NO. 13-485

In the

Supreme Court of the United States

COMPTROLLER OF THE TREASURY OF MARYLAND,

Petitioner,

v.

BRIAN WYNNE, *et ux.*,

Respondents.

On Writ of Certiorari to the Court of Appeals for Maryland

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND OTHER STATE AND LOCAL GOVERNMENT GROUPS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae respectfully submit this brief to protect the sovereign interests of state and local governments—including thousands of counties, cities, townships and other municipalities—that need flexibility to raise revenues to fund vital benefits and services that are enjoyed primarily, if not exclusively, by their residents. *Amici* urge this Court not to extend principles designed to protect non-residents from overreaching local taxation to the distinct context of taxes on residents, where there is no overreaching, no political process problem, and no need for courts to constitutionalize an area where flexibility and the need to respond to local conditions are paramount.

Established in 1935, the International Municipal Lawyers Association (IMLA) is the oldest and largest association of attorneys representing United States municipalities, counties and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and in state supreme and appellate courts.

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Counsel of record for all parties have consented to this filing in letters on file with the Clerk's office.

legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits *amicus* briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The Government Finance Officers Association (GFOA) is the professional association of state, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and the identification and promotion of best practices. Its 18,000 members are dedicated to the sound management of government financial resources.

The Maryland Association of Counties (MACo) serves Maryland's 23 Counties and Baltimore City by articulating the needs of local government to the Maryland General Assembly. Although MACo does not regularly advocate in the courts, it has made an exception in this case because of the profound ramifications of the Court of Appeals' decision on MACo's member jurisdictions.

SUMMARY OF ARGUMENT

It is well-settled that the unique relationship residents have with the place they call home justifies a state or local government taxing "all income of their residents, including income earned outside their borders." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n.12 (1995); *e.g., N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937). While the possibility that jurisdictions may overreach when taxing non-residents has prompted a long line of cases from this Court addressing allocation of non-resident income to a taxing jurisdiction, there is no comparable concern regarding non-discriminatory taxation of residents' income: There is no possibility of overreach because a resident's entire income is already within reach, and the political process provides residents an ample check "against erroneous and oppressive taxation," *McCulloch v. Maryland*, 17 U.S. 316, 428 (1819).

State and local governments "giv[e] security to life, liberty and the other privileges of dwelling in a civilized community," *Maguire v. Trefry*, 253 U.S. 12, 14 (1920) (quotation marks omitted), including a wide array of vital public benefits—such as free public schools—that are enjoyed primarily, if not exclusively, by residents. To pay for those services, state and local governments need flexibility to determine the optimal mix of taxes, whether they be levied on income, sales, real property, personal property, or otherwise.

It is an inherent feature of our federalism that people can live in one place and earn money in another. This Court in turn has recognized that a jurisdiction's treatment of its own residents' out-of-jurisdiction income generally is not a constitutional question for the courts but an "independent policy decision" for state and local governments to decide. *Chickasaw Nation*, 515 U.S. at 463 n.12 (quotation marks omitted). Jurisdictions can and sometimes do provide a tax credit for taxes paid by residents on income generated in other jurisdictions. *Id.* But to raise the same revenue while providing such a foreign income tax credit,[2] a state or local government must

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[2] This brief uses the phrase "foreign income taxes" to refer to all income taxes paid to jurisdictions other than to those where the taxpayer resides. The decision below involves taxes paid to

increase the income tax rate or raise other taxes—and the potential alternatives tend to be more regressive and all involve different trade-offs and different perceived inequities.

For example, giving a full dollar-for-dollar credit for foreign income taxes avoids the inequity of two neighbors having different tax burdens even though they earn the same income. But a full credit simultaneously creates a different inequity: A neighbor with substantial foreign income will contribute substantially less to pay for local services like schools than the otherwise identically-situated neighbor earning all her income in-state, even though both take equal advantage of local services. And to counterbalance the foreign tax credit, the local jurisdiction will need to raise some other tax, which will fall disproportionately on some other neighbor and often be more regressive.

