No. 23-914

IN THE

Supreme Court of the United States

DIANE ZILKA,

Petitioner,

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA,

Respondent.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Petitioner has demonstrated that the decision below creates a square and acknowledged split among state supreme courts about whether tax burdens must be assessed at the state level and in light of the state's tax scheme as a whole to survive under the Commerce Clause. This is a fundamental methodological question that determines whether interstate movement of goods and labor can be unfairly burdened by individual states. Respondent does not deny that the Pennsylvania Supreme Court's decision below conflicts with decisions from the Colorado and West Virginia supreme courts nor that the conflict in this case arises at least in part from courts' disagreement about how to interpret this Court's decision in *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542 (2015). Indeed, not only did the concurring and dissenting opinions below—representing three of the five justices on that court—suggest this Court should grant certiorari to provide additional guidance about when a state's policy for crediting income earned interstate passes constitutional muster, that call has been echoed in the *amici* briefs submitted in this case and by multiple tax-law practitioners.

Respondent offers various reasons why the conflict does not warrant this Court's review but they are merely attempts to distract from the fact that this case is certworthy. Moreover, all of Respondent's arguments are unpersuasive. Only this Court can resolve the important and recurring questions under the Commerce Clause that this case presents. The Court should grant certiorari.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT'S CONCLUSION THAT STATE AND LOCAL TAXES NEED NOT BE CONSIDERED IN THE AGGREGATE CREATES AN ACKNOWLEDGED SPLIT ABOUT WHEN A STATE'S TAX SCHEME SURVIVES UNDER THE COMMERCE CLAUSE.

A. Respondent Does Not Deny That The Court Below Disagreed With Other State Courts on the Question Presented.

Respondent does not and could not deny that the decision below rejected holdings from the Colorado and West Virginia high courts that state and local tax liabilities must be aggregated for constitutional purposes. See Pet. 13–17; Phila. Opp. 10–12. Instead, Respondent attempts to downplay the split as "shallow" and "immature." Phila. Opp. 10–12. A two-to-one split, however, is no reason for this Court to ignore the outcome-determinative issues these cases raise on important federal Constitutional questions. See *Mallory* v. *Norfolk S. Ry.*, 600 U.S. 122, 127 (2023) (granting certiorari to decide conflict between Pennsylvania Supreme Court and Georgia Supreme Court on due process limits on exercise of personal jurisdiction).

Respondent first suggests that the Colorado Supreme Court's decision in *General Motors Corp.* v. *City & County of Denver*, 990 P.2d 59 (Colo. 1999) (en banc) and the Supreme Court of Appeals of West Virginia's decision in *Matkovich* v. *CSX Transportation, Inc.*, 793 S.E.2d 888 (W. Va. 2016), are not really in conflict with the decision below because those cases concern use taxes rather than income taxes. Phila. Opp. 2, 10–11. This Court in

Wynne, however, expressly rejected any distinction between taxes on goods and taxes on income for constitutional Commerce Clause purposes. 575 U.S. at 551 ("We see no reason why the distinction between gross receipts and net income should matter . . . ."); see Pet. 15 n. 7.

Respondent then tries to diminish the importance of the split based on the length of the relevant analyses in *General Motors* and *Matkovich* and the purported insignificance of those cases. Phila. Opp. 10–12. But Respondent does not—nor could it—dispute that the split is outcome-determinative in this case. Both the Colorado and West Virginia high courts concluded that local and state level tax liabilities must be aggregated to survive the internal consistency test and satisfy federal Constitutional restraints. See *Matkovich*, 793 S.E.2d at 896–98; *Gen. Motors Corp.*, 990 P.2d at 69–71. Thus, as Petitioner explained, if Ms. Zilka had resided in Colorado or West Virginia, those courts would have considered whether the tax policy passed constitutional muster by considering her local and state tax liabilities together, or in other words, the combined amount Ms. Zilka owed to Pennsylvania and Philadelphia and the combined amount she owed to Delaware and Wilmington. Applying the internal consistency test by examining the state's tax scheme as a whole in that fashion would have resulted in an undeniable reduction of Ms. Zilka's tax liability. Pet. 16–17.

