No. 13-485

In The
Supreme Court of the United States

MARYLAND STATE COMPTROLLER OF THE TREASURY,

Petitioner,

v.

BRIAN WYNNE, *et ux.*,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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Few constitutional principles are more firmly established than the right of states "to tax all income of their residents, including income earned outside their borders." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995); *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 281 (1932). As this Court has repeatedly recognized, that broad authority is grounded in the special relationship between a sovereign and its residents. *See, e.g., Cohn,* 300 U.S. at 313. By virtue of that relationship, a state undertakes unique responsibilities for the care and protection of those who claim residency within its borders. In turn, those residents bear heightened obligations to provide support through payment of taxes. *See id.*

The decision below upends this fundamental understanding. Convinced that it had unearthed a new, overriding constitutional limitation on state taxing power, the Maryland Court of Appeals decided that this Court's repeated pronouncements affirming a state's authority to tax all its residents' income, wherever earned, do not tell the whole story. According to the Court of Appeals, this broad taxing authority is subject to a substantial caveat: a state may *not* tax all its residents' income if the income is earned and taxed in another state. To reach this unorthodox conclusion, the court brushed aside Maryland's inherent sovereign power to tax its residents and resorted to an inapt test for examining state taxing authority under the Commerce Clause.

This novel recasting of state sovereignty, with its oppressive effect on Maryland's treasury, warrants this Court's attention.

The Wynnes' brief in opposition does little to show otherwise. Apart from a flimsy forfeiture contention that is patently belied by the record, their arguments depend on the implausible notion that, for nearly a century, this Court, lower courts, and litigants have simply overlooked a supposed Commerce Clause restriction on states' power to tax their residents' income. This theory is defeated, however, by this Court's own decisions, which do not merely *state* the principles governing taxation of residents, but also *explain* the origins and rationale for a sovereign's broad taxing powers in a way that is flatly inconsistent with the existence of superseding limitations under the Commerce Clause. And the Wynnes' attempt to play down the severe impact of the decision below on Maryland's treasury—in particular, their suggestion that the State should just raise other taxes—merely underscores why states must have broad latitude to set their own tax policies, constrained only by the democratic process and genuine constitutional limits, not ones imagined by litigants seeking to evade their fiscal responsibilities as state residents.

The petition should be granted.

1. Seizing on one opaquely phrased sentence in the briefs below, the Wynnes claim that the Comptroller renounced the argument that Maryland may tax its residents' entire income, whether earned within the State or not.[1] The Court of Appeals perceived no such forfeiture. That court stated plainly that the Comptroller's argument was "based on a state's power to tax its own residents." Pet. App. 15. The court then rejected the argument that Maryland could tax all of the Wynnes' income based on their "status as Maryland residents" and declared that the Wynnes are "subject to the income tax because they are Maryland residents *and* because they have income derived from intrastate and interstate activities." *Id.* Building on that non sequitur, the court decided that Maryland's ability to tax its residents' income should be subject to extensive scrutiny (and, ultimately, curtailment) under the Commerce Clause. It is precisely that unprecedented—and quite mistaken—view of state sovereignty that the Comptroller challenges here.

The Court of Appeals' understanding of the Comptroller's argument was amply supported by the briefs below. His opening brief unequivocally stated that "Maryland, like all states, has the power to tax its residents on all of their income regardless of

[1] As written, the sentence reads: "What is not necessarily constitutionally permitted is when a citizen has to pay multiple taxes on the same income at the same level because the income was earned in a state in which he was not a resident." C.A. Brief 10. The Wynnes twice alter the quote to omit the word "necessarily." Opposition 2, 11.

where that income is earned." C.A. Brief 9 (citing *Cohn*, 300 U.S. at 312-13); *see also id.* ("'[A] jurisdiction, such as [Maryland or Howard County], may tax *all* the income of its residents, even income earned outside the taxing jurisdiction.'" (quoting *Chickasaw Nation*, 515 U.S. at 462-63)). The brief stated that the Wynnes' income was taxed because "they were residents of Maryland during the taxable year" and because they "lived in Howard County." C.A. Brief 10. The Comptroller explained that the Wynnes' obligation to pay Maryland and Howard County income taxes is "based on their '[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws,' because these privileges and rights are 'inseparable from the responsibility for sharing the costs of government.'" *Id.* (quoting *Cohn,* 300 U.S. at 312-13). Finally, the Comptroller stated, "'[t]hese are rights and privileges which attach to domicile within the state,' and neither the privileges nor the income tax burden associated with those privileges are 'affected by the character or source from which the income is derived.'" C.A. Brief 10 (quoting *Cohn*, 300 U.S. at 313).