The Constitution does not demand a single bright-line answer to what is at bottom a complex policy question for state and local officials. A jurisdiction can offer its residents a full credit for foreign taxes paid, a partial credit (for example, phased out for high-income individuals), a deduction (in full or in part), or no

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other States, but taxes paid to other countries present the same issues of tax policy. To the extent the law here implicates the domestic Commerce Clause, it would similarly implicate the foreign Commerce Clause. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979). This brief uses "dollar-for-dollar" to describe the credit Respondents demand, which is for every single dollar in income tax they paid to other States that they would otherwise owe to Maryland and Howard County on income earned in those States. *See* Comptroller Br. 4 & n.3; U.S. Br. 2.

credit at all without running afoul of any principle enshrined in the Constitution. Maryland rationally chose a compromise position, providing a full credit at the state level but no credit at the county level. That choice does not cross any constitutional line.

In our system of federalism, each of the co-equal States is generally free to organize its affairs as its people determine through the democratic process. Indeed, deciding how to structure taxes on residents is a quintessential policy judgment for each of the several States and its subdivisions. Although the Supremacy Clause ensures that the U.S. Constitution and federal laws and treaties can trump State laws, there is no "horizontal supremacy clause" providing that one State's lawful exercise of its jurisdiction must defer to a sister State's exercise of jurisdiction over that same person, particularly when the person lives in the first State and merely works or invests in the other. The Maryland Court of Appeals seriously erred in misreading the Commerce Clause as a warrant to break from that constitutional tradition, and its decision should be reversed.

ARGUMENT

I. Neither The Constitution Nor Considerations Of Sound Tax Policy Demand A Full Dollar-For-Dollar Credit For Foreign Income Taxes Paid.

A. State and Local Governments Provide Residents With Extensive and Unique Benefits.

State and local governments provide vital protections and services that directly impact the lives of their residents virtually every day. They provide police and fire protection to protect life, liberty, and property; medical care to keep people healthy; roads, bridges, and mass transportation to help people get from place to place; they deliver the water we drink; they enforce environmental laws to ensure that water is pure and that the air we breathe is clean; they support the unemployed and needy; and they ensure equal access to the state and local courts. All of these critical services cost money. *See Compania General de Tabacos v. Collector*, 275 U.S. 87, 100 (1927) ("Taxes are what we pay for civilized society…."); Jeffrey L. Barnett & Phillip M. Vidal, *State and Local Government Finances Summary: 2011,* U.S. Census Bureau 3–4 (July 2013), http://perma.cc/96AY-8S9M ("State Survey") (summarizing costs). And although many of these benefits are available generally to any person who sets foot in the State or municipality, because they are provided locally they provide the greatest benefit to people who are there most often and have decided to call that place home: residents.

State and local governments provide some important benefits *exclusively* to residents, with public education being one of the most important (and expensive) examples. Here, for example, Respondents have five school age children, all of whom could enjoy the privilege of a free top-quality education from kindergarten through high school, followed by discounted in-state tuition at a public university. *See Frankel v. Board of Regents*, 761 A.2d 324, 326 (Md. Ct. App. 2000). Roughly 57% of the Howard County budget goes to public education. Howard County, *Fiscal Year 2014 Approved Operating Budget Detail* 5 (2013), http://perma.cc/J4Y9-G7QX ("County Budget"); *see also id.* at 11 ("Nothing is more important than our obligation to the education of our children. It is the bedrock of the Howard County experience."). Maryland similarly devotes 36% of its budget to public education. Md. Dep't of Budget & Mgmt., *Budget Highlights FY 2014* at 6 (Jan. 16, 2013), http://perma.cc/KLA6-LZR4 ("State Budget") (22% from income tax); *see also id.* at iii ("With record investments, we have built the best public school system in America.").

