No. 13-485

In the Supreme Court of the United States

COMPTROLLER OF THE TREASURY OF MARYLAND,
PETITIONER

v.

BRIAN WYNNE, ET UX.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The State of Maryland funds county-level services in part through taxes on the income of each county's residents. The question presented is as follows:

Whether the Commerce Clause entitles Maryland residents to reduce or eliminate their residential county income-tax obligation based on their payment of income taxes to other States in which they do not reside.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. The State of Maryland funds its operations in part through taxes on the income of its residents. Pet. App. 4-5. Each resident is subject to a general state income tax at a rate specified by the legislature. Md. Code Ann. Tax-Gen. §§ 10-102, 10-105(a) (LexisNexis 2010) (Md. Tax Code). Each resident is also subject to a county income tax at a rate not to exceed 3.2%, to be specified by the county in which he is domiciled or has a principal place of residence on the last day of the taxable year. *Id.* §§ 10-103, 10-106. Both sets of taxes are collected by petitioner, Maryland's Comptroller of

the Treasury, who then distributes the proceeds of the county income tax to the appropriate county. Pet. App. 5.

If a Maryland resident earns income in another State, the income may also be subject to taxation in that State. In addition to imposing income (and other) taxes on its own residents, a State may tax the income that non-residents earn within its borders. See, *e.g.*, *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 463 n.11 (1995) (citing *Shaffer* v. *Carter*, 252 U.S. 37, 57 (1920)). Maryland applies its state income tax (along with a special nonresident tax in place of the county tax) to income earned in Maryland by non-residents. Md. Tax Code §§ 10-102, 10-106.1; see Pet. App. 4-5.

In recognition that Maryland residents' out-of-state income may be taxed by the States in which it is earned, Maryland generally grants its residents a credit against their Maryland state income-tax obligation in an amount equal to the income taxes paid to other States. Md. Tax Code § 10-703. For example, if a Maryland resident has a state-income-tax rate of 5% and earns all of his income in another State with an income-tax rate of 4%, his effective Maryland state-income-tax rate would be only 1%. Maryland does not, however, offer a similar tax credit for its county income tax. *Ibid.*; see Pet. App. 7. As a result, a Maryland resident who has paid out-of-state income taxes that exceed his Maryland state-income-tax obligation cannot apply the excess to offset the county income tax. Thus, if a Maryland resident has a state-income-tax rate of 5% and a county-income-tax rate of 2%, and earned all of his income in another State with an income-tax rate of 6%, he would not owe any state in-

come tax to Maryland, but he would still owe the 2% county income tax.

2. Respondents are a married couple. Pet. App. 8-9. In 2006, they resided in Howard County, Maryland, which had a county-income-tax rate of 3.2%. *Ibid.*; Br. in Opp. 5. Respondents owned stock in a corporation, Maxim Healthcare Services, Inc. (Maxim), that had elected to be treated as an "S corporation" under the Internal Revenue Code. Pet. App. 9. An S corporation does not pay federal income tax but instead passes through its income to its shareholders, who then pay tax on that income. See 26 U.S.C. 1366. Because Maryland has adopted the concept of an S corporation in its own tax code, it also taxes the income of such a corporation as income earned by its individual shareholders. Pet. App. 8.

In 2006, respondents earned taxable net income of $2,667,133, much of which was passed through from Maxim. Pet. App. 56. Because Maxim had earned much of its income in States other than Maryland, it had filed income-tax returns on behalf of its shareholders in 39 States. *Id.* at 9, 56. Maxim had allocated to each shareholder a pro rata portion both of its income and of the state taxes that it had paid. *Ibid.* On their 2006 Maryland income-tax return, respondents claimed a tax credit of $84,550 for income taxes paid in other States. *Id.* at 56. Petitioner denied the full amount of the tax credit, however, declining to apply it to respondents' county income tax. *Ibid.*

3. Respondents appealed the resulting tax deficiency. Pet. App. 10. The Hearings and Appeals Section of the Comptroller's Office modified the assessment slightly but otherwise affirmed. *Ibid.*

Respondents then appealed to the Maryland Tax Court, which also affirmed. Pet. App. 10, 127-139. In the tax court, respondents argued for the first time that the "limitation of the credit" to apply only to the state income tax and not to the county income tax "discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution." *Id.* at 10. This Court has interpreted the Commerce Clause—which empowers Congress to "regulate Commerce * * * among the several States," U.S. Const. Art. I, § 8, Cl. 3—to "have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98 (1994). The Maryland Tax Court rejected respondents' Commerce Clause argument, viewing the constitutionality of the state taxing scheme as settled by binding precedent. Pet. App. 135-136.

