

No. 13-485

IN THE
Supreme Court of the United States

MARYLAND STATE COMPTROLLER OF THE TREASURY,
Petitioner,

v.

BRIAN WYNNE, *et ux.*,
Respondents.

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

NEAL KUMAR KATYAL
DOMINIC F. PERELLA
Counsel of Record
SEAN MAROTTA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6452
dominic.perella@hoganlovells.com

Counsel for Respondents

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INTRODUCTION

The United States' recommendation that the Court grant the petition is curious, to say the least, since everything it has to say about the petition's certworthiness cuts the other way. The United States tacitly concedes that the case is important to Maryland alone. U.S. Br. 18. It concedes that the decision below does not conflict with any holding of this Court or any state high court. *Id.* at 18-21. It concedes that the decision's impact on other jurisdictions is uncertain at best. *Id.* at 19. And while it asserts that "more than 2000 municipal income taxes" may be called into question by the logic of the ruling below, *id.*, that math is wrong: The vast majority of those taxes are irrelevant because they do not double-tax. This Court does not typically grant certiora-

ri when none of its traditional criteria are satisfied. It should not do so here.

Lacking anything convincing to say about certworthiness, the United States leads with a long merits discussion. U.S. Br. 7-18. Its argument is unsound. The United States relies on *due process* cases to argue that states' income taxes on their residents cannot run afoul of the *Commerce Clause*—a mix-and-match approach this Court has criticized before. It offers an analysis of *Complete Auto* that bears no resemblance to how this Court has applied that case. And, most startling of all, it advances a rule that would give corporations far stronger protections under the Commerce Clause than individuals engaged in interstate business.

The United States' dubious merits analysis only underscores the wisdom of allowing the question presented to percolate—something that, thus far, has not happened in even one other state. The petition should be denied.

ARGUMENT

I. THE UNITED STATES CONCEDES THAT THE DECISION BELOW DOES NOT MEET THIS COURT'S CERTIORARI CRITERIA.

1. The United States' lead rationale for a grant is that “the court below resolved a question of exceptional importance *to Maryland*.” U.S. Br. 18 (emphasis added). The last two words give away the game. This Court grants the writ in cases “involving principles the settlement of which is of importance to the public as distinguished from that of the parties.” *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). Whatever the importance of this case to Maryland, its application to the rest of

the nation is questionable at best. *Infra* at 3-6. Moreover, Maryland has a court dedicated to resolving questions of exceptional importance to Maryland: the Maryland Court of Appeals. That tribunal has spoken. Its decision does not warrant further review.

The United States emphasizes that the decision below will impact Maryland’s coffers. U.S. Br. 18. But “[t]he amount of money involved” in a case “is not usually thought to be controlling unless it is enormous.” S. Shapiro *et al.*, *Supreme Court Practice* § 6.31(b), p. 480 (10th ed. 2013). If this Court were to take every case involving—at most—\$170 million (U.S. Br. 18), its discretionary docket would soon be overwhelmed.

Besides, the \$120 million in refunds the United States cites is the result of Maryland’s own statutory three-year window for reopening filed returns and 13% interest rate for income-tax refunds and deficiencies. Md. Code, Tax-Gen. §§ 13-1104(c), 13-604(b)(1); BIO 24-25. Those statutes make the Comptroller a “net winner,” in his words, by permitting him to recover past delinquencies at a significant premium. Maryland House, Ways & Means Committee Hearing, at 11:09-11:20 (Jan. 16, 2014).¹ That they happen to cut the other way here hardly converts this into a certworthy case.

2. The United States is studiously agnostic about the decision’s impact beyond Maryland. The most it can manage: the decision “*appears* to have im-

¹ Available at <http://mgahouse.maryland.gov/house/play/bb27a73d-ed8f-4474-b6e4-c5b9cc9c7acf/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c>.

portance” outside the state’s borders. U.S. Br. 19 (emphasis added). But the United States does not cite a single imperiled local tax. Instead—relying solely on the briefs—it tentatively concludes that there are “more than 2000 municipal income taxes nationwide that *might not* provide credits[.]” *Id.* (emphasis added). In a brief that was supposed to provide the United States’ expert view, the Solicitor General has punted.