Maryland residents are also exclusively entitled to Maryland's Medicaid coverage and certain other health care benefits. *See* Md. Code Regs. 10.09.24.05-3(A). Many forms of public assistance are likewise available exclusively to residents. *See, e.g.,* Md. Code Regs. 07.03.07.03(A)(1), 07.03.17.08(A)(2), 07.03.21.03(A)(1). Maryland's practices in this regard are typical, as other state and local governments similarly dedicate extensive resources to public education, health care, and support for the indigent. *See* State Survey at 7 tbl. A-1.

Residents also exclusively enjoy one other unique privilege that directly informs the constitutional issues at stake here: Only residents enjoy the right to vote. Md. Const. Art. I, § 1. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)). Unlike non-residents who have no direct say in setting another State's tax policies, residents can vote to change them. Thus, whereas there are structural reasons to be wary of taxes on non-residents, there is no comparable concern regarding policies directed at residents and instead every reason to defer to the political process.

States and local governments have a variety of options for raising the revenue necessary to pay for the critical services that primarily or exclusively benefit residents. Sales taxes and real property taxes are important options that account for much state and local revenue. State Survey at 3. The vast majority of States—43 plus the District of Columbia—also fund their operations at least in part through a tax on their residents' net income. Scott Drenkard & Joseph Henchman, *2014 State Business Tax Climate Index*, Tax Foundation 16–17 (Oct. 2013), http://perma.cc/9MGC-DSDJ. Nearly 5,000 state subdivisions—counties, cities and special districts around the country, with a total population of more than 23 million—have made the same choice. Joseph Henchman & Jason Sapia, *Local Income Taxes,* Tax Foundation (Aug. 31, 2011) http://perma.cc/ZG28-33DH. Each of Maryland's counties assesses an income tax, at rates from 1.25% to 3.2%. *Id.* So too do Indiana's 92 counties, assessing income taxes at rates up to 3.13%. *Id.* In Ohio, 593 municipalities and 181 school districts assess such a tax, as do 2,469 municipalities and 469 school districts in Pennsylvania. *Id.* New York City, Birmingham, Detroit, San Francisco, and numerous other cities nationwide also levy taxes on income. *Id.*

Raising revenues through a tax on net income has the advantages of having a broad tax base and being more progressive than alternatives. *See* Inst. on Taxation & Econ. Policy, *Who Pays? A Distributional Analysis of the Tax Systems in All 50 States* 1

(4th. ed. Jan. 2013), http://perma.cc/LT9K-T83U ("Distributional Analysis") ("Of the three broad kinds of taxes states levy (income, property, consumption), the income tax is the only one that is typically progressive in that its rate rises with income levels."). There are, of course, lively policy debates about the extent to which taxes should be relatively progressive or relatively flat. But the Constitution is agnostic about that debate. *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24–26 (1916); *see also Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (The Constitution "does not enact Mr. Herbert Spencer's Social Statics."). Moreover, unlike property taxes which local governments often administer themselves, local income taxes can "piggyback" on the State's income tax system. Tax Policy Ctr., *Residential Property Taxes in the United States* 2 (Nov. 18, 2013), http://perma.cc/6XBE-TFZT. The option of imposing an income tax on residents' net income is thus an important option for jurisdictions seeking to avoid regressive means of raising revenues.

Where imposed, income taxes are critical to balancing state and local budgets. For example, in fiscal year 2014, the state and county income taxes in Maryland and Howard County are projected to raise nearly 25% of each government's revenue. State Budget at 6 (22% from income tax); County Budget at 4 (23%). Again, this is typical of state and local governments that levy income taxes. *See* State Survey at 6 tbl. A-1 (21.3% of state and local tax revenue from individual income taxes).

B. Any Approach to Foreign Income Taxes Has Policy Advantages and Disadvantages

Because "income may be taxed both by the state where it is earned and by the state of the recipient's domicile," *Curry v. McCanless*, 307 U.S. 357, 368 (1939), state and local governments must make an "independent policy decision" about how to address this overlapping tax jurisdiction and the potential for double taxation, *Chickasaw Nation*, 515 U.S. at 463 n.12. Any approach to this issue presents policy advantages and disadvantages.