The Circuit Court for Howard County reversed, concluding that Maryland's taxation scheme violates the Commerce Clause. Pet. App. 53-126. The circuit court concluded that, in the absence of a credit against the county income tax for "income earned and taxed out-of-state," Maryland's scheme "substantially burdens its residents conducting business in interstate commerce, as compared to those conducting purely intrastate commerce." *Id.* at 54. The court observed, *inter alia*, that if a Maryland resident earns income in a State with an income-tax rate higher than Maryland's state-income-tax rate, the resident's total tax liability (to all States) will be greater than if he had earned all of his income in Maryland (because he will pay the higher out-of-state income tax plus the entire

Maryland county income tax). *Id.* at 101-103. The circuit court remanded the case for "further factual considerations" and "an appropriate credit for out-of-State income taxes." *Id.* at 126.

4. The Court of Appeals of Maryland granted certiorari and affirmed the circuit court's decision. Pet. App. 1-49. The court recognized that, under decisions of this Court addressing the Due Process Clause, a State "may tax the income of its residents, regardless of where that income is earned." *Id.* at 3; see *id.* at 4 (citing *Chickasaw Nation*, 515 U.S. at 462-463 & n.11; *New York* v. *Graves*, 300 U.S. 308, 312-313 (1937)). The court concluded, however, that Maryland's imposition of a county income tax without a credit for out-of-state income taxes violates the Commerce Clause because it "discriminates against interstate commerce." *Id.* at 32.

The court of appeals reasoned that, because a Maryland resident will sometimes face greater total multistate tax liability if he earns out-of-state income, "[t]his 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." Pet. App. 16. The court also concluded that the Maryland tax scheme did not satisfy the four-part test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), which looks to whether the state tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Id.* at 279; see Pet. App. 17-32. Although respondents did not contest the first (substantial-nexus) and last (fair-relation) elements of the

Complete Auto test, the court concluded that the tax did not satisfy the other two elements. Pet. App. 17-31.

Two Justices dissented. Pet. App. 36-49. The dissenters observed that respondents "live in Howard County where they benefit from the services provided by that county," and that it "'is not a purpose of the Commerce Clause to protect state residents from their own state taxes.'" *Id.* at 37 (quoting *Goldberg* v. *Sweet*, 488 U.S. 252, 266 (1989)). The dissenting Justices also recognized that States can, in some circumstances, permissibly "impose taxes that may result in some overlap in taxation of income." *Id.* at 40 (citing *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 278-279 (1978)). They emphasized that Maryland's tax system "does not expressly discriminate against interstate commerce" because the county income tax "is directed at income earned by residents of Howard County, not interstate commerce." *Id.* at 41. They also concluded that respondents had failed to prove that Maryland's system "places more than an incidental burden upon interstate commerce." *Ibid.*; see *id.* at 44-48.

5. The court of appeals denied reconsideration. Pet. App. 52. The court issued a short opinion clarifying, *inter alia*, that Maryland might avoid Commerce Clause concerns not only through tax credits but also through other methods. *Id.* at 50-52. The court of appeals granted a stay pending this Court's disposition of the petition for a writ of certiorari. *Id.* at 52.

DISCUSSION

The decision below is incorrect and warrants this Court's review. This Court has long recognized that States have plenary authority to tax the entire income, wherever earned, of their own residents, who

directly benefit from the services funded by income taxes, and who collectively have the political power to achieve the repeal of any undesirable tax laws. Although States often choose to grant tax credits to their residents for income taxes paid in other States, nothing in the Commerce Clause compels a State to offer such credits or otherwise defer to other States in the taxation of its own residents' income. The decision below has significant financial consequences for Maryland; may lead to challenges to similar tax schemes in other jurisdictions; and is inconsistent with statements made by the highest courts in other States. This case is a suitable vehicle for addressing the question presented, and this Court should grant certiorari.

A. Maryland's County Income Tax Is Constitutional

1. It is a "well-established principle of interstate and international taxation" that "a jurisdiction * * * may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 515 U.S. 450, 462-463 (1995). "Domicil[e] itself affords a basis for such taxation" because "[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." *Id.* at 463 (quoting *New York* v. *Graves*, 300 U.S. 308, 313 (1937)). "These are rights and privileges which attach to domicil[e] within the state," and "[n]either the privilege nor the burden is affected by the character of the source from which the income is derived." *Ibid.* (quoting *Graves*, 300 U.S. at 313).

