—as investment income with no situs—that would unconstitutionally discriminate against nonresidents. Perhaps

2. Respondent Brian Wynne was a longtime Maxim employee and part-owner who helped build the company from a local operation to a national business operating in almost every State. In 2006, Wynne was Maxim's president and owned 2.4% of the company. J.A. 10. He and his wife, respondent Karen Wynne, resided in Howard County with their five children. Pet. App. 8-9.

During the 2006 tax year, the Wynnes earned income from two sources: their salaries, including Brian Wynne's salary as Maxim's president, and the income passed through to the Wynnes from Brian Wynne's stake in Maxim. J.A. 19, 58. Credits aside, the Maryland tax on that income would have been \$207,984. J.A. 19 (add lines 24 and 31). The Wynnes claimed no credits against their wage income because it was earned within Maryland. They thus paid both "State" and "county" income tax on that income in full.

The Wynnes, however, had already paid tens of thousands of dollars in taxes to other States on the income passed through to them from Maxim. J.A. 10, 19. That was because 39 other States where Maxim did business assessed their own taxes on Maxim or its shareholders on the income earned within their borders. J.A. 77. Yet the Comptroller refused to allow the Wynnes to claim the full \$84,550 credit against their Maryland taxes. J.A. 84-86.

That left the Wynnes with thousands of dollars in double taxation. To take one example: In North Carolina, the Wynnes' share of Maxim's income was

recognizing as much, the Comptroller has not advanced the Commission's rationale in this Court.

$128,702, which resulted in a $9,411 tax bill. J.A. 77-3. But under Maryland's partial-credit scheme, the Wynnes were not entitled to $9,441 in credits. Instead, they could claim only a $6,113 credit—the $128,702 in North Carolina-sourced earnings multiplied by the applicable Maryland "State" rate of 4.75%. *Id.* The Wynnes were thus double-taxed by more than $3,000 on the money Maxim made in North Carolina alone. That pattern repeated itself across the Wynnes' tax return. J.A. 77. In total, they paid over $25,000 more in state income taxes, simply because they (through Maxim) did business across state lines. *See* Pet. 15.

Even with their claimed credits, however, the Wynnes still paid significant state and county income taxes: $42,086 to Maryland and $81,348 to Howard County. J.A. 19 (lines 30 and 31). They also paid thousands more in property taxes to Howard County. Wynnes' C.A. Br. 46 n.17.

C. Decisions Below

1. The Wynnes appealed the Comptroller's decision to the Maryland Tax Court. J.A. 88-93. There, the Wynnes challenged the constitutionality of the State's partial-credit scheme under the dormant Commerce Clause. Pet. App. 10. The Tax Court rejected their arguments. Pet. App. 135-136.

The Wynnes sought judicial review in the Howard County Circuit Court, which reversed. Pet. App. 53-126. 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. 54. The court accordingly held that Maryland's tax scheme violates the Commerce Clause. Pet. App. 126.

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

In the Court of Appeals, the Comptroller argued that Maryland's partial-credit scheme did not implicate interstate commerce. Comptroller C.A. Opening Br. 9-20. The Court of Appeals disagreed. It held that Maryland's partial-credit system implicated interstate commerce because the double taxation "creat[es] a disincentive for the taxpayer * * * to conduct income-generating activities in other states with income taxes." Pet. App. 16-17. The court then analyzed Maryland's scheme under the *Complete Auto* test and found it was neither fairly apportioned nor neutral toward interstate commerce. Pet. App. 17-32; *see Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). It therefore violated the dormant Commerce Clause. Pet. App. 34.

3. The Comptroller moved for reconsideration. Pet. App. 51a. In that motion, he admitted that Maryland's partial-credit scheme results in double taxation. Comptroller C.A. Recons. Mot. 2-3, 9. He also admitted that this double taxation "*make[s] it more difficult to conduct a business that crosses state lines.*" *Id.* at 3 (emphasis added). But he nonetheless asserted that the 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. 50-52. It clarified, however, that its decision does not require Maryland to offer credits for taxes paid to other States. Instead, it requires only that Maryland remedy the double taxation imposed by its partial-credit scheme; Maryland may choose among granting a full credit, dividing the tax base, or some other method. Pet. App. 51-52.

SUMMARY OF ARGUMENT

I. "[T]he commerce clause forbids" state taxes that subject "[i]nterstate commerce * * * to the risk of a double tax burden to which intrastate commerce is not exposed." *J.D. Adams*, 304 U.S. at 311. The Court has reiterated that teaching again and again for nearly a century. It resolves this case. Maryland has enacted an income-tax scheme that systematically causes the double taxation of those who earn money across state lines. "[I]ntrastate commerce," meanwhile, is "not exposed" to that double taxation. *Id.* And Maryland creates that result quite intentionally, by refusing to do what its sister States do: grant its residents a full credit for income taxes they pay to other States.

That tax scheme is "indistinguishable from a type of law previously held unconstitutional by this Court." *United Haulers Ass'n* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348 (2007) (Scalia, J., concurring in part) (quotation marks omitted). Since 1938, this Court's Commerce Clause jurisprudence has invalidated state tax laws that subject a State's domiciliaries to multiple taxation, or the risk thereof, as the consequence of engaging in interstate commerce. *See*, *e.g.*, *J.D. Adams*, 304 U.S. at 311; *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 662-663 (1948). That is what Maryland's credit scheme does. It therefore is no surprise that the tax flunks the *Complete Auto* test this Court uses to determine whether a tax violates the Commerce Clause. Maryland's scheme cannot stand.

II. Notably, the Comptroller's brief never applies the *Complete Auto* test, and it never denies that Maryland's tax subjects interstate commerce to multiple taxation. Instead, the Comptroller tries to float above the Commerce Clause jurisprudence and casts about for some exception to the rule that interstate commerce may not be double-taxed. Every theory he advances has been rejected by this Court.

The Comptroller primarily argues that Maryland has the sovereign power to tax all its residents' income, wherever earned. Respondents agree, but the proposition does not help Maryland: This Court has held for 200 years that taxes within the State's "sovereign power" to impose nonetheless must yield when they offend the Commerce Clause. *Brown,* 25 U.S. at 449. Moreover, the Court has struck down numerous state laws that caused multiple or discriminatory taxation, *even though those taxes were imposed on the State's own residents*. If the Comptroller's sovereignty argument were correct, all those cases would be wrongly decided.

The Comptroller also argues that Maryland is not imposing a burden on interstate commerce at all—and thus that the Commerce Clause does not apply—because its income tax is based on a "status": that of being a resident. But this Court has long rejected the formalistic notion that it matters how a tax is labeled—whether, for instance, it is deemed a tax on property, or a "privilege" tax, or a tax on a "local incident." The question instead, in every case, is whether the tax substantially affects interstate commerce. *See Camps Newfound/Owatonna, Inc.*

v. *Town of Harrison*, 520 U.S. 564, 574 (1997) ("A tax on real estate, *like any other tax*, may impermissibly burden interstate commerce." (emphasis added)); *Commonwealth Edison*, 453 U.S. at 615 (the Court has "long * * * rejected" the notion that a state tax "affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or 'intrastate' activity"). Maryland's tax unquestionably has such a substantial effect. On the facts here, it discourages interstate activity by a corporation that operates in dozens of States. And more generally, it punishes interstate activity by every single pass-through entity and unincorporated small businessperson domiciled in the State. The Commerce Clause applies, and Maryland must abide by its strictures.

Finally, the Comptroller argues that Maryland *must* be allowed to double-tax interstate commerce because otherwise local residents will not pay their share for state services. The argument is specious. The Wynnes still would pay substantial income taxes to Maryland even with a full credit, and the same goes for almost everyone earning money across state lines. Moreover, States levy many other taxes on their residents, from sales taxes to property taxes to fees, and thus every resident contributes to the cost of state services in that way too. Indeed, the Wynnes themselves paid significant property taxes to Maryland. Finally, States provide extensive services to domiciliary *corporations*—fire protection, water, roads—and yet States cannot double-tax those corporations. Maryland's argument thus proves too much. The State has every right to tax to fund the services it provides. But it cannot do so by subjecting interstate commerce to burdens that intrastate commerce does not bear.

III. The Comptroller's proposed categorical exception to the Commerce Clause therefore cannot be reconciled with precedent. And it would have a bizarre result: States would be forbidden to double-tax domiciliary *C* corporations but would be free to double-tax domiciliary *S* corporations and resident small businesspeople to the hilt. That rule makes absolutely no sense; each kind of business engages in interstate commerce in equal degree. And the Comptroller makes no attempt to justify it.

The United States does acknowledge the issue, U.S. Br. 30-32, but the weakness of its arguments only underscores how problematic this point is for Maryland. The United States argues that a State's "relationship" with its individual residents differs from its "relationship" with its domiciliary corporations. It is difficult to see, however, why this is so—both corporations and individuals are resident in a particular State or States, and both receive state services—or why it makes a constitutional difference. The United States also says, boldly, that "it is an open question whether States are constitutionally *required* to apportion the income of a domestic corporation"—in other words, it argues that maybe States can double-tax C corporations too. *Id.* at 31. That will come as news to the Nation's corporations, given that this Court has long held that States *must* structure their taxes to avoid multiple taxation of interstate business.

In the end, Maryland lacks any justification for its project here: to blow a gaping hole through the

Commerce Clause's protections for interstate commerce. The decision below should be affirmed.