That reticence is particularly puzzling because although some of those 2,000 local taxes may not provide a *credit* for out-of-state income taxes, they avoid infirmity in other ways:

- Kansas’ 535 local income taxes apply only to “intangibles such as interest, dividends, and securities transactions[.]” J. Henchman & J. Sapia, *Tax Foundation Fiscal Fact No. 280*, at 7 (2011).² Unlike income taxes on interstate business income, taxes on intangible investment income are not necessarily subject to apportionment under the dormant Commerce Clause. BIO 19.
- Kentucky’s 218 local income taxes are distinguishable because they do not treat S Corporations as pass-through entities. Instead, they tax the S Corporation on a formula-apportionment basis, which avoids double taxation. *See, e.g.*, City of Adairville, Ky., Ordinances § 110.04(F)³;

² Available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff280.pdf>.

³ Available at <http://app.sos.ky.gov/occupationaltax/images/8-16.pdf>.

Ky. Rev. Stat. § 67.753. Distributions from the S Corporation to shareholders, meanwhile, are not taxed by the locality at all. *See, e.g.*, City of Berea, Ky., Occupational License Tax Instruction Form.⁴

- Iowa’s 297 local income “surtaxes” are not measured by the taxpayer’s income, but rather the taxpayer’s state income-tax obligation. Iowa Code § 257.21. And because an Iowa resident’s state income-tax obligation already includes a credit for taxes paid to other states, *id.* § 422.8, so does the surtax.
- Most of Ohio’s 774 local income taxes avoid double taxation because they tax the S Corporation on a formula-apportionment basis. Distributions passed through to the shareholder are then excluded from the shareholder’s locally taxable income. *See* Ohio Rev. Code § 718.01(9)(a); OAR Daily Buzz, *Experts Highlight Key Provisions of Ohio’s Municipal Income Tax Reform Package* (Nov. 14, 2013).⁵

Of the 2,000 supposedly imperiled taxes, then, *over 1,700* are not implicated by the decision below. Respondents provided this information to the Solicitor General, but the United States’ brief does not engage with it. Its failure to do so calls into question the soundness of its views.

⁴ Available at <http://app.sos.ky.gov/occupationaltax/images/13-29.pdf>.

⁵ Available at <http://ohiorealtors.org/2013/11/14/experts-highlight-keyprovisions-of-ohios-municipal-income-tax-reform-package/>.

3. Even as to the few local taxes that may (or may not) be suspect under the Court of Appeals' reasoning, the United States admits the outcome is speculative. Such taxes, it says, "*could* be invalidated *if* courts in the relevant jurisdictions find the reasoning of the decision below persuasive." U.S. Br. 19-20 (emphases added). That uncertainty is an argument for percolation, not review.

Indeed, the United States concedes that the decision below does not conflict with any decision of this Court or any state high court: It confesses that we are "correct[]" that the Comptroller's cited Supreme Court decisions "addressed challenges brought under the Due Process Clause, rather than under the Commerce Clause." U.S. Br. 10. It admits that the Comptroller's cited state-court decisions did not address "identical" issues. *Id.* at 20. And it does not disagree with our argument (BIO 18-21) that if the Wynnes lived in the states whose decisions the Comptroller cites, they would not have been double-taxed.

In similar circumstances, the United States has counseled this Court to deny the writ. *See, e.g.*, Br. for Federal Respondents, *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466, 2006 WL 3740624, *6 (Dec. 15, 2006) (disagreeing with decision below but recommending denial because "there is no square circuit conflict"). Its only reason to deviate from that course here is the supposed "uncertainty created by the decision below, together with the *possibility* that similar tax schemes *might* be deemed constitutional in some jurisdictions but not others." U.S. Br. 20 (emphases added). That the United States must qualify its sentence so heavily refutes its own argument.

4. In the end, this Court is faced with a nascent legal principle, a question presented that was not pressed or passed upon below, *see* BIO 10-13, and a state-court decision with conjectural national impact. That is a recipe for denial.

II. THE DECISION BELOW IS CORRECT.

1. On the merits, this case is governed by three bedrock principles. First, the dormant Commerce Clause imposes a “prohibition against multiple taxation” of the same value by two or more states. *Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 182 (1995). Second, the Court “has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.” *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-447 (1979). Third, the Court has held that “[t]he rule which permits taxation by two or more states on an apportionment basis precludes taxation of all the property *by the state of domicile*.” *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 (1952) (emphasis added). Taken together, these rules confirm that the decision below was correct. Because other states exercised their due-process power to tax a portion of the Wynnes’ income, Pet. App. 9a, Maryland was precluded from taxing their income in full.