As the Court observed nearly two centuries ago, the "people of a State * * * give to their government a right of taxing themselves and their property,

and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 428 (1819).[1] In accordance with that principle, this Court has frequently rejected claims that taxes on a resident's out-of-state income violate the Due Process Clause for lack of a sufficient "connection" or "relat[ionship]," *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 306, 313 (1992) (citations omitted), to the taxing State. The Court has held, for example, that a State "may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power," *Graves*, 300 U.S. at 313 (citing, *inter alia*, *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276 (1932)); "may tax net income from bonds held in trust and administered in another state," *ibid.* (citing *Maguire* v. *Trefry*, 253 U.S. 12, 14 (1920)); and may tax the income from rental properties located in other States, *id.* at 313-316.

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[1] The *McCulloch* Court's reference to "property" is best understood as a reference to property located in the State. A State cannot necessarily tax property located out-of-state simply because its owner is a state resident. See, *e.g.*, *Safe Deposit & Trust Co.* v. *Virginia*, 280 U.S. 83, 93 (1929) ("Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place."); *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 384-385 (1952) (invalidating tax on whole value of out-of-state property of domestic corporation). Income taxation, however, operates on principles different from those that govern property taxation. See, *e.g.*, *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 188 (1983).

A State does not lose authority to tax its own residents' income simply because the State in which the income was earned also taxes that income. "Although sovereigns * * * sometimes elect not to" exercise their "authority to tax all income of their residents," and thus "commonly credit income taxes paid to other sovereigns," that "'is an independent policy decision and not one compelled by jurisdictional considerations.'" *Chickasaw Nation*, 515 U.S. at 463 n.12 (citation omitted). A constitutional rule requiring an automatic tax credit whenever a resident's income is subject to tax in another State would produce anomalous results. Suppose that many residents of State A, which has an income-tax rate of 4%, work (and earn all of their income) in State B. If State B has no income tax, then State A can collect the full 4% from those residents. But if the legislature of State B imposes a 2% income tax, then State A's tax collections from those residents will be halved. And if State B imposes a 4% income tax, then State A cannot collect any income tax at all from those residents unless it increases its generally-applicable income-tax rate.

It would make little sense for a State's power to collect an income tax from its own residents, in order to fund the services and protection its residents receive, to be circumscribed by the independent actions of another State with a less significant connection to those persons. The residents of State A are likely to receive considerable benefits (including schools, emergency services, utilities, and the legal protections attendant to residency) from that State, and it is the only State whose officials are politically accountable to those residents. If State A's authority to tax its residents' income were contingent on State B's taxing

decisions, then State B's officials could limit the range of options available to State A in matters of fiscal policy. In particular, any increase in State B's income-tax rate would force State A's legislators either to forgo revenue (and likely cut programs that benefit its residents) or to generate revenue in other ways (likely by increasing taxes that affect its residents). Nothing in the Constitution, and no decision of this Court, compels that result.

2. As respondents correctly explain (Br. in Opp. 13-17), this Court's decisions recognizing the States' broad authority to tax their own residents have typically addressed challenges brought under the Due Process Clause, rather than under the Commerce Clause. Respondents identify no decision of this Court, however, holding that the Commerce Clause effectively subjugates a State's "ordinary prerogative to tax the income of every resident," *Chickasaw Nation*, 515 U.S. at 464, to a right of first refusal by the State in which the income is earned. Income taxes have long been "a recognized method of distributing the burdens of government, favored because [they] requir[e] contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay." *Shaffer* v. *Carter*, 252 U.S. 37, 51 (1920). "Taxes of this character were imposed by several of the States at or shortly after the adoption of the Federal Constitution." *Ibid.* The States did not likely intend, in ratifying a Constitution that granted Congress the exclusive authority to regulate interstate commerce, to limit their own sovereign authority to impose income taxes on their own residents. Chief Justice Marshall, "speaking for the

[C]ourt" in *McCulloch*, explained "that the States have full power to tax their own people and their own property." *Ibid.*; see *McCulloch*, 17 U.S. (4 Wheat.) at 428-429 (finding it "almost * * * self-evident" that "[a]ll subjects over which the sovereign power of a State extends, are objects of taxation").