In any case, the courts' analyses are not so brief as Respondent argues. Phila. Opp. 10–12. The *General Motors* court's conclusion that "[i]nternal consistency requires that states impose identical taxes when viewed in the aggregate—as a collection of state and sub-state taxing jurisdictions"

carries through its examination of whether Denver's use tax meets the internal consistency test under *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). 990 P.2d at 69–71. Using a hypothetical in which a purchaser was subject to Colorado, Denver, Michigan, and Detroit taxes, the court concluded that because Denver credited only tax paid to other municipalities, the hypothetical purchaser was subject to a higher tax burden than an in-state purchaser. *Id.* at 70. "Thus, Denver's use tax could burden interstate commerce [and] . . . provides an internally inconsistent crediting scheme." *Id.* To save the use tax provision from its apparent invalidity, the court interpreted Denver's separate exemption provision "to reduce the tax owed Denver by the amount of sales and use tax paid to other state and sub-state taxing jurisdictions." *Id.*; see *id.* at n. 11 (noting any fair notice issue with the statutory language might never arise "[p]rovided that Denver grants the credits demanded by the Constitution").

Matkovich similarly posed a hypothetical demonstrating that a taxpayer who received a credit against only sales tax paid to other states and not also other municipalities incurred a higher tax burden than an instate purchaser. 793 S.E.2d at 897–98. And, when determining whether the tax scheme discriminated against interstate commerce, the court reiterated that: "we again determine that the proper, and constitutionally sound, construction to be afforded to this provision requires that it apply with equal force to grant a credit for sales taxes paid both to other states and to sales taxes paid to the municipalities of other states." *Id.* at 898.

Respondent also unsuccessfully attempts to minimize that the conflict arises in part from disagreement about this Court's decision in *Wynne*. Respondent argues that *General Motors* predated *Wynne* and suggests *Matkovich* misunderstood it. Phila. Opp. 10–11. But notwithstanding that *General Motors* predated *Wynne*, it anticipated this Court's guidance in that case, even if it did not have the benefit of that decision. Moreover, *Matkovich* applied *Wynne*'s guidance to consider the "total tax burden on interstate commerce." *Matkovich*, 793 S.E.2d at 896 (quoting *Wynne*, 575 U.S. at 567); see Pet. 14–16. The Pennsylvania Supreme Court in the decision below expressly considered and rejected that interpretation of *Wynne*. See Pet. 13; Pet. App. 30a–33a. This Court should not ignore a clear split that arises out of state courts' confusion about the meaning of this Court's precedent. See, e.g., Pet. App. 65a n.8 (Dougherty, J. and Mundy J., dissenting) ("It may well be this case is worthy of *certiorari* so that the Court can provide further guidance with respect to its dormant Commerce Clause jurisprudence.").

B. The State Court Split Warrants This Court's Review.

Petitioner has demonstrated that the state-court conflict needs to be resolved because federal constitutional issues concerning taxation of cross-border economic activity should not be decided by the vagaries of geography. Pet. 16–17. Both the concurring and dissenting opinions in the decision below strongly suggested the Court should grant certiorari to resolve this issue. See Pet. 11, 12, 17, 21. Industry groups have submitted *amici* briefs that demonstrate the need to resolve the conflict. Brief of National Taxpayers Union Foundation ("NTUF Br.") 7 ("A distinction

between a 'locally administered' and 'state' tax has no constitutional significance, is at odds with *Wynne*, and in practice would create a problematic loophole."); Brief of the American College of Tax Counsel ("ACTC Br.") 2 ("This Court should take this opportunity to clarify its dormant Commerce Clause jurisprudence with respect to the thousands of local taxes throughout the Nation."). And practitioners have also advocated for the Court to grant certiorari to resolve this important constitutional issue. Audrey E.P. Pollitt, *Zilka: A No-Wynne Situation?*, 112 Tax Notes State 345 (Apr. 29, 2024) (compiling nine board members' thoughts on the Pennsylvania Supreme Court's decision below); see also Steven N.J. Wlodychak, *Zilka: A SALT Case the Court Must Take*, Tax Notes State, 2 (Feb. 26, 2024) ("[T]his is an appeal the U.S. Supreme Court must take.").[1]