ARGUMENT

I. MARYLAND'S PARTIAL-CREDIT SCHEME VIOLATES THE COMMERCE CLAUSE.

A. The Commerce Clause Forbids States To Burden Interstate Commerce With The Risk Of Multiple Taxation.

1. The problem in this case is simple. In our national economy, commerce often crosses state lines. And when that happens, two or more States may seek to tax the same commercial event.

Consider the person who resides in State A but does business in both State A and State B. Because she does business in State B, State B has jurisdiction to tax the income she earns within its borders. *See Shaffer* v. *Carter*, 252 U.S. 37, 57 (1920). And because she resides in State A, State A has jurisdiction to tax all of her income, even income earned in State B. *See Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 462-463 (1995) ("[A] jurisdiction * * * may tax *all* the income of its residents, even income earned outside the taxing jurisdiction * * * ."); *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276, 279 (1932). Thus, when a person who resides in State A earns income in State B, both States have jurisdiction to tax the income she earns in State B.

This overlapping jurisdiction creates a problem for interstate commerce, because the person who does business across state lines is exposed to a risk that others are not: the risk of multiple taxation. The question in this case is whether the Constitution tolerates this burden on interstate commerce.

2. It does not. The Commerce Clause gives Congress the Power "[t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. "Although the Constitution does not in terms limit the power of States to regulate commerce," this Court has "long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *United Haulers*, 550 U.S. at 338. And while "the Court's understanding of the dormant Commerce Clause has taken some turns," *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995), one thing has remained constant for generations: This Court has held that the Clause forbids the risk of multiple taxation.

Thus, nearly 80 years ago in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), this Court declared that "interstate business * * * shall not be burdened with cumulative exactions which are not similarly laid on local business." *Id.* at 258. The Court's opinion, written by then-Justice Stone, traced that rule to one of the Court's earliest dormant Commerce Clause decisions: the *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873). The Court there struck down a state tax on merchandise carried in interstate commerce. *Id.* at 271. The reason for that decision, Justice Stone explained, was that if "every state" imposed an identical tax, "interstate commerce * * * would bear cumulative burdens not imposed on local commerce." *Western Live Stock*, 303 U.S. at 256.

This Court has reaffirmed that basic teaching in case after case. It has said, for example, that "multiple taxation of interstate operations * * * offends the Commerce Clause." *Central R.R. Co. of Pa.* v. *Penn-*

sylvania, 370 U.S. 607, 612 (1961) (quotation marks omitted). It has admonished States not to "subject[] interstate commerce to the burden of multiple taxation." *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458 (1959) (quotation marks omitted). And it has struck down state taxes whenever they violate this rule. *See, e.g.*, *Evco* v. *Jones*, 409 U.S. 91, 94 (1972) (per curiam) (invalidating state gross-receipts tax that subjected interstate commerce to "the risk of a double tax burden to which intrastate commerce is not exposed" (quotation marks omitted)); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 170 (1954) (invalidating state tax on taking natural gas to avoid "a multiple burden upon that commerce" (quotation marks omitted)); *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 385 (1952) (invalidating state tax on river vessels to avoid "multiple taxation of interstate operations").

It is therefore beyond question that, "[i]n reviewing state taxation schemes under the Commerce Clause," this Court "act[s] as a defense against state taxes which * * * give rise to serious concerns of double taxation." *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358, 386 (1991). As this Court recently reiterated, the "Commerce Clause forbids the States to levy taxes * * * that burden [interstate commerce] by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco*, 553 U.S. at 24; *see State Taxation* ¶¶ 6.03, 8.02[1].

3. State income taxes are no exception to this long-settled rule. Time and again, this Court has invalidated state income taxes on Commerce Clause grounds because they burdened interstate commerce with the threat of multiple taxation. And despite the Comptroller's contrary suggestions (Br. 12, 24-26),

the Court has done so even when the tax fell on residents of the taxing State.

In *J.D. Adams*, for example, this Court struck down an Indiana tax on "the gross income of every resident of the State," regardless of where the income was earned. 304 U.S. at 308; *see id.* at 316 (describing tax as a "tax demanded on appellant's gross income from its business in interstate commerce"). The tax was challenged by one of the State's residents—a corporation that earned income selling goods out-of-state. *Id.* at 308-309. The Court agreed that the tax violated the Commerce Clause. It wrote that the "vice of the statute" was that it "include[d] in its measure, without apportionment, receipts derived from activities in interstate commerce." *Id.* at 311. And if the tax were upheld, other States could lay the same "exaction," thereby subjecting "[i]nterstate commerce * * * to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." *Id.*

The Court reached a similar conclusion in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). That case involved a tax levied by Washington on the "gross income" of "every person" doing business in the State, no matter where the income was earned. *Id.* at 435 (quotation marks omitted). A Washington corporation challenged the tax, *id.*, and this Court struck it down. "If Washington is free to exact such a tax," the Court explained, "other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service." *Id.* at 439. The Court concluded: "The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." *Id.*

The Court's decision in *Central Greyhound*, 334 U.S. 653, is to the same effect. New York sought to tax the gross income of its own domiciliary—a New York bus company whose routes crossed into New Jersey and Pennsylvania. *See id.* at 654; *id.* at 664-665 (Murphy, J., dissenting) (identifying plaintiff as a "New York corporation"); *Jefferson Lines*, 514 U.S. at 190 (explaining that the Court understood the tax in *Central Greyhound* to be "simply a variety of tax on income"). In invalidating the tax, the Court emphasized that New Jersey and Pennsylvania might also seek to tax the company's receipts, at least with respect to mileage within their respective borders. *See Central Greyhound*, 334 U.S. at 662. And that meant the company "was exposed to taxation by New Jersey and Pennsylvania on portions of the same receipts that New York was taxing in their entirety." *Jefferson Lines*, 514 U.S. at 190. The Court concluded that this risk of multiple taxation imposed an "unfair burden" on interstate commerce. *Central Greyhound*, 334 U.S. at 662.

The lesson from these cases is clear: The Commerce Clause forbids taxes, including income taxes, that subject interstate commerce to the risk of multiple taxation. When two or more States have jurisdiction to tax the same income, the Commerce Clause requires a credit, division of the tax base, or some other mechanism to eliminate that risk.

B. Maryland's Scheme Burdens Interstate Commerce With The Risk (And Reality) Of Multiple Taxation.

Because Maryland's partial-credit scheme cannot be squared with these principles, it cannot stand.

1. Maryland's scheme is indistinguishable from laws previously invalidated by this Court. In *J.D. Adams*, *Gwin*, and *Central Greyhound*, this Court struck down state income taxes that exposed interstate commerce to a risk of multiple taxation. There is no principled way to distinguish those taxes from the law at issue here.

Consider, for instance, the tax struck down in *J.D. Adams*: a tax on "the gross income of every resident of the State." 304 U.S. at 308. That is precisely the type of tax at issue here: a tax on the gross income of every resident of the State. *See* Md. Code Ann., Tax-Gen. § 10-101(i) (defining "Maryland taxable income" as "Maryland adjusted gross income, less the exemptions and deductions allowed under this title"). To be sure, Maryland's income tax can be broken down into "State" and "county" components. *Id.* §§ 10-102, 10-103(a)(1), 10-105(a), 10-106. But "the county tax * * * *is* a state tax," so these labels do not matter. *Frey*, 29 A.3d at 492 (emphasis added). As in *J.D. Adams*, the tax at issue is a tax on the gross income of every resident of the State.

As in *J.D. Adams*, moreover, the tax exposes the State's residents to a risk of multiple taxation. What was true when this Court decided *J.D. Adams* is true today: A person's income is taxable not only by the State where she resides, but also by the State where she earns it. *Chickasaw Nation*, 515 U.S. at 463 & n.11. And that means that absent a credit or some other method of apportionment, a Maryland resident with interstate income is subject to a risk of multiple taxation. In *J.D. Adams*, the Court struck down Indiana's scheme because it did not eliminate that risk. *See* 304 U.S. at 311. Here, Maryland's scheme similarly fails to eliminate that risk, because Maryland grants only "partial but not full credits for out-of-state taxes." Comptroller Br. 41; *see* Md. Code Ann., Tax-Gen. § 10-703(a). Like the tax in *J.D. Adams*, the Maryland tax subjects "[i]nterstate commerce * * * to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U.S. at 311.

J.D. Adams controls this case—as do *Gwin* and *Central Greyhound*. In each, the State sought to tax the gross income of persons domiciled in the State. And in each, the State exposed interstate commerce to the risk of multiple taxation, with no method to eliminate that risk. Principles of *stare decisis* command that the outcome here should be the same as in *J.D. Adams*, *Gwin*, and *Central Greyhound*: The state law should be struck down. *See Quill Corp.* v. *North Dakota*, 504 U.S. 298, 320 (1992) (Scalia, J., joined by Kennedy and Thomas, J.J., concurring in part and concurring in the judgment) (*stare decisis* has "special force" in dormant Commerce Clause context because "Congress remains free to alter what [this Court] has done" (quotation marks omitted)).

2. Analyzing Maryland's income-tax scheme under this Court's four-part *Complete Auto* test yields the same result: Maryland's law must fall.

Under *Complete Auto*, this Court "examine[s] the practical effect of a challenged tax to determine whether it '[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.'" *Mobil Oil Corp.* v. *Commissioner of Taxes*, 445 U.S. 425, 443 (1980) (quoting *Complete Auto*, 430 U.S. at 279). "[N]o tax may be sustained" under the Commerce Clause unless it meets all four prongs. *Maryland* v. *Louisiana*, 451 U.S. 725, 754 (1981). Maryland's income tax flunks prongs two and three: It is not fairly apportioned, and it discriminates against interstate commerce.