If the Commerce Clause limited a State's authority to tax the income of its own residents, as the Maryland Court of Appeals believed, then a longstanding and significant principle of this Court's state-taxation jurisprudence would be a virtual dead letter. In *Fidelity & Columbia Trust Co.* v. *City of Louisville*, 245 U.S. 54 (1917), for example, this Court held that a city in Kentucky could tax bank deposits belonging to one of its residents, notwithstanding that the deposits represented the proceeds of a Missouri business and were held in a Missouri bank. *Id.* at 57-60. Although the Court accepted that "the Missouri deposits could have been taxed in that State," it explained that "liability to taxation in one State does not necessarily exclude liability in another." *Id.* at 58. On respondents' theory, however, the taxpayer could have asserted under the Commerce Clause a valid objection to the imposition of tax by Kentucky (or at least could have claimed a credit for the Missouri taxes if the Kentucky taxes were higher). Recognizing such a right under the Commerce Clause would effectively nullify the Court's Due Process Clause holding. See also *Guaranty Trust Co.* v. *Virginia*, 305 U.S. 19, 22-23 (1938) (concluding that the Due Process and Equal Protection Clauses permitted "imposing two State taxes on the same income," where a New York trust paid taxes on income in New York and a Virginia beneficiary paid taxes on distributions in Virginia).

3. The "modern law of what has come to be called the dormant Commerce Clause is driven by concern about '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, 337-338 (2008) (quoting *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273-274 (1988)). The court below analyzed Maryland's taxation system under the four-part test set forth in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). See Pet. App. 17-32. Under that test, a state tax is consistent with the Commerce Clause so long as it "is applied to an activity with a substantial nexus with the taxing State," "is fairly related to the services provided by the State," "does not discriminate against interstate commerce," and "is fairly apportioned." *Complete Auto*, 430 U.S. at 279.

It is far from clear that the *Complete Auto* test should apply to a State's taxation of its own residents' income. See, *e.g.*, Pet. App. 41 n.2 (Greene, J., dissenting) (observing that, "[i]n most of the cases where the Supreme Court has subjected a tax to the *Complete Auto* test, the tax was directly on interstate commerce itself or items in interstate commerce"). Assuming *arguendo* that the *Complete Auto* test applies, however, Maryland's county income tax satisfies that test, even if Maryland declines to credit out-of-state income taxes against the county tax. Respondents have not disputed that "application of the county tax in this case has a substantial nexus to Maryland or that it is fairly related to services provided by the State." *Id.* at 17-18. And, contrary to the state court of appeals' conclusion (*id.* at 17-32), the county income tax "does not discriminate against interstate com-

merce" and is "fairly apportioned." *Complete Auto*, 430 U.S. at 279.

Discrimination against interstate commerce. This Court has consistently distinguished laws that "regulate[] evenhandedly with only 'incidental' effects on interstate commerce" from those that "discriminate[] against interstate commerce." *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); see, *e.g.*, *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 334 (2007). Maryland's county income tax falls into the former category. It treats all residents of a particular county—whether they earn income in-state or out-of-state—"exactly the same," assessing a tax on each of them at an identical fixed rate. See *id.* at 345 (concluding that certain ordinances, "which treat in-state private business interests exactly the same as out-of-state ones, do not 'discriminate against interstate commerce' for purposes of the dormant Commerce Clause"); see Md. Tax Code §§ 10-103, 10-106; see also Pet. App. 41 (Greene, J., dissenting) (noting that Maryland's county income tax "does not expressly discriminate against interstate commerce"). The tax also lacks any evident protectionist purpose.

The state court of appeals believed that Maryland's income-tax system discriminated against interstate commerce because, in the absence of a credit against the county income tax for income taxes paid to other States, Maryland residents may sometimes pay higher total (in-state plus out-of-state) taxes on out-of-state income than on in-state income. See Pet. App. 30. It is true that a "finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory ef-

fect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984) (citation omitted). But the possibility that a state resident's multistate tax bill will be higher if he earns income out-of-state (and thus is subject to taxation by multiple States) is not in itself a cognizable discriminatory effect under the Commerce Clause. See *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 277 n.12 (1978) (finding no "discriminat[ion] against interstate commerce" where higher taxes were "the consequence of the combined effect" of two different States' statutes). The higher tax bill is no more attributable to Maryland than it is to the other State or States that are taxing the resident's income. See *ibid.*

If it were considered discriminatory to adopt a tax scheme under which residents have a financial incentive to earn income in-state, then any number of state taxation systems would be constitutionally infirm. Suppose, for example, that a State assesses no income tax on its residents, but requires them to pay a property tax or a flat-fee residence tax. The residents of that State will inevitably have higher total tax bills if they earn income in another State that has an income tax (and thus pay both that income tax and the local property or residence tax) than if they earn income locally (and thus pay only the local property or residence tax). Respondents do not contend, however, that state residents are entitled to a credit against their local property taxes for the income taxes they pay in other States. See Br. in Opp. 23 (suggesting that Maryland can replace its current system with increased property taxes).