At the outset, a number of policy justifications rationally support a decision to decline to provide a credit for income taxes paid to foreign jurisdictions. A no-credit regime is simpler for residents to comply with because they need not document the taxes paid to foreign jurisdictions. It is easier for the government to administer because it need not verify the reported amount or determine which foreign taxes constitute creditable "income taxes." *Cf*. 26 C.F.R. § 1.901-2 (2013) (exhaustively distinguishing income taxes from other non-creditable taxes); *PPL Corp. v. Comm'r*, 133 S. Ct. 1897 (2013) (providing an example of the difficult questions that can arise). The no-credit approach raises the same revenue from all residents with the same income. *See infra*. And it avoids the need to raise rates or other taxes to recoup the substantial cost of a full credit. *E.g.,* Md. Dep't of Budget & Mgmt., *Tax Expenditures Report, Fiscal Year 2014* 51 (Feb. 2013), http://perma.cc/SH5P-T99W (Maryland's state-level credit costs more than $200 million per year).

The Maryland Court of Appeals emphasized that by declining to provide a full dollar-for-dollar foreign tax credit, Maryland produced an inequity: If a Maryland resident pays foreign income tax, her effective tax rate will be higher than another resident who earns the same overall income but does not pay foreign income tax because she earns income only in Maryland or in jurisdictions without an income tax or that do not tax Maryland residents' income, such as through a tax reciprocity agreement. Pet. App. 16. The court observed that this "creates a disincentive for the taxpayer—or the S corporation of which the taxpayer is an owner—to conduct income-generating activities in other states with income taxes." *Id.*[3]

But while the Maryland Court of Appeals is correct that a no-credit system creates this potential inequity, there is no perfect tax system and no platonic mode of dealing with foreign taxes such that all inequities are avoided. Indeed, correcting the potential inequity the Maryland Court of Appeals identified by providing a full dollar-for-dollar credit, as Respondents demand, can only be done by creating other potential inequities. *Cf. Logan v. United States*, 552 U.S. 23, 33 (2007) (declining to interpret a statute to avoid "anomalous results" when that "would correct one potential anomaly while creating others").

[3] This "disincentive" theory also proves too much, as it can equally be said that a State that taxes non-resident income "creates a disincentive for the taxpayer … to conduct income-generating activities" there. Indeed, if the foreign jurisdiction has no income tax or chooses not to tax Maryland residents' income, there is no disincentive at all.

First, with a full dollar-for-dollar foreign tax credit, a Maryland resident with substantial foreign income will contribute less toward local services than a neighbor with the exact same net income but no foreign income taxes paid. For example, if a family lives in Howard County, sends two children to the local public schools, and earns $200,000 a year in Maryland or jurisdictions that do not tax Maryland residents' income, the family would pay income tax to the State and county on the entire $200,000. But with a full dollar-for-dollar foreign tax credit, the family next door with the same income and two children at the same school would pay less to support those very same services if it earned part of its income in foreign jurisdictions that taxed Maryland residents' income. Indeed, if the income was earned in New York, New Jersey, or other jurisdictions that tax income at or above the combined Maryland and Howard County rate (7.95% in 2006), the out-of-state earner could pay little or no state or county tax at all. *See Comptroller of Treasury v. Blanton*, 890 A.2d 279, 284 n.9 (Md. Ct. App. 2006) (describing as "possibl[y] absurd" the prospect of one family "paying little or no local tax for the services provided by the county while a neighbor with similar income, exemptions, and deductions might be paying a substantial local tax to support those services").

Thus, with or without full dollar-for-dollar foreign tax credits, there will be inevitable disparities between similarly situated taxpayers. There are sound policy arguments for imposing the same overall tax burden on two taxpayers with the same net income, and there are sound policy arguments for imposing the same obligation to fund local services on two taxpayers with the same net income. But there is no sound argument for constitutionalizing the issue and taking this policy judgment away from state and local lawmakers.