Start with the second prong. A state tax is not "fairly apportioned" unless it is "internally consistent." *Goldberg* v. *Sweet*, 488 U.S. 252, 261 (1989). The internal consistency test ferrets out any risk of multiple taxation. "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.* The question, in other words, is whether "identical application [of the tax] by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185.

Here the answer is clear: If every State adopted Maryland's tax scheme, interstate income would be subjected to multiple taxation nationwide. Recall that Maryland taxes the entire income of all its residents, wherever earned. Md. Code Ann., Tax-Gen. §§ 10-102, 10-103(a)(1). It also taxes the income of nonresidents earned within the State's borders, and refuses to fully credit residents for taxes owed in another State. *Id.* §§ 10-102, 10-103(a)(4), 10-106.1, 10-210, 10-703(a). Thus, if every State adopted Maryland's tax scheme, income earned by residents out of State would be taxed twice: once by the State of the income's source, and again by the State of the taxpayer's residence. And residents would receive only partial credit for taxes owed out of State, creating double taxation. Maryland's scheme is thus internally inconsistent, because adoption of an identical scheme by every other State would "add [a] burden to interstate commerce that intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185; *see also Central Greyhound*, 334 U.S. at 662-663 (conducting similar analysis in striking down State's income tax); *Gwin*, 305 U.S. at 439 (same); *J.D. Adams*, 304 U.S. at 311 (same); *State Taxation* ¶ 8.02[3] ("[A] state * * * , which seeks to tax the unapportioned income of its domiciliary corporations doing business in other states while taxing an apportioned share of the income of foreign corporations doing business within the state, violates the Court's 'internal consistency' principle.").

An example illustrates the point. Assume every State has adopted Maryland's scheme, imposing a 4.75% "State" income tax on residents and nonresidents alike, in addition to a 1.25% "county" income tax on residents and an equivalent 1.25% "special nonresident tax" on nonresidents. John resides in Home State and earns an income of $200,000, all within Home State. His total income-tax burden—owed entirely to Home State—will be $12,000, calculated by multiplying $200,000 by the overall Home State income-tax rate of 6%.

Like John, Mary resides in Home State and has an income of $200,000. But unlike John, Mary engages in interstate commerce. Although she earns half her income in Home State, she earns the other half in

Neighboring State. Absent any apportionment, she will owe $12,000 to Home State, calculated by multiplying her total income of $200,000 by the overall Home State income-tax rate of 6%. She will also owe $6,000 to Neighboring State, calculated by multiplying her Neighboring State income of $100,000 by the overall Neighboring State income-tax rate of 6%. Home State, however, will credit her for only the "State" portion of the taxes on her Neighboring State income—which amounts to $4,750, or $100,000 multiplied by 4.75%. So Mary's total income-tax burden will be $13,250—$7,250 owed to Home State and $6,000 owed to Neighboring State.

As this example shows, Mary ends up owing $1,250 more in taxes than John, just because she does business across state lines. That added burden results from the double taxation of Mary's income earned in a different State. And because that burden falls on interstate commerce alone—without affecting intrastate commerce at all—the tax is not internally consistent. Maryland's law is not fairly apportioned under *Complete Auto*. *See Jefferson Lines*, 514 U.S. at 185.

It follows that Maryland's law also discriminates against interstate commerce within the meaning of *Complete Auto*'s third prong. As this Court has held, "[a] tax that unfairly apportions income from other States is a form of discrimination against interstate commerce." *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984). Here Maryland's tax subjects income from other States to the risk of multiple taxation. That discriminates against interstate commerce by "plac[ing] burdens on the flow of commerce *across* [a State's] borders that commerce *wholly within* those borders would not bear." *Jefferson Lines*, 514 U.S. at

180 (emphases added); *see also Armco*, 467 U.S. at 642. To borrow the words of this Court in *Gwin*, "[t]he present tax, though nominally local, * * * in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." 305 U.S. at 439.

That is not a burden interstate commerce should have to bear. It is true that "even interstate business must pay its way, and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." *Western Live Stock*, 303 U.S. at 254 (quotation marks and citations omitted). But it is one thing for "different States" to tax "*distinct* events" along "the stream of commerce." *Jefferson Lines*, 514 U.S. at 187-188 (emphasis added). It is quite another for different States to tax the *same* income within that stream. Though interstate commerce can be made to "pay its way," it cannot be made to pay *twice*. *See Western Live Stock*, 303 U.S. at 256-258.

3. By forcing interstate commerce to pay twice, Maryland's tax strikes at "the very purpose of the Commerce Clause," which "was to create an area of free trade among the several States." *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388, 402 (1984) (quotation marks omitted). Free trade requires the removal of barriers to commerce crossing state lines. But Maryland's scheme exposes to multiple taxation the earning of income beyond the State's borders, "exert[ing] an inexorable hydraulic pressure on interstate businesses to ply their trades within the State * * * rather than 'among the several States.'"

Scheiner, 483 U.S. at 286-287 (quoting U.S. Const. art. I, § 8, cl. 3). Specifically, it discourages small businesspeople, and pass-through entities with Maryland owners, from plying their trades across state lines, thereby denying other States' citizens access to goods and services offered by Marylanders. Pet. App. 16-17.

The Maryland law's effect is therefore to "reestablish the barriers to interstate trade which it was the object of the commerce clause to remove." *Gwin*, 305 U.S. at 440. And it would encourage other States to erect similar barriers. After all, reducing tax credits is a politically appealing solution for States looking to plug persistent budget gaps. "[A] loss of [a] credit is, in effect, a tax increase on every dollar of that taxpayer's income," Mark H. Neikrie, *Connecticut's Personal Income Tax*, 65 Conn. B.J. 345, 362 n.96 (1991) (quotation marks omitted), and it is a tax increase the legislature can accomplish under the radar, "without the political cost of raising tax rates." Ronald D. Auctt, *The "2% Floor" Grows Up*, 33 ACTEC J. 214, 217 (2008).

Maryland's partial-credit scheme, in short, cannot be squared with settled precedent, and it fails the *Complete Auto* test. It is invalid under the dormant Commerce Clause.

4. This is not to say there is a "single constitutionally mandated" way of structuring a state income-tax scheme. *Goldberg*, 488 U.S. at 261 (quotation marks omitted). Although the Commerce Clause forbids States to burden interstate commerce with the risk of multiple taxation, it does not dictate any particular method of eliminating that risk.

One way of avoiding multiple taxation is for States to do what most *already* do: grant full credit against their income tax for income taxes paid to other States. That would "cure the discrimination" against interstate commerce, *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Revenue*, 483 U.S. 232, 249 (1987), and render the State's tax internally consistent, by ensuring that interstate commerce is not subject to double-taxation burdens that intrastate commerce does not face. *See id.* at 245 n.13 (recognizing that credits can eliminate potential for multiple taxation); *Goldberg*, 488 U.S. at 264 (same); *D. H. Holmes Co.* v. *McNamara*, 486 U.S. 24, 31 (1988) (same).

Another way of curing the discrimination would be for States to divide their residents' tax base, to avoid taxing all their income in the first place. States (including Maryland) already apply formulas for apportioning the tax base of a C corporation so that a State does not, "when imposing an income-based tax, tax value earned outside its borders." *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164 (1983) (quotation marks omitted); *see also Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 276-280 (1978) (discussing single- and three-factor formulas adopted by various States); Md. Code Ann., Tax-Gen. § 10-402(a) (requiring apportionment of C corporation income). States could apply similar apportionment formulas to their individual residents, to avoid taxation of any "extraterritorial values." *Container Corp.*, 463 U.S. at 164 (quotation marks omitted). That would eliminate the potential for multiple taxation because when a State apportions, "multiple burdens logically cannot occur." *Department of Revenue* v. *Association* *of Wash. Stevedoring Cos.*, 435 U.S. 734, 746-747 (1978).

What States may not do is none of the above. But that is what Maryland has done here. Its law places an unconstitutional burden on interstate commerce, and should be invalidated.

II. THE COMPTROLLER'S ARGUMENTS CANNOT SAVE MARYLAND'S UNCONSTITUTIONAL SCHEME.

Tellingly, the Comptroller makes no serious attempt to apply *Complete Auto*, and he never denies that Maryland's scheme double-taxes in theory and in practice. Quite the opposite: He has conceded that it does. *E.g.*, Comptroller C.A. Recons. Mot. 9 (asserting that "some degree of double taxation, in the form at issue here, is unavoidable"). The only question, then, is whether the Commerce Clause applies. Of course it does. The scheme at issue "substantially affects" interstate commerce in exactly the same manner as the improperly apportioned taxes in a host of past cases; it therefore is "subject to the strictures of the Commerce Clause." *Commonwealth Edison*, 453 U.S. at 614.

Ignoring the substantial-effects test, the Comptroller relies on notions of "jurisdiction," "residence," and political process in his effort to carve out an exception to the scope of the Commerce Clause. Each argument fails.

A. The Comptroller's Due-Process And Sovereignty Arguments Duck The Commerce Clause Question At Issue.

1. The Comptroller spills much ink (Br. 18-19, 27-29) proving a point the Wynnes have never contested: that a State has the raw jurisdictional power to

tax its residents on all the income they earn, no matter where they earn it. But proving that proposition does not decide the case. In scores of cases in which this Court has applied the Commerce Clause to invalidate a state tax, the State had undisputed jurisdiction to levy the tax: The tax either fell on a resident's income, *see, e.g., J.D. Adams*, 304 U.S. at 311; or on money earned in the taxing State, *see, e.g., Tyler Pipe,* 483 U.S. at 235; or on property in the taxing State, *see, e.g., Camps Newfound*, 520 U.S. at 574. But that did not matter. The operative question instead was, and is, whether a tax otherwise within the State's taxing authority "offend[s] the Commerce Clause." *Commonwealth Edison*, 453 U.S. at 617. If it does, it cannot stand.