The United States insists these settled principles are inapplicable because the case involves income. U.S. Br. 8 n.1. But the case it cites—*Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983)—only confirms the infirmity of Maryland’s partial-credit scheme. *Container Corp.* held that the income tax at issue was constitutional because it did not necessarily double-tax. Any double taxation was simply the

result of two jurisdictions’ different apportionment formulas. *Id.* at 184-185, 188. It contrasted that result with *Japan Line*, where “one taxing jurisdiction claimed the right to tax a given value in full, and another taxing jurisdiction claimed the right to tax the same entity in part—a combination resulting necessarily in double taxation.” *Id.* at 188. This case is like *Japan Line*: Maryland claims the right to tax the Wynnes’ income in full, whereas other jurisdictions claim the right to tax the same income in part—“a combination resulting necessarily in double taxation.” *Id.*; see Pet. App. 22a.

The United States also suggests the Wynnes can be double-taxed as much as Maryland pleases because they are natural persons, not corporations. U.S. Br. 16 n.2. As the government sees things, the dormant Commerce Clause forbids double taxation of a *corporation’s* interstate income by its state of domicile, but *individuals* are not entitled to the same protection. *Id.* That assertion is startling: We are aware of no case holding that corporations enjoy greater constitutional rights than human beings.

The United States’ corporations-are-different argument also fails on its own terms. The interstate income at issue here *is* corporate income—it is Maxim’s income, imputed to the Wynnes by Maxim’s S-Corporation election and Maryland’s tax statutes. Pet. App. 7a-9a; 26 U.S.C § 1366. Moreover, a corporation *does* have a special relationship with its state of domicile. Legally, a corporation is “at home” in its domiciliary state and is subject to the state’s pervasive general jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 n.11 (2014). And economically, a corporation often draws robustly on local services in its state of domicile. Yet, according to the United

States, corporations cannot be double-taxed whereas the Wynnes can. That result has no basis in logic or law.

2. Instead of examining this Court's dormant Commerce Clause precedents, the United States relies on what it admits are solely due-process cases. U.S. Br. 7-11. It justifies this sleight-of-hand by arguing that the dormant Commerce Clause holding below "would effectively nullify" those cases' due-process holdings. *Id.* at 11.

Not so. We do not know whether the domiciliary states in the United States' cases allowed a credit, precisely because the cases did not focus on that aspect. But even those states did not, their taxes' infirmity under the dormant Commerce Clause simply demonstrates a different principle: "A tax may be consistent with due process and yet unduly burden interstate commerce." *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.7 (1992). The United States' brief ignores that teaching.

The United States also leans on a solitary footnote from *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995). U.S. Br. 9, 18-19. As we have explained before, that footnote cannot be read as the United States reads it; the footnote refers to a state's policy discretion to forgo some of its due-process authority, not the dormant Commerce Clause's prohibition against double taxation. BIO 15.

3. When the United States finally turns to the dormant Commerce Clause, it argues that Maryland's partial-credit scheme satisfies this Court's test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). U.S. Br. 12-18. The United States thus

parts company with the Comptroller, who has abandoned the pretense that Maryland's scheme can survive *Complete Auto*. BIO 9-10.

And for good reason: Maryland's scheme is doubly invalid under that test. First, under *Complete Auto*, a tax must be "fairly apportioned." 430 U.S. at 279. Fair apportionment requires a state's taxing scheme to be—among other things—"internally consistent," *i.e.*, "if applied by every jurisdiction, it would result in no more than all of the [taxpayer's] income being taxed." *Container Corp.*, 463 U.S. at 169. Maryland's partial-credit scheme is not internally consistent because if every state had an income tax identical to Maryland's, resident taxpayers would be subject to substantial double taxation. Pet. App. 18a-25a.

The United States avoids this result by simply declining to conduct the internal-consistency analysis—even while claiming it has done so. U.S. Br. 15-18. Its supposed *Complete Auto* analysis is nothing more than an argument that *Complete Auto* does not apply.