Second, it is no accident that the taxpayers who demanded credits here reported a high income. Non-refundable tax credits are generally regressive because they are valuable only to the extent a person has tax liabilities to offset, and many people who have foreign income (particularly through investments) have relatively high incomes. *See* Roberton Williams, *How Some High-Income People Avoid Paying Federal Income Tax*, Forbes (Sept. 5, 2013), http://perma.cc/MZB9-HBGP ("High-Income Tax Avoidance") (in 2010 thousands of taxpayers earning over $200,000 used the federal foreign tax credit to avoid all federal income tax liability).

The possibility of high-earning taxpayers offsetting substantial parts of their state and local income tax burden means that they may pay less to support state and local public services than not just their similarly-situated neighbors, but also their neighbors who are considerably less fortunate. To take an extreme example, if Respondents had earned $2.7 million in jurisdictions that taxed Maryland residents' income at 7.95% or higher, they could potentially zero out their state and local tax liability—yet another Howard County resident earning only $27,000 in Maryland or jurisdictions that do not tax Maryland residents' income would pay $1136 to the State and $800 to the county after a standard deduction. *See Maryland 2006 State & Local Tax Forms & Instructions* 19 (2006), http://perma.cc/7JTB-

8CXW. The person living paycheck-to-paycheck thus would be cross-subsidizing the wealthy family's enjoyment of important state and local services. The Constitution surely does not force that policy choice on States and localities.

Third, to counteract the foregone revenue of a foreign tax credit, a State or locality would need to raise revenue elsewhere. Indeed, extending a full dollar-for-dollar tax credit to Respondents alone could cost Howard County tens of thousands of dollars, *see* Pet. App. 56, and the net effect could reduce overall personal income tax collections "by $45,000,000 to $50,000,000 annually in future tax years." Pet. 15. That lost revenue would need to be made up for by increasing tax burdens elsewhere, and the alternatives tend to be regressive.

For example, Respondents suggest that the State could "[r]aise all residents' county tax rates" or "increas[e] sales or property taxes." Opp. 23. But raising income tax rates across the board would simply foist the cost of the credits on Respondents' neighbors who do not pay foreign income taxes, which would exacerbate the inequities described above and likely be regressive. *See* High-Income Tax Avoidance, *supra*. Increasing property taxes would likely be "somewhat regressive," as "poor homeowners and renters pay more of their incomes in property taxes than do any other income group—and the wealthiest taxpayers pay the least." Distributional Analysis at 6. And increasing sales or excise taxes would be "very regressive," as "[p]oor families pay almost eight times more of their incomes in these taxes than the best-off families, and middle-income families pay more than five times the rate of the wealthy." *Id.*

It is one thing for a jurisdiction to provide a full foreign tax credit based on policy views about avoiding so-called double taxation or certain forms of perceived inequity. It is quite another for courts to force that policy judgment on States and localities. Indeed, constitutionally compelling such a full tax credit would countermand both the democratically-arrived policy judgment not to extend a full foreign tax credit and many other judgments as well. Respondents would not only pay less to support their local government, but other residents would have to pay *more*—and that additional tax burden would be levied in ways that state and local elected officials determined were undesirable.

C. Providing a Partial Foreign Income Tax Credit Is a Rational and Fair Response to This Difficult Policy Problem

Faced with policy tradeoffs either way, it is rational for a state or local government to resolve the competing equitable claims by declining to provide a foreign income tax credit and thus ensuring that two local taxpayers with the same income make the same contribution to local government services. It is also rational for a state or local government to give a dollar-for-dollar credit and thus prevent its residents from having a higher overall tax burden if they happen to earn income that is taxed by other jurisdictions, and to make a policy decision about where best to raise the lost revenue. It would be equally rational to provide a partial credit, a credit that is phased out at certain income thresholds, a deduction, or any number of other approaches. Maryland, for its part, chose another rational compromise. Maryland gives a full credit against the larger State portion of the income tax (here, a 4.75% marginal rate) but not the smaller county portion (here, 3.2%). Maryland thus protects its residents from at least 60% of any foreign income tax they pay, and perhaps more depending on the foreign tax rate. Beyond that point, Maryland requires residents to pay county income tax to support the local services they enjoy. Maryland thus gains some of the upsides (and some of the downsides) of each approach.