The cases the Comptroller cites do not suggest otherwise. In each, the Court's holding rested on the *Due Process Clause*, without addressing the Commerce Clause's distinct limitations. Such cases do not help the Comptroller because "[a] tax may be consistent with due process and yet unduly burden interstate commerce." *Quill*, 504 U.S. at 313 n.7.

Every one of the Comptroller's cases is limited in this way. In *Lawrence*, 286 U.S. 276, for instance, the 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." *Id.* at 281. The Comptroller quotes this excerpt. *See* Comptroller Br. 18. But he fails to mention that the taxing statute in *Lawrence* "was challenged on the ground that in so far as it imposes a tax on income derived wholly from activities carried on outside the state, *it deprived [the challenger]* *of property without due process of law*." 286 U.S. at 279 (emphasis added).

So, too, in *People ex rel. Cohn* v. *Graves*, 300 U.S. 308 (1937), 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." *Id.* at 313. 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.* at 312 (emphasis added). Moreover, the case was tried on a "stipulation of facts" that did "not indicate that [the plaintiff's] income ha[d] been taxed by New Jersey"—the only other State that could seek to do so—and so no issue of multiple taxation was even raised. *Id.* at 311.

The Comptroller's (and the United States') other cited cases are similarly inapplicable. *See State Tax Comm'n* v. *Aldrich*, 316 U.S. 174, 174 (1942) ("sole question" presented was whether Utah was "precluded by the Fourteenth Amendment from imposing" a contested inheritance tax); *Curry* v. *McCanless*, 307 U.S. 357, 372 (1939) (due-process challenge); *Guaranty Trust Co. of New York* v. *Virginia*, 305 U.S. 19, 22-23 (1938) (same); *Shaffer*, 252 U.S. at 58 (same); *Maguire* v. *Trefry*, 253 U.S. 12, 15 (1920) (same); *Fidelity & Columbia Trust Co.* v. *City of Louisville*, 245 U.S. 54, 54, 58 (1917) (same). Indeed, *Aldrich*—one of the Comptroller's favorite precedents—is even further off-base. There the domiciliary State's inheritance tax "allowed as a credit * * * the amount of any constitutionally valid estate or inheritance tax paid to any other state." 316 U.S. at 175. Thus, no double taxation could arise on the case's facts.

Chickasaw Nation, another of the Comptroller's most heavily cited cases, is likewise inapposite. The Comptroller relies on a footnote in that decision, which in turn quoted an American Law Institute publication, stating: "'[I]f foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations.'" 515 U.S. at 463 (quoting American Law Institute, *Federal Income Tax Project: International Aspects of United States Income Taxation* 6 (1987)). According to the Comptroller, that means the Commerce Clause places no limit on a State's taxation of its residents' income.

But that is not what the footnote says. What it describes as an "independent policy decision" is "*exempt*[*ing*]" foreign income. And "exempt[ing]" foreign income means excluding it from the tax base altogether. *See* Center on Budget & Policy Priorities, *Policy Basics: Tax Exemptions, Deductions, and Credits* 1-2 (Apr. 16, 2013).[4] The footnote is correct that the Constitution does not compel exemptions; it allows a jurisdiction to choose between exempting the income—i.e., dividing the tax base—and any other method of avoiding multiple taxation, including credits. And the Court in *Chickasaw Nation* made clear that neither multiple taxation nor any question about credits was presented in the case: In the very next footnote, it wrote that the question presented was "a narrow one" because the plaintiff did not "complain that Oklahoma fails to award a

[4] *Available at* http://goo.gl/6ro3QL.

credit against state taxes for taxes paid to" another jurisdiction. 515 U.S. at 464 n.13. That is why the Court limited its discussion to "*jurisdictional* considerations," *id.* at 463 n.12 (emphasis added), which have nothing to do with the Commerce Clause. *See Nippert* v. *City of Richmond*, 327 U.S. 416, 423-424 (1946) (distinguishing "due process or 'jurisdictional'" considerations from Commerce Clause considerations).[5]

By contrast, in cases where the Commerce Clause question *was* presented, this Court has invalidated state taxes that impose a risk of multiple taxation or that discriminate against interstate commerce—and it has done so even when the State was taxing its own residents. *See*, *e.g.*, *Camps Newfound*, 520 U.S. at 567, 595 (striking down tax imposed on resident corporation); *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 327-328 (1996) (striking down tax that applied to resident natural persons as well as resident corporations); *Central Greyhound*, 334 U.S. at 662-663 (same); *Gwin*, 305 U.S. at 435 (same); *J.D. Adams*, 304 U.S. at 308 (same). These cases are irreconcilable with the Comptroller's argument. If the Comp-

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[5] Moreover, the quoted publication did not concern the U.S. Constitution at all. It instead concerned "general principles that have international acceptance," American Law Institute, *supra*, at 4—and those same international principles distinguish between "jurisdictional considerations" and considerations of double taxation. The sentences immediately following the one quoted in *Chickasaw Nation* state: "When one country taxes on the basis of domiciliary jurisdiction and another country taxes on the basis of source, the same income will be taxed twice. Under internationally accepted practice, it is incumbent on the domiciliary jurisdiction to alleviate this double taxation by some reasonable means." *Id.* at 6.

troller were correct, each would have come out the other way. This Court would have held that the State has jurisdiction to tax all income of its residents without limitation, even if double taxation followed, and it would have gone no further.

2. There is a reason why this Court has taken care to separate the Due Process and Commerce Clause analyses: "[T]he Due Process Clause and the Commerce Clause reflect different constitutional concerns." *Quill*, 504 U.S. at 305. The Due Process Clause regulates individuals' relationship with the State. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 126 (1992). The Commerce Clause, by contrast, regulates States' relationships with each other. *See*, *e.g.*, *Case of the State Freight Tax*, 82 U.S. at 279. A state action that does not infringe its citizens' rights may still hobble commerce among the States.

Thus, as the Court has explained, "'[t]here may be more than sufficient factual connections, with economic and legal effects, between the transaction and the taxing state to sustain the tax against due process objections.'" *Quill*, 504 U.S. at 305-306 (quotation marks omitted). Yet the tax "'may fall because of its burdening effect upon the commerce.'" *Id.* at 306 (quotation marks omitted). Put differently, a tax's validity under the Commerce Clause "'depends upon * * * considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce'" not present in the Due Process Clause. *Michigan-Wisconsin Pipe Line*, 347 U.S. at 164 (quoting *Nippert*, 327 U.S. at 424).

But rather than heed this Court's warning that the Due Process and Commerce Clause questions "are analytically distinct," *Quill*, 504 U.S. at 305, the Comptroller conflates them. His position appears to be that so long as each State claiming a share of a taxpayer's income has jurisdiction to tax under the Due Process Clause, there is no Commerce Clause problem with multiple taxation. Comptroller Br. 13, 28. But that would mean this Court was wrong when it held that "[a] tax may be consistent with due process and yet unduly burden interstate commerce." *Quill*, 504 U.S. at 313 n.7. It also would make nonsense of every case in which (i) the State had undisputed jurisdiction to tax and yet (ii) this Court invalidated the tax on multiple-taxation grounds. *See, e.g.*, *Evco*, 409 U.S. at 93-94; *Michigan-Wisconsin Pipe Line*, 347 U.S. at 163-164, 170; *Standard Oil*, 342 U.S. at 384; *Central Greyhound*, 334 U.S. at 662-663; *Gwin*, 305 U.S. at 438-440. Indeed, in *J.D. Adams* the dissent pointed out that the State had jurisdiction to tax all of its residents' income, citing *Shaffer* and *Cohn*—the same cases the Comptroller relies on here. *J.D. Adams*, 304 U.S. at 330 n.21 (Black, J., dissenting). The Court nevertheless invalidated the State's income tax because it subjected interstate commerce "to the risk of a double tax burden." *Id.* at 311 (majority opinion). The Comptroller's proposition would require the wholesale overruling of this Court's precedents.

The United States asserts exactly the converse: It claims that due process must impose the only relevant restriction on a State's power to tax its residents because a contrary rule would "effectively overrule specific precedents." U.S. Br. 13. But the "specific precedents" it points to are the same due-process cases the Comptroller cites. *Id.* at 13-14. The United States' argument therefore is a mere restatement of the Comptroller's over-read of those cases. And its claim that the Wynnes' position would "overrule" the due-process precedents is absurd. This Court already has struck down discriminatory and multiplicative taxes imposed on residents in a host of cases, *see supra* at 31-32, and those rulings did not overturn due-process precedent. The due-process cases and Commerce Clause cases simply address separate issues.

3. Perhaps aware of the risk of relying solely on a State's *jurisdiction* to tax, the Comptroller and the United States pitch this as a case about Maryland's *sovereignty*. The Comptroller's brief is a veritable paean to state sovereignty; the word appears 20 times. But as with the Comptroller's closely related due-process argument, its sovereignty argument misses the point: States do enjoy extensive sovereign power to tax, but that sovereign power must yield when a tax offends the Commerce Clause.