The Framers could not have contemplated that the Commerce Clause would require *every* resident-specific state tax to give way to the non-resident income

taxes imposed by other States. And even if every State credited its residents for taxes paid in other States, that would not eliminate the potential for out-of-state income to be taxed at a higher rate than in-state income. If State A has an income-tax rate of 5% and State B has an income-tax rate of 7%, then even with a full tax credit from State A, residents of State A will be taxed more on income they earn in State B than on income they earn in State A. To achieve complete equality of taxation between in-state and out-of-state income, it would be necessary for every State to adopt an identical system of taxation. The Commerce Clause, however, leaves to Congress the decision whether to prescribe such a uniform national code; it does not in itself impose one. See *Moorman Mfg.*, 437 U.S. at 279-280.

Fair apportionment. The "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg* v. *Sweet*, 488 U.S. 252, 260-261 (1989). "[W]here taxation of income from interstate business is in issue, apportionment disputes have often centered around specific formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 186 (1995). The Court has held, for example, that under fair-apportionment principles, California cannot apply a tax (of 5.5%) to all of an out-of-state corporation's income, but can apply the tax only to the fraction of the corporation's income that represents a rough approximation of the "value * * * generated" in California. *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164, 175 n.12, 183 (1983). The size of that

"slic[e]" of the "taxable pie," *Jefferson Lines*, 514 U.S. at 186, does not depend on whether other States actually impose taxes on the remainder of the taxpayer's income. See, *e.g.*, *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644-645 (1984).

Respondents do not contend that, whenever a Maryland resident earns income in other States, Maryland may tax only a fixed portion of that income. Such a rule would saddle Maryland (and the other States) with the infeasible task of making an apples-to-oranges comparison—between the strength of Maryland's interest in taxing such income based on the recipient's residence and the strength of another State's interest in taxing the income based on the place where it was earned—in order to decide how much of the "taxable pie" is fairly allocable to Maryland.[2] Such a rule would also mean that some percentage of a Maryland resident's out-of-state income is beyond Maryland's power to tax *even if* the State in

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[2] This case does not present any question about the Commerce Clause implications of a State directly taxing the income of a domestic corporation. In such a circumstance, apportionment would not necessarily be infeasible. See, *e.g.*, *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 663 (1948) (holding that New York could tax only the portion of a domestic corporation's gross income from sale of interstate bus tickets that reflected miles traveled in New York). Because a State's relationship to a domestic corporation is fundamentally economic in nature, its interest in taxing the corporation's income need not be considered qualitatively different in character from the interest of other States in taxing the same income. The relationship between an *individual* resident and the State in which he resides, however, is unique and different in kind from the relationship between that resident and a State in which he merely earns income. See, *e.g.*, *Chickasaw Nation*, 515 U.S. at 463-464 & n.11.

which the income is earned does not impose any tax upon it.

Although the court below purported to apply the judicial tests that this Court has employed in the fair-apportionment context (see Pet. App. 17-27), it did not identify any specific portion of Maryland residents' out-of-state income as being categorically beyond Maryland's authority to tax. Rather, the court appeared to accept that every dollar earned by a Maryland resident, including dollars earned through out-of-state activity, may be taxed in full by Maryland and its counties *unless* the State in which the income is earned imposes its own tax upon that income. The constitutional infirmity that the court perceived lay in the failure of Maryland's counties to provide a credit for out-of-state taxes actually imposed and paid on Maryland residents' out-of-state income. See, *e.g.*, *id.* at 30 ("[T]he failure to allow a credit is at the heart of the discrimination in this case."); *id.* at 34 ("What is unconstitutional is the application—or lack thereof—of the credit to the county income tax."). That rationale, which makes the taxing authority of Maryland and its counties contingent on taxing decisions of other States, cannot be reconciled with this Court's dormant Commerce Clause jurisprudence. See *Armco*, 467 U.S. at 644-645 (rejecting approach under which "the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of 49 other States").

For reasons already discussed, see pp. 13-15, *supra*, a tax scheme does not violate the Commerce Clause simply because residents may pay less overall in taxes if they earn income locally. Because a resident who believes that his taxes are unfair can "com-

plain about and change the tax through the [state] political process," it "is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg*, 488 U.S. at 266.