The Comptroller's reply brief placed similar emphasis on the breadth of the State's taxing power over its own residents. He reiterated that the State had "exercise[d] its taxing authority over *all* of the Wynnes' income due to their status as residents of the State." C.A. Brief 9. And, while observing that Maryland had provided substantial credits for taxes the Wynnes paid to other states, he insisted that the State was "under no constitutional obligation to do

so." *Id.* at 11-12. The brief also cited decisions from other states rejecting attempts by resident taxpayers to avoid their home states' taxes by invoking the Commerce Clause, *see id.* 4-9, several of which were distinguished (incorrectly) by the Court of Appeals, Pet. App. 15-16 n.15. Not surprisingly, therefore, even the Wynnes' counsel seemed well aware that the Comptroller was claiming a residency-based right to tax all the Wynnes' income. At oral argument, their counsel summed up the Comptroller's position by saying that, if his view of the State's constitutional authority "were true, . . . then states could always simply say, well, by virtue of your residency, we're going to tax you on everything and refuse to give credits." Transcript 26:05-13.

The Wynnes' claim of forfeiture is thus an empty one. The merits of the decision below are properly before the Court, and the Court should address them.

2. This Court has repeatedly said that a State may "tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Chickasaw Nation*, 515 U.S. at 462-63; *see* Petition 9 (citing cases). If this principle is correct, then the decision below is not. Its core holding is that the Commerce Clause *prohibits* a state from taxing all the income of its residents if that income is taxed by another state. In the Comptroller's view, that holding is wholly unfounded. But, at the very least, this Court, not the Maryland Court of Appeals, should have the final word about whether this Court has misapprehended the extent of state taxing powers for nearly 100 years.

The Wynnes argue that the Maryland court was free to disregard this Court's pertinent precedents because the protesting taxpayers in those cases did not call attention to the Commerce Clause and this Court saw no need to address it. That reticence offers little support for either the lower court's analysis or the Wynnes' insistence that further review is unwarranted. The Commerce Clause has been part of the Constitution since the founding of the Republic, and it is telling that, in all that time, no Justice of this Court has even intimated that the Commerce Clause diminishes a state's power to tax its residents' income. It seems highly improbable that this Court would have recently described the sovereign power to tax a resident's entire income as "a well-established principle of interstate and international taxation," *Chickasaw Nation*, 515 U.S. at 462, if the Court harbored any suspicion that this "well-established principle" was contrary to the dictates of a hardly-obscure provision like the Commerce Clause.[2]

Even more significant, this Court has not just said that states may tax all their residents' income, it has

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[2] The Court in *Chickasaw Nation* further characterized a sovereign's choice not to tax all of its residents' income as "an independent policy decision and not one compelled by jurisdictional considerations." 515 U.S. at 463 n.12. The Wynnes try to confine this observation to decisions that "exempt" income from tax, rather than decisions that grant credits for taxes paid elsewhere, but that wishful reading is foreclosed by the Court's own reference to "credit[s]" as an example. *See id.*

explained why that is so. A state's special power to tax its residents' income "is founded upon the protection afforded to the recipient of the income by the state," *Lawrence*, 286 U.S. at 281, which bears a special responsibility for the care and protection of its own citizens. Correspondingly, "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. . . . These are rights and privileges which attach to domicil within the state." *Id.*; *see Cohn*, 300 U.S. at 313. A state's power to tax its residents is thus part of a reciprocal bargain: the state extends unique privileges to its residents, and those residents accept an enhanced responsibility for supporting their home state.

The Wynnes ignore completely the special privileges enjoyed by state residents. But Maryland not only provides the basic governmental structure that protects its residents, it offers those residents significant benefits that are unavailable to non-residents. To take just a few examples, only Maryland residents are entitled to preferential admissions and reduced tuition at State universities, *see Frankel v. Board of Regents*, 361 Md. 298, 302-03 (2000); Univ. Sys. of Md. Policy III-4.0, are eligible for a broad array of public-assistance programs, *see, e.g.*, Code Md. Regs. 07.03.07.03(A)(1), 07.03.17.08(A)(2), 07.03.21.03(A)(1), and may obtain subsidized medical care under the State's expanded Medicaid program, *see* Code Md. Regs. 10.09.24.05-3(A). Conversely, Maryland residents have no right

to demand such benefits from other states, even if they pay income taxes there.

The Wynnes insist that the Constitution shelters them from "double taxation." Again, however, their theory runs headlong into contrary authority. This Court has frequently recognized that multiple states may tax the same income, so long as each state has a legitimate, freestanding basis for doing so. *See, e.g., State Tax Comm'n v. Aldrich*, 316 U.S. 174, 178 (1942) ("[I]ncome [from intangibles] may be taxed both by the state where it is earned and the state of the recipient's domicile."); *Curry v. McCanless*, 307 U.S. 357, 367-68 (1939); *Guaranty Trust Co. v. Virginia*, 305 U.S. 19, 23 (1938). That is the situation here: Maryland has the right to tax the Wynnes' entire income—wherever earned—because they are Maryland residents; another state may tax this income only insofar as it is earned within that state's borders. In light of these independent grounds for taxation, neither state is required to yield to the other in assessing taxes for the support of its government.