This Court has so held since the earliest days of the Republic. Indeed, Chief Justice Marshall made exactly this point in rejecting a sovereignty argument advanced by none other than Maryland. In *Brown*, Maryland argued that applying the Commerce Clause to a state tax "would abridge the acknowledged power of a state to tax its own citizens or their property within its territory." 25 U.S. at 448. Chief Justice Marshall brushed the argument aside, observing that "the taxing power of the States must have some limitation" and that the taxing power, though "sacred," "cannot reach and restrain the action of the national government within its proper sphere." *Id.* Thus, he wrote, even taxes that are "within the [States'] sovereign power of taxation" must be struck down where they would "derange the measures of Congress to regulate commerce and affect materially the purpose for which that power was given." *Id.* at 449. The States' sovereign power to tax had to yield to the national-uniformity demands of the Commerce Clause.

The Court has adhered to that principle through time. It has explained that the States' "power to lay and collect taxes, as comprehensive and necessary as that power is, cannot be exerted in such a way" as to unduly burden interstate commerce. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 (1923); *accord Lacoste* v. *Department of Conservation*, 263 U.S. 545, 549 (1924). And it has explained why that limitation is consistent with State sovereignty: Through their ratification of the Constitution, "[a]ll the states have assented to [the Commerce Clause], all are alike bound by it, and all are equally protected by it." *Pennsylvania*, 262 U.S. at 596. In our federalist system, each State agreed to cede some of its sovereign taxing powers to reap the benefits of "a national 'common market.'" *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977). That Maryland's taxing policies have been limited in some small way by that agreement is no reason to cast aside the Commerce Clause.

4. The Comptroller raises a second sovereignty concern: He says the Court of Appeals' decision makes the constitutionality of Maryland's tax scheme dependent on the tax choices of other States, which "severely diminishes one of the core attributes of sovereignty." Comptroller Br. 30-32; *accord* U.S. Br. 10-12. That is incorrect. It is the *risk* of multiple taxation that renders Maryland's scheme unconstitutional. Accordingly, Maryland's scheme is unconstitutional regardless of whether other States actually

exercise their jurisdiction to tax the Wynnes' income earned within their borders.

As this Court long ago explained, the "unlawfulness of the burden" a state tax imposes "depends on its nature, measured in terms of its *capacity* to obstruct interstate commerce, and not on the contingency that some other state may have first subjected the commerce to a like burden." *Gwin*, 305 U.S. at 440 (emphasis added). Put another way, the Commerce Clause forbids state taxes that subject "[i]nterstate commerce * * * to the risk of a double tax burden to which intrastate commerce is not exposed." *J.D. Adams*, 304 U.S. at 311. Whether such a risk exists depends on only one thing: the structure of the State's own tax.

That principle is put to action in *Complete Auto*'s internal-consistency requirement. By hypothesizing a world in which each State has a tax identical to the one challenged, the test measures the *potential* for double taxation; whether the tax actually results in double taxation is irrelevant. Indeed, the Court has rejected the argument that a taxpayer invoking internal consistency must "prove actual discriminatory impact." *Armco*, 467 U.S. at 644. The reason: "Any other rule would mean that the constitutionality of [a State's] tax laws would depend on the shifting complexities of the tax codes of 49 other States." *Id.* at 644-645. Far from undercutting the Court of Appeals' analysis, as the United States claims (Br. 22), *Armco* confirms that Maryland's tax is unconstitutional regardless of any other State's tax policy.

The United States similarly misunderstands *Mobil Oil*'s statement that "the constitutionality of [one State's] tax should not depend on the vagaries of [another State's] tax policy." 445 U.S. at 444; *see* U.S. Br. 12. That statement is just another articulation of the principle articulated in *Armco*. Indeed, in a later passage, *Mobil Oil* makes clear that it means exactly the opposite of what the United States suggests: Rather than bless double taxation, the Court noted that when two States have jurisdiction to tax the same income—thus creating a risk of double taxation—"apportionment is ordinarily the accepted method." *Mobil Oil*, 445 U.S. at 445-446. *Mobil Oil* thus "hold[s] squarely that that the Commerce Clause protects taxpayers against the risk, and not merely the actuality of multiple taxation." *State Taxation* ¶ 4.09[1][a].[6]

The Comptroller protests that the rule against multiple taxation creates the "intractable problem of deciding which of two legitimate state taxes should take precedence over the other." Comptroller Br. 30. Yet, for decades, this Court has held that when more than one State seeks to tax the same income, the income should be " 'fairly apportioned' " to the " 'business done within each State.' " *Central Greyhound*,

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[6] *Moorman*, on which the United States relies (Br. 28), is not to the contrary. In *Moorman*, two States took steps to eliminate the risk of multiple taxation, but used different formulas for apportioning a business's income. 437 U.S. at 276. Each formula was internally consistent, and the Court held that the possibility that the two formulas might inadvertently overlap did not rise to the level of a constitutional violation. *Id.* at 276-280. Here, by contrast, Maryland has not sought to eliminate the risk of multiple taxation. It has instead chosen deliberately to create an internally inconsistent tax that denies its residents a full credit for taxes paid to other States. It is that choice which the Commerce Clause forbids. *See MeadWestvaco*, 553 U.S. at 24.

334 U.S. at 663 (quoting *Western Live Stock*, 303 U.S. at 255); *see also Standard Oil*, 342 U.S. at 384 ("The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property by the state of domicile."); *Mobil Oil*, 445 U.S. at 445-446 (same in income-tax context). That rule makes sense, because it ensures that no State is left with less than its fair share of the tax revenue: Each may tax commerce conducted within its borders. The Comptroller's objection inexplicably overlooks this Court's fair-apportionment holdings.

It also overlooks the fact that "all states with broad-based income taxes"—some 40 in all—"provide a credit for taxes paid by their residents to other states." *State Taxation* ¶ 20.04[2]. The Comptroller and his *amici* try to undermine that uniformity, but they are able to identify only three States besides Maryland that supposedly fail to grant such a credit in full. International Municipal Lawyers Association (IMLA) Br. 17. And even that modest claim is exaggerated: Only one of those States categorically refuses, like Maryland, to grant a full credit. *See* Wis. Admin. Code § 2.955(3)(d). North Carolina, contrary to *amici*'s claim, allows a credit against any taxes paid "to another state" and has not determined if county and city taxes qualify as "state" taxes, as they do in Maryland. *See* N.C. Gen. Stat. § 105-153.9(a)(1). And we have previously explained why Tennessee's credit scheme is consistent with the decision below (Br. in Opp. 22), yet *amici* never acknowledge—much less refute—that analysis.[7]

[7] *Amici*'s attempt to identify local taxes imperiled by the Court of Appeals' decision (IMLA Br. 17-18) is similarly sus-

That more than three dozen States already embrace credits for out-of-state income earned by their residents belies any suggestion that enforcing the rule against multiple taxation is impossible. It likewise belies the Comptroller's assertions that such a rule will trigger widespread uncertainty, Br. 30-32, or that it will prevent States from funding state services, Br. 20-24. Maryland is the outlier. Other States have had no trouble running their tax systems without saddling their residents with blatant double taxation.

To be sure, as the United States observes (Br. 12), under a full-credit system other States' choices may affect the amount *collected* by Maryland's tax—just as they do under Maryland's present system. But that does not mean other States' choices have any impact on the *constitutionality* of Maryland's scheme. They do not. Indeed, the amount collected by a state tax is often affected by matters outside a State's control, such as the profit a resident's business earns or the migration of residents into or out of a State. To say that Maryland might collect variable amounts from a constitutionally designed tax is to say little about the Commerce Clause question in this case.

For all these reasons, the Comptroller's first argument—that Maryland's jurisdiction and sovereign

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pect. *Amici* cut-and-paste their certiorari-stage argument regarding the Philadelphia tax without mentioning the Pennsylvania credit statute, *see* Br. in Opp. 26-27, and string-cite statutes and webpages without any meaningful analysis. Suffice it to say few local taxes appear to be implicated by the decision below. *See* Supp. Br. 4-5. *Amici*'s cherry-picked survey does not suggest otherwise.

power to tax mean it may expose interstate commerce to unlimited double taxation—fails.

B. The Comptroller's Attempt To Elevate The "Status Of Residency" Over The Substantial-Effects Test Fails.

The Comptroller's second argument is just as insubstantial. He argues that Maryland's tax does not implicate the Commerce Clause at all because it is "based upon" the "status" and "privilege" of Maryland residency. Comptroller Br. 3, 11, 15, 16, 19, 37, 39. This remarkable claim seeks to rewind this Court's Commerce Clause jurisprudence at least a half-century, to a time when formalism ruled the day. It fails for two separate reasons: First, Maryland's tax is *not* based upon residency; it is based upon income. Second, what the tax is "based upon" is irrelevant; the question is whether it substantially affects interstate commerce. The tax at issue here clearly does.

1. The Comptroller posits that the incidence of Maryland's income tax falls upon residency, Comptroller Br. 18-19, 37-40, but under the statutes' plain terms, it does not. Both the "State" and "county" portions of the income tax are levied "on the Maryland taxable income" of the taxpayer. Md. Code Ann., Tax-Gen. §§ 10-102, 10-103(a). In other words, the tax is *measured by* income. It is therefore *based upon* income—and nothing else. *See Hunt-Wesson, Inc.* v. *Franchise Tax Bd.*, 528 U.S. 458, 464 (2000) ("[A] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." (quotation marks omitted)).