Many other state and local governments have made similar choices to provide residents partial credits for foreign income taxes paid. For example, Wisconsin and North Carolina provide credits for state-level foreign income taxes but disallow credits for city, county and local foreign income taxes. *See* Wisc. Admin Code Tax § 2.955; N.C. Gen. Stat. § 105-153.9(a)(1). Tennessee denies a credit for income taxes paid by a resident Subchapter S income derived from States that do not have tax reciprocity with Tennessee. *Boone v. Chumley*, 372 S.W.3d 104, 108–11 (Tenn. Ct. App. 2011).

Many municipal governments impose taxes on residents' net income without a full credit for taxes paid in other States. For example, in New York State, two cities (New York City and Yonkers) impose an income tax. *See* N.Y. Tax Law § 1301. And although a foreign tax credit is provided against the state-level income tax, no credit is provided against this municipal income tax. *Compare* N.Y. Tax Law § 620, *with* N.Y. Tax Law § 1310. Similarly, "[n]on-residents of Pennsylvania cannot claim a tax credit against Philadelphia Earnings Tax for income taxes paid to any other state or political subdivision. Residents of Philadelphia employed outside of Pennsylvania may be required to file and pay a local income tax in that jurisdiction in addition to Philadelphia Earnings Tax." City of Phila. Dep't of Revenue, *Earnings Tax,* http://perma.cc/8MB9-F764. Cleveland, Detroit, Indiana's counties, Kansas City, St. Louis, and Wilmington, Delaware have similar laws.[4]

These decisions about whether to provide a tax credit against certain local taxes not only reflect a complex policy judgment about the appropriate mix of taxes and treatment of competing equities, but also a judgment about the nature and purpose of the tax. For example, at the state level Maryland endeavors to tax all income earned in the State: The State taxes residents' income, non-residents' income earned in Maryland, and corporate income allocated to Maryland. *See* Md. Code Ann., Tax-Gen §§ 10-102, 10-203, 10-210(b), 10-301. But the county tax is more limited. There is no county corporate income tax; the county tax applies only to individuals. *See id.* §§ 10-103, 10-101(j), (k). The counties also do not tax the income of most non-residents who work there. Counties do not tax the income of residents of other Maryland counties, *id.* § 10-103(a), and they only tax

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[4] *See Municipal Income Tax,* http://perma.cc/99XF-D4RG (Cleveland); Mich. Comp. Laws § 141.601-99; John Eckart, *General Information on County Income Taxes* (July 2008), http://perma.cc/BV4N-5GGK; *Wage Earner Return Earnings Tax*, http://perma.cc/D5VU-GD2V; St. Louis, Mo. Code Ch. 5.22; City of Wilmington, *Earned Income Tax,* http://perma.cc/JNL9-HMMD.

the income of non-residents who happen to live in a locality that would itself tax the income of a Maryland resident working there without providing a credit or otherwise exempting the income, *id.* §§ 10-103(a)(4), 10-806(c). Nine States have such localities, and notably the bordering States of Virginia, West Virginia, Pennsylvania, Delaware, and the District of Columbia are not among them. See Comptroller of Md., *Nonresident Income Tax Rate*, http://perma.cc/H629-32V5. Howard County thus taxes neither the wages of a Baltimore County resident nor a Virginia resident who works in Howard County. Thus, rather than seeking to tax all income earned locally, the county primarily uses its residents' net income as a proxy for the extent to which residents have the ability to pay for the local services they enjoy. In light of the different nature of the two taxes, it is rational to provide a credit against the former but not the latter.