Unlike the Maryland Court of Appeals, other state courts have acknowledged a state's right to tax all the income of its residents and have rejected limitations assertedly imposed by the Commerce Clause. For example, in *Keller v. Department of Revenue*, the Oregon Supreme Court held that Oregon residents did not have an absolute right to credit out-of-state taxes against their Oregon income

tax, stating that it "[did] not read *Complete Auto Transit, Inc.* [a Commerce Clause case[3]] to alter the rule that Oregon is entitled to tax the income of its residents." 872 P.2d 414, 416 (Ore. 1994) (citing *Lawrence*, 286 U.S. at 276). Likewise, in discussing "[t]he inapplicability of dormant Commerce Clause analysis to State resident income taxation," the New York Court of Appeals specifically noted that "[t]he Supreme Court has long held that multiple taxation of State residents is not forbidden." *Tamagni v. Tax Appeals Tribunal*, 695 N.E.2d 1125, 1134 (N.Y. 1998) (citing *Aldrich,* 316 U.S. at 174; *Cohn*, 300 U.S. at 313; and *Fidelity & Columbia Trust Co. v. Louisville*, 245 U.S. 54 (1917)). Rebuffing the same "nobody ever thought of the Commerce Clause" argument that the Wynnes make here, the New York court stated pointedly: "While this line of cases involved due process challenges, the very fact that the dormant Commerce Clause was never mentioned as a limitation on State power to tax resident income suggests that there is no such limitation." 695 N.E.2d at 1134.[4]

Given these decisions, it is striking that the Wynnes cannot cite a single decision of this Court relying on the Commerce Clause to invalidate state income taxes based on residency; indeed, they are unable to cite such a case from any court other than

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[3] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

[4] The Comptroller agrees with the New York court that, if a Commerce Clause analysis applies, it does not bar full taxation of a resident's income. *See Tamagni,* 695 N.E.2d at 1133-34.

the one below. That is hardly surprising, because taxes on individual income rarely, if ever, implicate what this Court has described as the driving concern of the Commerce Clause: "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Department of Revenue v. Davis,* 553 U.S. 328, 337-38 (2008).[5] Even the Wynnes' favored tax treatise can say only that the question presented in this petition is "a complicated question for which the courts have yet to provide a definitive answer." W. Hellerstein, *State Taxation* ¶ 20.10[2][b] (3d ed. 2013). It is simply insupportable therefore, for the Wynnes to proclaim that the court below decided this case by applying "settled principles." Opposition 1.

This petition presents a straightforward question: does a state have the sovereign power to tax all the income of its residents, even if part of that income is earned in, and taxed by, other states? Taking their lead from repeated decisions of this Court, the highest courts of Oregon and New York, as well as courts in other states, *see* Petition 13-14, would say yes; the Maryland Court of Appeals, standing alone, has declared that the answer is no. This Court should grant review to settle this critical question of state taxing power.

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[5] By comparison, the two Commerce Clause cases the Wynnes point to as supporting the decision below, Opposition 16, both involve preferential tax treatment for businesses based on their in-state activities. *See Camps Newfound/Owatonna v. Town of Harrison,* 520 U.S. 564 (1997); *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996).

3. The Wynnes do not seriously dispute that, if allowed to stand, the decision below will have a substantial impact on Maryland tax revenues. Although the exact amounts are not known, the State estimates that the decision will cost the State approximately $50 million each year in future tax revenues, plus as much as $120 million in possible refunds. While it is obviously true that "the magnitude of an unconstitutional tax is no basis to uphold it," Opposition 23, the magnitude of a tax *is* a reason for this Court to review a decision holding the tax unconstitutional, especially when that decision overturns decades of common understanding.

The Wynnes' primary solution to the shortfall calls for the State to "increas[e] sales or property taxes" or to "[r]aise all residents' county tax rates." Opposition 23. Although the Wynnes frankly acknowledge that their proposed tax increases "may prove locally unpopular," they insist that "the point of the dormant Commerce Clause" is to counteract the fact that "it is more politically palatable to raise revenue by imposing higher taxes on interstate commerce." Opposition 23-24. But that supposed purpose has little to do with taxes based on residency. If, by denying full credits, Maryland is imposing "higher taxes," it is imposing them on Maryland residents—that is, voters—hardly an illustration of the "politically palatable" strategy the Wynnes condemn. *See McCulloch v. Maryland*, 4 U.S. (Wheat.) 316, 428 (1819) ("In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."). Precisely because residents

are "able to complain about and change [a challenged] tax through [their state's] political process," this Court has emphasized that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989).

Finally, the decision below has potential repercussions beyond Maryland. While most states provide full credits for income taxes paid to other states, many local jurisdictions do not. *See* IMLA Amicus Brief 16-18. The Wynnes do not deny that their wide-ranging Commerce Clause theory would invalidate those tax codes; instead, they argue only that code variations might shelter some jurisdictions from its full effect. Opposition 26-27. That is cold comfort. As long as the decision below remains in place, any jurisdiction taxing its residents' entire income will face needless uncertainty about the viability of its tax system and its potential exposure to onerous refund claims.

The Wynnes have offered no good reason to deny review. The new doctrine announced by the Maryland Court of Appeals dramatically departs from the foundational principle that states may tax all their residents' income. There is no justification for this counter-historical rule, and the decision mandating it is both important and gravely wrong. This Court should grant review to correct it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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