B. The Question Presented Warrants This Court's Review

1. The court below resolved a question of exceptional importance to Maryland, and its decision should be reviewed by this Court. The petition explains (at 15) that, if the decision below is permitted to stand, Maryland's income-tax revenue will be reduced by an estimated $45 million to $50 million per year. In addition, residents could file retroactive tax-refund claims seeking as much as $120 million. *Ibid.* Respondents suggest (Br. in Opp. 23) that the Maryland legislature could mitigate the effect of the decision by, for example, raising the overall tax rate. As respondents recognize (*ibid.*), however, "[s]uch increases may prove locally unpopular." Before Maryland is forced to take such measures, this Court should address whether the court below erred in invalidating the taxation scheme that Maryland's representatives enacted and that Maryland has long applied.

That is particularly so because the body of this Court's precedents gave Maryland ample reason to believe that its taxing scheme was constitutional. In *Chickasaw Nation*, this Court summarized its prior decisions by asserting without qualification that a State "may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." 515 U.S. at 462-463. The Court recognized that, "[a]lthough sovereigns have authority to tax all income of their residents, including income earned outside their borders, they sometimes elect not to do so, and they commonly credit income taxes paid to other sover-

eigns." *Id.* at 463 n.12. It stated, however, that "if foreign income of a domiciliary taxpayer is exempted, this is an independent policy decision and not one compelled by jurisdictional considerations." *Ibid.* (quoting Am. Law Inst., *Federal Income Tax Project: International Aspects of United States Income Taxation* 6 (1987)) (brackets omitted).

To be sure, the Court in *Chickasaw Nation*, and in the prior decisions cited in that opinion, was not confronted with a challenge premised on the dormant Commerce Clause. In articulating the applicable constitutional rule, however, the Court has not simply stated that particular constitutional provisions (such as the Due Process Clause) do not limit a State's power to tax its residents' income. Rather, it has described the power to tax all such income as an affirmative aspect of state sovereignty. See, *e.g.*, *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."). The practical effect of the decision below therefore is to prevent Maryland from fully exercising a power that the State had good reason to believe it possessed.

The question presented also appears to have importance beyond its effect on Maryland. Respondents do not dispute the existence of more than 2000 municipal income taxes nationwide that might not provide credits for out-of-state income taxes. Br. in Opp. 26-27; see Pet. 15-16; Int'l Mun. Lawyers Ass'n Amicus Br. 14-18. Because "a municipality is merely a political subdivision of the State from which its authority derives," *United Bldg. & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 215 (1984), those municipal taxes could be invalidated if courts in

the relevant jurisdictions find the reasoning of the decision below persuasive. Before the court below issued its ruling, state courts addressing issues similar (though not identical) to the question presented here had strongly suggested that a tax system of this sort would be consistent with the Commerce Clause. See *Tamagni* v. *Tax Appeals Tribunal*, 695 N.E.2d 1125, 1134 (N.Y.) (reasoning that "dormant Commerce Clause analysis" is "inapplicab[le] * * * to State resident income taxation"), cert. denied, 525 U.S. 931 (1998); *Keller* v. *Department of Revenue*, 872 P.2d 414, 416 (Or. 1994) (reasoning that *Complete Auto* does not "alter the rule" that a "state's taxing authority extends to all of the income earned by its residents, including income earned outside the state"). The uncertainty created by the decision below, together with the possibility that similar tax schemes might be deemed constitutional in some jurisdictions but not in others, provides additional reason for this Court's review.

2. This case is a suitable vehicle for resolving the question presented. This Court has jurisdiction under 28 U.S.C. 1257(a), notwithstanding the fact that the decision below contemplates further proceedings on remand to determine the precise amount of respondents' tax liability, see Pet. App. 34. Although Section 1257(a) authorizes review only of "[f]inal judgments or decrees," this Court has long recognized that its jurisdiction encompasses cases "in which [a] federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975); see Stephen M. Shapiro et al., *Supreme Court Practice*

165-166 (10th ed. 2013). In this case, the question whether Maryland may collect the entire county income tax will persist, regardless of the precise tax liability computed on remand.

For reasons explained in the reply brief in support of the petition (at 3-5), the question presented was "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992); cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) ("A litigant seeking review in this Court of a claim properly raised in the lower courts * * * generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below."). The issues are largely legal in nature, are clearly defined, and do not require any additional factual development. In light of the immediate impact of the decision below on the sovereign interests and fiscal solvency of Maryland, there is no sound reason to delay review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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