Maryland's treatment of nonresidents confirms the point. Maryland levies both portions of its income tax on nonresidents: The "State income tax" applies to "each individual," without respect to residency, Md. Code Ann., Tax-Gen. § 10-102, and the "county income tax" applies to "nonresident[s] who derive[] income from salary, wages, or other compensation for personal services for employment in the county," *id.* § 10-103(a)(4). Moreover, nonresidents who are not subject to the "county income tax" have to pay the "special nonresident tax" instead. *Id.* § 10-106.1; *see also Frey*, 29 A.3d at 505 (holding that the "special nonresident tax" is a "compensatory" substitute for the "county" tax). Because Maryland taxes the income of nonresidents, its income tax cannot be described as a tax on residency. Indeed, this Court recognized exactly that point in *J.D. Adams*: It held that an income tax could "not [be] an excise for the privilege of domicile alone, since it is levied upon the gross income of *non-residents* from sources within the State." 304 U.S. at 310 (emphasis added). Just so here.

2. Even if the Maryland income tax were "based on" the "privilege" or "status" of residence, however, it still would be subject to the Commerce Clause. That is because the notion that the Clause's protections switch on and off depending on how a tax is labeled, or what kind of tax it is, has long been consigned to the dustbin.

In the past, this Court thought labels significant. Thus, for example, the Court held in the first half of the last century that a levy labeled as a tax on the "privilege of exercising corporate functions within the State" was permissible, while a tax on "the privilege of doing interstate business" was not. *Complete Auto*, 430 U.S. at 282-285 (recounting earlier decisions). It held that a tax on the "privilege of using [the State's] highways" was permissible, while a tax on carrying on interstate commerce was not. *Scheiner*, 483 U.S. at 293 (quoting *Aero Mayflower Transit Co.* v. *Board of R.R. Comm'rs*, 332 U.S. 495, 503 (1947)). And in *Freeman* v. *Hewit*, 329 U.S. 249 (1946)—a case quoted four times by the Comptroller—the Court "embraced again the formal distinction between direct and indirect taxation," invalidating a tax because it "would 'impos[e] a direct tax on interstate sales.'" *Quill*, 504 U.S. at 309-310 (quoting *Freeman*, 329 U.S. at 256). These cases created a landscape in which "the use of magic words or labels" marked the difference between constitutional and unconstitutional levies. *Railway Express Agency* v. *Virginia*, 358 U.S. 434, 441 (1959); *see State Taxation* ¶¶ 4.08-4.11 (tracing doctrinal development).

This Court overturned all of that in *Complete Auto*. That opinion "renounced the *Freeman* approach as 'attaching constitutional significance to a semantic difference.'" *Quill*, 504 U.S. at 310 (quoting *Complete Auto*, 430 U.S. at 285). Such formalism, the Court wrote, "merely obscures the question of whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. The Court thus held that henceforth it would "consider[] not the formal language of the tax statute but rather its practical effect." *Id.* at 279.[8]

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[8] The Comptroller heavily emphasizes the Court's statement in *Freeman* that a State "can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce." 329 U.S. at 255; *see* Comptroller Br. 11, 16, 19, 39. But that statement means only that there is no *per se* rule against such a tax. *See Freeman*,

The Court has hewed to that approach since, emphasizing that States may not "avoid the strictures of the dormant Commerce Clause" by labels alone. *Camps Newfound*, 520 U.S. at 575. The kind of tax—real estate, property, sales, income—and how "local" it is likewise do not matter: The Court has "long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity," *Commonwealth Edison*, 453 U.S. at 615, and accordingly has explained that "[a] tax on real estate, *like any other tax*, may impermissibly burden interstate commerce." *Camps Newfound*, 520 U.S. at 574 (emphasis added). The question, instead, is one of substantial effect: A state tax is "subject to the strictures of the Commerce Clause" if it "substantially affects interstate commerce." *Commonwealth Edison*, 453 U.S. at 614; *accord*, *e.g.*, *Michigan-Wisconsin Pipe Line*, 347 U.S. at 164.

3. The Comptroller's focus on labels therefore fails. Moreover, through his silence he has waived any argument on the real question: whether Maryland's tax substantially affects interstate commerce.

There can be no doubt of the answer anyway. As explained, *see supra* at 19-25, Maryland's tax burdens interstate commerce with the risk (and the

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329 U.S. at 255 (citing *U.S. Glue Co.* v. *Town of Oak Creek*, 247 U.S. 321 (1918), which rejected the claim that a tax on the privilege of residence was *per se* unconstitutional as a "direct" tax on interstate commerce). Such a tax is still unconstitutional if it "produces a forbidden effect," *Complete Auto*, 430 U.S. at 288—which Maryland's tax does by subjecting interstate commerce to the risk of multiple taxation.

reality) of multiple taxation. That burden affects interstate commerce in ways much more substantial than this Court has heretofore required.

By providing only a partial credit, Maryland's tax penalizes interstate commercial activity to the tune of $50 million per year, by the State's own estimation. Pet. 15. That penalty discourages tens of thousands of Maryland businesspeople "from plying their trades in interstate commerce," *Fulton*, 516 U.S. at 333, as the Court of Appeals concluded, Pet. App. 16-17. The Comptroller does not dispute that conclusion. On the contrary, he has admitted it, telling the Maryland high court that the State's tax scheme causes double taxation that "make[s] it more difficult to conduct a business that crosses state lines." Comptroller C.A. Recons. Mot. 3.[9]

Quite so. And that is precisely the sort of burden that implicates the Commerce Clause. *See Fulton*, 516 U.S. at 333 (discriminatory tax on ownership of interstate corporations' stock implicated Commerce Clause because it discouraged interstate commerce); *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 336 (1977) (discriminatory tax on transfer of securities implicated Commerce Clause because "the flow of securities sales [was] diverted from the most

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[9] The Comptroller also has conceded the substantial-effects question in a second way: by acknowledging (Br. 42) that Congress has authority to legislate in this area. After all, "[t]he definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979). If Congress has authority to legislate, that necessarily means the tax falls within the Commerce Clause's coverage.

economically efficient channels and directed to" the taxing State); *Camps Newfound*, 520 U.S. at 574 (tax that discouraged local camp from serving out-of-state campers "clearly ha[d] a substantial effect on commerce"). Indeed, if the tax in *Camps Newfound* substantially affected interstate commerce, it follows *a fortiori* that this one does. The tax there discouraged interstate activity by a summer camp with "revenues * * * averaging about $400 per week for each student." 520 U.S. at 567. The tax here discourages interstate activity by a multi-state corporation with millions of dollars in annual revenues, and more generally by every sole proprietorship and pass-through entity in the State.

Tax on "residence" or not, then, Maryland's partial-credit scheme must avoid the risk of double taxation. It does not. It is therefore unconstitutional.

C. The Comptroller's Efforts To Justify His Residency Exception Are Unpersuasive.

The Comptroller tries to justify his radical rule—that the Commerce Clause does not protect interstate commerce so long as the tax happens to land on a State's residents—by declaiming at length about the services States provide to their residents. Comptroller Br. 20-24. He also argues that the protections of the Commerce Clause must yield because the State's political process will solve the problem. *Id.* at 24-26. These arguments fail on several levels.

1. To begin with, they do nothing to answer the key doctrinal point: If the connection between a State and its residents were enough to preclude relief under the Commerce Clause, then many of this Court's cases—both old and new—were wrongly decided. *See supra* at 31-32. The plaintiff in

J.D. Adams was an Indiana corporation challenging an Indiana tax, and this Court struck it down as unconstitutionally duplicative. 304 U.S. at 308, 311-312. The plaintiff in *Gwin* was a Washington corporation challenging a Washington tax, and this Court struck it down. 305 U.S. at 435, 439. The plaintiff in *Central Greyhound* was a New York corporation challenging a New York tax, and this Court struck it down. 334 U.S. at 662-663. And the taxpayers in *Fulton* and *Camps Newfound* were North Carolina and Maine domiciliaries, respectively, each challenging their own States' taxes on Commerce Clause grounds. *Fulton*, 516 U.S. at 328, 333-344; *Camps Newfound*, 520 U.S. at 568, 576-583. This Court struck them both down.

If "resident" status were enough to take a case outside of the Commerce Clause, then all these cases came out the wrong way. That just underscores that the Comptroller is focused on the wrong issue. The key question is not whether the Wynnes are Maryland residents; it is whether Maryland's tax imposes undue burdens on interstate commerce. This Court has never removed a whole category of cases from that sensible analysis. It should not start now.

The Comptroller's only answer is a cursory footnote: He suggests that while the Commerce Clause does not protect individuals, it *does* protect domiciliary corporations like those in the above cases because domiciliary corporations "do not possess the capacity to effect change by voting" as natural persons do. Comptroller Br. 25 n.12. That is a surprising claim, given that Maryland told the Court in 2009 that corporations can exercise " 'significant and disproportionate influence' " in the state political process. Br. for State of Montana et al. as *Amici*

Curiae at 15-16, *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (No. 07-2240) (filed July 31, 2009, by a coalition of States including Maryland). Moreover, even if corporations cannot vote, their resident officers, shareholders, and employees can, and "[a] corporation is simply a form of organization used by human beings to achieve desired ends." *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014).

The Comptroller's assertions about voters' ability to eliminate discriminatory taxes also blink at political reality. The political process could arguably be an adequate safeguard—if at all—only when a burdensome tax broadly affects the State's residents. *See West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994); *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Res.*, 504 U.S. 353, 370 (1992) (Rehnquist, C.J., dissenting) (political process relevant when the state policy burdens "all the State's consumers"). Here, by the Comptroller's own calculation, this case affects only approximately 50,000 to 55,000 taxpayers, out of a total of 2.83 million returns. *See* Comptroller C.A. Recons. Mot., Aff. of Andrew Schaufele, Ex. 1; Comptroller of Maryland, *Personal Income Tax, Statistics of Income, Tax Year 2011*, at tbl.1 (2014).[10]

The "voting" distinction on which the Comptroller seizes is of dubious constitutional relevance anyway. The Commerce Clause, after all, 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." *Quill*,

[10] *Available at* http://goo.gl/VIHNG0.