Second, Maryland's tax scheme impermissibly discriminates against interstate commerce. *Complete Auto*, 430 U.S. at 287. By singling out interstate commerce for double taxation, Maryland "exert[s] a pressure on" investors in interstate businesses like the Wynnes "to conduct more of [their] activities in" Maryland. *Amerada Hess Corp. v. Director, Div. of Tax.*, 490 U.S. 66, 77-78 (1989); Pet. App. 28a-32a. That is the very discriminatory incentive the dormant Commerce Clause forbids. *See Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 (1996).

The United States' contrary analysis is misguided. To hear the government tell it, the Wynnes' claim is that the Maryland law is discriminatory because the Wynnes pay more taxes than couples who do business entirely within Maryland. *See* U.S. Br. 13-15. But that is *not* the Wynnes' claim; they will pay higher taxes whenever a state where Maxim does business applies a higher tax rate than Maryland does, and there is nothing wrong with that. Maryland's scheme is discriminatory for an entirely different reason: The Wynnes *are double-taxed on a portion of their income* and similarly situated Marylanders who earn income entirely in-state are not. Pet. App. 28a-32a.

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978), which the United States cites, is not on point. In *Moorman*, as in *Container Corp.*, double taxation resulted because two states' apportionment formulae inadvertently overlapped. *Id.* at 278-280. Here, Maryland made a *deliberate choice* to deny its citizens a credit on out-of-state income. BIO 6. And that is what the Commerce Clause "forbids the States to" do: levy taxes that subject interstate commercial activities to multiple taxation. *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 24 (2008).

4. Out of doctrinal answers, the United States summons up phantom fears. It says the Court of Appeals' rule unfairly subjects states' tax revenue to the caprice of other states' tax rates. U.S. Br. 9-10. But all states—including Maryland—already face that uncertainty in affording their citizens a credit. BIO 25-26. The sky has not fallen.

Similarly, the United States worries that the decision below will lead to the Wynnes paying nothing for county services. U.S. Br. 9-10. But even with credits, the Wynnes paid over \$50,000 in Howard County income taxes due to Maxim's Maryland income and Brian Wynne's salary as Maxim's president. Wynnes' C.A. Br. 46 n.17. Nationwide, moreover, local services are generally funded by property taxes and other local levies, not income taxes. See M. Dixon, *Public Education Finances: 2011*, tbl.4 (May 2013)⁶; FEMA, *Funding Alternatives For Fire & Emergency Services 2-1*.⁷ Indeed, nine states—including such populous states as Florida and Texas—provide services without imposing *any* income tax. See L. Stone, *State Personal Income Tax Rates and Brackets 2014 Update 1* (Mar. 2014).⁸

But even if the Court of Appeals' decision imposed some hardship on Maryland, the United States' rule would be far worse. Under that regime, no state need provide *any* credit for taxes their residents pay to other states. States may double-tax all they wish.

For residents who commute across state lines, like those in the United States' example (Br. 9), and for shareholders of pass-through entities, the financial impact would be tremendous. The resident would pay *twice* the income taxes, simply for the privilege of working across state lines or owning a business

⁶ Available at <http://www2.census.gov/govs/school/11f33pub.pdf>.

⁷ Available at <http://www.iaff.org/grants/FundingforFireandEMS.pdf>.

⁸ Available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/FF422%20%20State%20Income%20Tax%20Rates%20and%20Brackets.pdf>.

that does so. That would make any rational resident decide to seek employment solely in-state, or to avoid investing in interstate partnerships and S Corporations. And that, in turn, creates economic Balkanization offensive to the “national ‘common market’ ” the Commerce Clause protects. *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 350 (1977).

The United States suggests this outcome is palatable because states are politically accountable to their residents. U.S. Br. 9, 17-18. But that misunderstands the dormant Commerce Clause’s breadth. “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) (citation omitted). Moreover, the clause is “informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.” *Quill Corp.*, 504 U.S. at 312. It is the nation as a whole that suffers when states inhibit the mobility of their citizens and their capital.

CONCLUSION

The petition should be denied.

Respectfully submitted,

NEAL KUMAR KATYAL

DOMINIC F. PERELLA

Counsel of Record

SEAN MAROTTA

HOGAN LOVELLS US LLP

555 Thirteenth Street, N.W.

Washington, D.C. 20004

(202) 637-6452

dominic.perella@hoganlovells.com

Counsel for Respondents

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