At bottom, any tax system will generate perceived inequities and policy tradeoffs and it is the function of state and local governments to make difficult judgments about the competing interests and to face the voters. A property tax to fund local schools has a potentially inequitable effect on those who lack school-age children or must devote more of their income to housing. A tax on personal property has a potentially inequitable effect on those who collect cars instead of stamps. Some would advocate a flat tax, which is equitable in some ways but would be far more regressive. Maryland's compromise approach in turn is rational and fair. The fact that there are competing equitable claims is thus an unavoidable reality, not an excuse for courts to craft a new bright-line rule without mooring in the Constitution.

II. The Novel Ruling Below Violates State Sovereignty And Misreads This Court's Precedents

1. The Maryland Court of Appeals' sweeping and novel ruling needlessly constitutionalizes a new area of the law, calls into question the democratic judgments made by all the jurisdictions above, significantly undermines State sovereignty, and imposes constitutional rigidity in an area where States and localities need flexibility.

This Court has long recognized that the power to tax is "a necessary instrument of self-government and territorial management." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982); *see also McCulloch*, 17 U.S. at 429 (an "incident of sovereignty"). It is critical for any government "to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932). Moreover, because taxes and tax collectors have been unpopular for as long as there have been taxes, governments need considerable flexibility to choose among rational policy alternatives.

Striking the right balance between the proper level of government benefits and the proper level of tax has always been (and always will be) a matter of intense political debate. This Court in turn has recognized that the resolution of those debates is generally reserved for the people—not the judiciary—through the democratic process. *E.g., Shaffer v. Carter*, 252 U.S. 37, 51 (1920) ("The rights of the several States to exercise the widest liberty with respect to the imposition of internal taxes always has been recognized in the decisions of this court."); *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 297 (1998) ("considerable discretion"); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) ("large area of discretion").

Structuring a state or local tax code thus involves quintessential policy judgments that our Constitution reserves for state and local elected officials. Those officials must decide how much revenue to raise with what kinds of taxes—Sales taxes? Property taxes? Income taxes? Gross receipts taxes? Corporate income taxes?—and they must make a host of policy decisions as to any particular tax: What should the rate be? How broad or narrow should the tax base be? How should the tax be assessed and enforced? What exemptions should be applied? Should credits or deductions be allowed? Should the tax be subject to a floor? A ceiling? The possibilities are endless, and virtually any decision pleases some constituents while upsetting others. Courts should be loath to craft new constitutional rules that embroil them in this policy thicket and encourage further litigation.

The Maryland Court of Appeals' novel venture is particularly pernicious because it deprives one State of authority to tax its own residents' income based on a sister State's exercise of its own authority to tax non-residents' income. *See* U.S. Br. 10–12. Our Constitution has no "horizontal supremacy clause" forcing any one State to defer to another, much less to command the bizarre result that the State where a person *lives* must defer to a State where she merely *invests*. The Constitution does not embrace a particular theory of taxation such that claims to tax all of a resident's income must yield to a competing claim to tax income-generating activities of a non-resident. Instead, each of the fifty States is generally free to operate as a laboratory of democracy, exercising its independent judgment about how to govern itself without restriction or limitation by another State's parallel conduct. *Cf. State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 181 (1942) ("[T]here is no constitutional rule of immunity from taxation of intangibles by more than one State."); *Bartkus v. Illinois*, 359 U.S. 121, 128–31 (1959) (no constitutional immunity from criminal prosecution by more than one State).

2. The Due Process Clause and the Commerce Clause provide no support for Respondents' novel rule that the Constitution compels a particular kind of tax relief (a credit, not a deduction) at a particular level (a full 100% credit and not a dollar less) when its residents pay foreign income taxes. First, Respondents have sufficient contacts with the jurisdiction to justify taxation of their entire income as a matter of Due Process: Howard County is their home. *Shaffer*, 252 U.S. at 57 ("As to residents [a State] may, and does, exert its taxing power over their income from all Sources, whether within or without the state."); *cf. Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (a State may exercise general jurisdiction even over a foreign corporation if it is "essentially at home in the forum State"). This hoary Due Process principle reflects both the close relationship between a resident and her state and local government, and the reality that when a

State or locality taxes its residents, it "acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." *McCulloch*, 17 U.S. at 428.