504 U.S. at 312. The Comptroller thus grossly overreads *Goldberg*'s dictum that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." 488 U.S. at 266; *see* Comptroller Br. 42. As one court has observed, *Goldberg* simply stands for the "obvious proposition" that "[t]he commerce clause is not designed to protect taxpayers of the taxing state, but to protect interstate commerce" by blocking taxes that unfairly burden it. *Woosley* v. *California*, 838 P.2d 758, 769 (Cal. 1992). It does not mean, as the Comptroller seems to think, "that a tax can never offend the commerce clause so long as it is levied on residents of the taxing state"—a proposition that is "inconsistent with a long line of prior decisions rendered" by this Court. *Id.* (collecting cases); *see supra* at 31-32 (same).

In short, Marylanders should not have to rely on the Maryland General Assembly's grace to engage in interstate commerce free of duplicative taxation. "To carry on interstate commerce is not a franchise or privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise." *Dennis* v. *Higgins*, 498 U.S. 439, 448 (1991) (quotation marks omitted). If the Comptroller believes there should be an exception to that rule, he is focused on the wrong political process. Interstate commerce is a national concern, and the only political body that can create an exception to the rule against double taxation is Congress. *See Lewis* v. *BT Inv. Managers*, 447 U.S. 27, 44 (1980).

2. The Comptroller nonetheless insists that double taxation of its residents is appropriate because States "provide their residents with a host of financial benefits" and should be able to ask for a "fair

return." Comptroller Br. 14, 20; *see id.* at 20-24. There are many answers. First, this Court's cases have never suggested that is a good enough reason to burden interstate commerce. *See supra* at 45-46. Second, dozens of States with income taxes provide a full credit, *see supra* at 38-39, and they apparently still believe they have obtained a "fair return" from their residents.

Third, Maryland ignores the fact that the double-taxed income at issue in this case was earned out of state. If there is any State that could claim a "fair return" on that income, it is the State where the income was earned—not Maryland. That is presumably why States, including Maryland, have decided to tax that nonresident income in the first place—to get a "fair return" for the services they provided that make that income possible. As this Court has explained, nonresident income taxes allow states to "make interstate commerce pay its way." *Northwestern States*, 358 U.S. at 464 (quotation marks omitted).

Finally, Maryland vastly exaggerates when it suggests that residents who earn income in interstate commerce will escape paying for state services. Such residents typically pay property taxes in the State where they live. They pay sales taxes. And they pay income taxes to their State of residence on all of their income sourced to the State—a point the Comptroller ignores.[11]

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[11] Moreover, residents of *other* States who earn money in Maryland pay taxes to Maryland on that money, even though they cannot access the cherry-picked list of resident-only services the Comptroller catalogues. And the Wynnes pay such

The Wynnes' own experience illustrates the point: They had substantial Maryland-sourced income, both through wages and through Maxim's Maryland activities, and they paid more than $123,000 in Maryland income taxes in 2006 alone. J.A. 19 (lines 30 and 31). They also paid substantial property taxes, though the record does not reveal the precise amount. The notion that they seek to free-ride is offensive; they seek instead not to be taxed by multiple States on the same income.

Nor is the Wynnes' experience unusual. The available data underscores that Maryland can offer a full credit and still collect the vast majority of the taxes it has always collected, including nearly all of those used to fund schools and other local services. In 2012, Maryland collected $7.69 billion from individual income taxes, Sheila O'Sullivan et al., *State Government Tax Collections Summary Report: 2013*, at 6 (Apr. 8, 2014),[12] and it asserts that $45 to $50 million per year is at stake in this case, Pet. 15. Crediting its high-end estimate, that means it would lose 0.6% of its income-tax collections. The Comptroller says this prevents him from imposing the taxing system Maryland's legislators feel most fair. Comptroller Br. 41-42. But sometimes, like here, "the freedom of the States to formulate independent policy [in the interstate taxation] area may have to yield to an

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taxes in other States for services *they* cannot access. The effects the Comptroller bemoans even out when one views the tax liabilities of multi-state businesspeople in a less parochial fashion.

[12] *Available at* http://goo.gl/FRNWcj.

overriding national interest in uniformity." *Moorman*, 437 U.S. at 280.

More broadly, States' individual income-tax collections nationwide are dwarfed by their collections of property, sales, and gross-receipts taxes. In 2011, local governments raised more than $429 billion from property taxes and more than $93 billion from local sales and gross-receipts taxes—some 15 times the amount they took in from individual income taxes on business income. *See* Jeffrey L. Barnett & Phillip M. Vidal, *State and Local Government Finances Summary: 2011*, at 6 (July 2013);[13] Ernst & Young LLP, *Total State and Local Business Taxes* (Aug. 2014).[14] And it is these property and sales taxes that primarily finance services such as schools, fire protection, and emergency medical services—the very local services on which the Comptroller focuses. Of the $259.4 billion in local funds spent on schools in 2011, for instance, $170.1 billion came from property taxes, while other taxes combined accounted for only just over $8 billion. Mark Dixon, *Public Education Finances: 2011*, at tbl.4 (May 2013).[15] Similarly, local property taxes are the "most common taxes supporting fire and EMS services nationally." FEMA, *Funding Alternatives for Fire and Emergency Services* 2-1;[16] *see also* U.S. Br. 18 (acknowledging that "property taxes may be a more common source of local revenue than income taxes"). States simply do not need, and are not entitled to, a special consti-

[13] *Available at* http://goo.gl/2KwBYw.

[14] *Available at* http://goo.gl/zy55YH.

[15] *Available at* http://goo.gl/yq3qx4.

[16] *Available at* http://goo.gl/mQvWLo.

tutional rule to fund local services. "[R]evenue generation is not a local interest that can justify discrimination against interstate commerce." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 393-394 (1994).

III. THE COMPTROLLER'S RULE PRODUCES AN ABSURD RESULT: PROTECTION AGAINST DOUBLE TAXATION FOR C CORPORATIONS BUT NOT S CORPORATIONS OR INDIVIDUALS.

The end result of the Comptroller's position is not just an undue burden on interstate commerce. It also is a disconnect in the Commerce Clause jurisprudence: States could not double-tax C corporations, but they could double-tax S corporations, other pass-through entities, and small businesspeople to their hearts' content. Nothing in the doctrine or the Comptroller's arguments justifies that bizarre and unjust result.

1. The Comptroller does not question this Court's decisions in *J.D. Adams*, *Gwin*, or *Central Greyhound*, which struck down state income taxes on domiciliary corporations because they contravened the constitutional rule against multiple taxation. And yet the Comptroller urges this Court to uphold Maryland's partial-credit scheme on the theory that a different rule should apply to "[i]ndividual residents." Comptroller Br. 25 n.12.

The Commerce Clause, however, does not confer greater rights on corporations than on individuals. In every case arising under the dormant Commerce Clause, the question is simply "whether the statute under attack, whatever its name may be, will in its practical operation" discriminate against or duplicatively tax interstate commerce. *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U.S. 64, 69 (1963); *see* *also Nippert*, 327 U.S. at 424 n.9; *Gwin*, 305 U.S. at 439; *supra* at 41-45. Here, the practical operation of the partial-credit scheme is the same, regardless of whose income is being taxed. Whether the income belongs to a corporation or an individual, a partial-credit scheme subjects "[i]nterstate commerce * * * to the risk of a double tax burden to which intrastate commerce is not exposed." *J.D. Adams*, 304 U.S. at 311. There is thus no basis for according corporations greater protection under the Commerce Clause. Like corporations, individuals engage in interstate commerce, and when they do, the effect of multiple taxation is no less discriminatory. *See State Taxation* ¶ 20.10[2][b] ("[A] state has no more power under the Commerce Clause to tax individuals on 100 percent of their income earned from commercial activities that are taxable in other states than it has to tax corporations on 100 percent of their income earned from commercial activities that are taxable in other states."). Given that this Court does not distinguish between corporations and individuals when it comes to the affirmative Commerce Clause, *see Wickard* v. *Filburn*, 317 U.S. 111 (1942), there is no basis to make that distinction with respect to the dormant Commerce Clause. *See Hughes* v. *Oklahoma*, 441 U.S. 322, 326 n.2 (1979) ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.").

The United States nevertheless insists that individuals should be afforded less protection from multiple taxation because they have a "unique" relationship with the State where they reside. U.S. Br. 30. But while the nature of a taxpayer's relationship with her State may be relevant to some constitutional inquiries—such as whether there are sufficient contacts to justify the State's assertion of taxing authority under the Due Process Clause, *see Quill*, 504 U.S. at 306-309—it bears no relevance to whether there is a risk of multiple taxation in violation of the Commerce Clause. That question turns instead on whether the State seeks to tax the same income as another State, without fair apportionment. And the answer does not depend on whether the taxpayer is a corporation or an individual.

In any event, the premise of the United States' argument fails twice over. The United States claims that individuals' relationships with their home States are different from corporations' because an individual can be a resident of only one State, whereas a corporation is often a resident of two—the State of its principal place of business and its State of incorporation. U.S. Br. 31 n.7; *see also* Multistate Tax Commission Br. 11. But individuals are often deemed resident in two States, particularly States—such as New York—with a broad statutory definition of residency. *See State Taxation* ¶ 20.03; *Worchester Cnty. Trust Co.* v. *Riley*, 302 U.S. 292, 299 (1937) ("Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil"). The United States' distinction is a false one.

Moreover, contrary to the Solicitor General's suggestion, a State's relationship with its individual residents is not fundamentally different from its relationships with other taxpayers. It is true, of course, that individual residents receive many local benefits in return for paying income taxes. But corporations and nonresidents do, too. "When a corporation doing business in a State pays its general corporate income tax, it pays for a wide range of things: construction and maintenance of a transportation network, institutions that educate the work force, local police and fire protection, and so on." *Fulton*, 516 U.S. at 337. Nonresidents also pay for—and benefit from—these same things in the States where they work and earn income. *See supra* at 49. There is nothing about a State's relationship with its individual residents that could justify an exception to the constitutional rule against multiple taxation.

In the end, perhaps recognizing that its distinction between individuals and corporations is anemic, the United States is left to contend that it is an "open question" whether even *C corporations* are constitutionally protected from multiple taxation. U.S. Br. 31. But that truly radical contention cannot be squared with the holdings of *J.D. Adams*, *Gwin*, or *Central Greyhound*. And given those holdings—which the Comptroller does not challenge—the outcome here should not be in doubt. Because there is no principled basis for treating individuals differently than corporations under the Commerce Clause, Maryland's law should be struck down.

2. Finally, even if there were a special rule against multiple taxation for income earned by corporations, that rule would apply here. That is because this case does involve a corporation—an S corporation. And nothing in this Court's cases suggests that the income of an S corporation should be treated any differently than the income of a C corporation for dormant Commerce Clause purposes.

The United States resists this conclusion, arguing that "the purpose and effect of S-corporation designation is that the income is treated as personal income under both Maryland and federal law." U.S. Br. 30 n.6. But the S-corporation designation does not change the fact that the income in question was earned by Maxim, beyond Maryland's borders, in the course of interstate commerce. *See* 26 U.S.C. § 1366(b); Pet. App. 8a. Whether that income is protected from multiple taxation should not depend on whether Maxim elected to be treated as an S corporation instead of a C corporation—an election that is not even available in some States. "[E]quality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S. at 70. This Court should not allow the difference between an S corporation and a C corporation to stand in the way of enforcing the Constitution's rule against multiple taxation. *Cf. Camps Newfound*, 520 U.S. at 584 (seeing "no reason why the nonprofit character of an enterprise should exclude it from the coverage of either the affirmative or the negative aspect of the Commerce Clause").

CONCLUSION

The Comptroller and his *amici* pitch Maryland's partial-credit scheme as a "rational compromise," in which it offers *some* credit for out-of-state taxes but truncates it to pay for state services. Comptroller Br. 23; IMLA Br. 16-17. But make no mistake: The rule the Comptroller seeks has no such limiting principle. He proposes "the status of residence" as a categorical exception to the Commerce Clause, and he therefore advocates a regime in which Maryland, and every State, need offer *no* credit for taxes paid to other States on interstate income. They could double-tax their residents in full.

That rule contradicts precedent and would create, for the first time, a two-tier Commerce Clause that discriminates against the Nation's millions of small businesspeople. The judgment of the Maryland Court of Appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

ADDENDUM

RELEVANT MARYLAND CODE PROVISIONS

Md. Code Ann., Tax-Gen. § 10-101 provides:

* * * *

(a) In this title the following words have the meanings indicated.

* * * *

(d) "County income tax" means the county tax on income authorized in § 10-103 of this subtitle.

* * * *

(e) "Federal adjusted gross income" means:

(1) for an individual other than a fiduciary, the individual's adjusted gross income as determined under the Internal Revenue Code;

* * * *

(g) "Individual" means, unless expressly provided otherwise, a natural person or a fiduciary.

* * * *

(i) "Maryland taxable income" means:

(1) for an individual, Maryland adjusted gross income, less the exemptions and deductions allowed under this title;

* * * *

(j) "Nonresident" means an individual who is not a resident.

* * * *

(k) (1) "Resident" means:

(i) an individual, other than a fiduciary, who:

1. is domiciled in this State on the last day of the taxable year; or

2. for more than 6 months of the taxable year, maintained a place of abode in this State, whether domiciled in this State or not;

* * * *

(2) "Resident" includes, for the part of the taxable year that an individual resides in this State, an individual who:

(i) moves to this State with the intent to be domiciled in this State; or

(ii) is domiciled in this State and moves outside this State before the last day of the taxable year with the bona fide intention to remain permanently outside of this State.

* * * *

(*l*) "S corporation" means a corporation that elects to be taxed as a small business corporation under Subchapter S of the Internal Revenue Code.

* * * *

(n) "State income tax" means the State tax on income imposed under this title.

* * * *

Md. Code Ann., Tax-Gen. § 10-102 provides:

Except as provided in § 10-104 of this subtitle, a tax is imposed on the Maryland taxable income of each individual and of each corporation.

Md. Code Ann., Tax-Gen. § 10-103 provides:

In general

(a) Each county shall have a county income tax on the Maryland taxable income of:

(1) each resident, other than a fiduciary, who on the last day of the taxable year:

(i) is domiciled in the county; or

(ii) maintains a principal residence or a place of abode in the county;

* * * *

(4) except as provided in § 10-806(c) of this title, a nonresident who derives income from salary, wages, or other compensation for personal services for employment in the county.

* * * *

Md. Code Ann., Tax-Gen. § 10-105 (1998) provided:

(a) The State income tax rate for an individual is:

(1) 2% of Maryland taxable income of $1 through $1,000;

(2) 3% of Maryland taxable income of $1,001 through $2,000;

(3) 4% of Maryland taxable income of $2,001 through $3,000; and

(4) for Maryland taxable income in excess of $3,000:

* * * *

(v) 4.75% for a taxable year beginning after December 31, 2001.

* * * *

Md. Code Ann., Tax-Gen. § 10-106 provides:

In general

(a) (1) Each county shall set, by ordinance or resolution, a county income tax equal to at least 1% but not more than the percentage of an individual's Maryland taxable income as follows:

* * * *

(iii) 3.20% for a taxable year beginning after December 31, 2001.

* * * *

Md. Code Ann., Tax-Gen. § 10-106.1 provides:

In general

(a) An individual subject to the State income tax under § 10-105(a) of this subtitle, but not subject to the county income tax under § 10-106 of this subtitle, shall be subject to the tax imposed under this section.

Rate of tax

(b) The rate of the tax imposed under this section shall be equal to the lowest county income tax rate set by any Maryland county in accordance with § 10-106 of this subtitle.

Distribution of tax

(c) The tax imposed under this section shall be distributed by the Comptroller in accordance with § 2-609 of this article.

Md. Code Ann., Tax-Gen. § 10-203 provides:

Except as provided in Subtitle 4 of this title, the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year as adjusted under this Part II of this subtitle.

Md. Code Ann., Tax-Gen. § 10-210 provides:

In general

(a) The amounts under this section are subtracted from the federal adjusted gross income of a nonresident to determine Maryland adjusted gross income.

Income not derived from business or property not in Maryland

(b) To the extent included in federal adjusted gross income, the subtraction under subsection (a) of this section includes all income other than:

(1) income derived from real or tangible personal property located in the State, whether the income is derived directly or from a fiduciary;

(2) income derived from:

(i) a business that is wholly carried on in the State and in which the individual is a partner, shareholder of an S corporation, member of a limited liability company as defined under Title 4A of the Corporations and Associations Article, but only to the extent the company is taxable as a partnership under § 761 of the Internal Revenue Code, or proprietor; or

(ii) an occupation, profession, or trade that is wholly carried on in the State;

(3) the part, allocable to the State under § 10-401 of this title, of income derived from:

(i) a business that is carried on both in and out of the State and of which the individual is a partner, shareholder of an S corporation, member of a limited liability company as defined under Title 4A of the Corporations and Associations Article, but only to the extent the company is taxable as a partnership under § 761 of the Internal Revenue Code, or proprietor; or

(ii) an occupation, profession, or trade that is carried on both in and out of the State; and

(4) income from Maryland State Lottery prizes or winnings from any other wagering, as defined in § 10-905(e) of this title, in the State.

Md. Code Ann., Tax-Gen. § 10-703 provides:

Credit allowed

(a) Except as provided in subsection (b) of this section, a resident may claim a credit only against the State income tax for a taxable year in the amount determined under subsection (c) of this section for State tax on income paid to another state for the year.

Exceptions

(b) A credit under subsection (a) of this section is not allowed to:

(1) a resident other than a fiduciary, if the laws of the other state allow the resident a credit for State income tax paid to this State;

(2) a resident fiduciary, if the fiduciary claims, and the other state allows, a credit for State income tax paid to this State;

(3) a resident for less than the full taxable year for tax on income that is paid to another state during residency in that state; or

(4) a nonresident.

Amount of credit for resident

(c) (1) Except as provided in paragraph (2) of this subsection, the credit allowed a resident under subsection (a) of this section is the lesser of:

(i) the amount of allowable tax on income that the resident paid to another state; or

(ii) an amount that does not reduce the State income tax to an amount less than would be payable if the income subjected to tax in the other state were disregarded.

(2) If the credit allowed a resident under subsection (a) of this section is based on tax that an S corporation pays to another state, the credit allowable to a shareholder:

(i) may not exceed that shareholder's pro rata share of the tax; and

(ii) will be allowed for another state's income taxes or taxes based on income.