The tax is also consistent with the Commerce Clause. This Court's dormant Commerce Clause jurisprudence protects against discriminatory taxation, *e.g., S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 169–70 (1999), but this Court has never suggested that there is a constitutional right to an exemption from a tax that is neutral and generally applicable. Indeed, in *Shaffer*, a non-resident relied on the Commerce Clause and Privileges and Immunities Clause to demand an exemption from a neutral and generally applicable tax law—and this Court squarely rejected the demand. *See Shaffer*, 252 U.S. at 53–58 ("no right to be favored by discrimination or exemption"); *cf. Employment Division v. Smith*, 494 U.S. 872 (1990) (First Amendment does not guarantee exemptions from neutral and generally applicable laws). The tax here is strictly neutral and any impact it has on interstate commerce is just as incidental as its impact on intrastate—and international—commerce: It taxes all of a resident's income equally.

If any further inquiry is required, at most there must be some minimal justification for the tax based on its connection to local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (burden on interstate commerce may not be "clearly excessive in relation to the putative local benefits"); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955) ("It is enough that there [be] an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."). For the reasons set forth above, the law here satisfies any such inquiry. State and local governments provide their residents with unique and extensive benefits that justify taxation, net income is a rational tax base, and a fixed-percentage tax on the net income of all residents, without credits for foreign income taxes paid, is not "clearly excessive" to the benefits of county residency. Maryland could opt for a different approach. It could provide full credits against county income taxes with corresponding increases in other taxes. But optimal or suboptimal from a policy perspective, Maryland's approach satisfies any applicable constitutional test.

3. The Maryland Court of Appeals mistakenly extended *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), which holds that it is not *per se* unconstitutional to apply a tax on the privilege of doing business against a non-resident corporation engaged solely in interstate activity. *Id.* at 289. The validity of such a tax depends not on its label but its function, including whether it is "fairly apportioned." *Id.* at 279.

But *Complete Auto* does not logically extend to taxes on *residents* or hold that apportionment is a free-standing requirement of all state taxes in all contexts. Rather, the apportionment requirement addresses the vulnerabilities of non-residents and attempts to ensure that, when a State taxes a foreign corporation's income, the State is only reaching activity within its jurisdiction and not purely extraterritorial activity (as familiar Due Process principles require) and not discriminating against out-of-state businesses (as familiar Commerce Clause principles require). *Compare Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945); *City of Philadelphia v. New Jersey,* 437 U.S. 617, 626–27 (1978). There is no basis for extending an apportionment requirement here, however, because Maryland has already satisfied those familiar constitutional commands without apportionment. Maryland has not reached values beyond its borders; it is taxing its own residents' income. And Maryland does not discriminate against interstate commerce; it taxes all income from all sources equally.

Moreover, this Court has long scrutinized state laws taxing multistate corporations with limited in-state presence because states may have a temptation to obtain out-of-state revenue without in-state costs by stretching their territorial jurisdiction and taxing out-of-state commerce without providing corresponding local benefits. *See, e.g., MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 553 U.S. 16, 25–29 (2008) (recounting the long history of this Court's "unitary business" jurisprudence). For taxation of residents, however, there is no such temptation and every reason to believe that the democratic process already provides adequate protection. Maryland's tax does not free ride on out-of-state commerce. The tax applies only to Maryland's own residents, and thus imposes in-state economic and political costs. The tax is literally paid out of residents' own in-state pockets. If they are displeased with the tax, they may "complain about and change the tax through [the] political process." *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989). Indeed, residents can vote with their feet and move to another jurisdiction with tax laws they prefer. These political and economic checks provide "sufficient security against erroneous and oppressive taxation," *McCulloch*, 17 U.S. at 428, and the novel interference of the courts is unwarranted.

In short, the animating purposes underlying this Court's allocation jurisprudence are missing here. There is no justification for extending that notoriously imprecise jurisprudence to a context where there is no extraterritoriality, no discrimination, and no incentive to impose disproportionate burdens on non-constituents.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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