This commentary refutes Respondent's position that there has been a "dearth of attention to this issue" so "further percolation" is warranted. Phila. Opp. 2, 15–17. There is no percolation that would result in a better case in which to address this issue in the future. This case is an ideal vehicle; the Pennsylvania Supreme Court's decision includes three separate opinions on the issue—two of which explicitly noted the case "worthy of certiorari." Pet. 21. More fundamentally, the Pennsylvania Supreme Court's express rejection of the Colorado and West Virginia

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[1] Indeed, as noted in the Petition, Walter Hellerstein, a leading commentator on state tax matters whom the Court has routinely cited, updated his 2017 article advocating that a proper constitutional analysis examines state and local tax burdens collectively explicitly because of the Pennsylvania Commonwealth Court's decision in this case. Pet. 16.

courts' decisions makes clear that the conflict will not resolve itself. Respondent attempts to distract this Court from the real issues with its half-hearted argument that the Court's decision in *National Pork Producers Council* v. *Ross*, 598 U.S. 356 (2023), has "significant implications" for this case. Phila. Opp. 16. *Ross* concerned a challenge to a California law that forbids the in-state sale of pork that comes from pigs confined in a "cruel" manner. 598 U.S. at 365–66. Petitioners there "disavow[ed] any discrimination-based claim, conceding that Proposition 12 imposes the same burdens on in-state pork producers that it imposes on out-of-state ones." *Id.* at 370 (emphasis omitted). Petitioner here claims the opposite: Philadelphia's tax policy impermissibly discriminates against interstate commerce by imposing a higher tax burden on residents who work out-of-state than on in-state workers. See, e.g., Pet. 2. That kind of discrimination is per se illegal under the dormant Commerce Clause.

Respondent also disputes that the Pennsylvania Supreme Court's decision empowers states to discriminate against interstate commerce by shifting tax burdens to the local level where they are not subject to full credit. Phila. Opp. 12–15. This is not an "abstract" harm; it is a concrete threat identified by the concurrence in the decision below and recognized by experienced tax-law practitioners. See Pet. App. 52a (Wecht, J., concurring) ("[W]ithout some form of state-level aggregation, a state potentially could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by authorizing cities or political subdivisions to impose a portion of the tax directly); Pollitt, *supra,* at 350 ("If *Zilka* is correct, then states can delegate their taxing authority to localities and avoid the responsi-

bility to credit state taxes."). This revenue-raising discrimination would not require "radical restructuring" as Respondent asserts; instead, under the ad hoc analysis endorsed by the Pennsylvania Supreme Court, states will simply shift the entity collecting the tax. See Phila. Opp. 14. Only immediate review by this Court will ensure that states do not follow Pennsylvania's example of refusing to provide full credit to its citizens who pay taxes to other states.[2]

Respondent wrongly suggests the only way to cure the issues Petitioner raises is through establishment of a national tax code. See Phila. Opp. 13–14. Petitioner does not ask this Court to establish a national tax code. Rather, this Court should intervene to clarify and harmonize federal constitutional principles so that taxpayers who earn income interstate will not be subject to an impermissibly higher tax burden because of their cross-border economic activity in some states, like Pennsylvania, but not in others. This is precisely the sort of inconsistency in federal law that this Court grants certiorari to prevent.

C. Respondent's Merits Arguments Do Not Provide A Basis for Denying Review.

Respondent makes several arguments why it believes the decision below was correct, but these arguments go to the merits and do not provide a reason to leave the state-court conflict unresolved. Phila. Opp. 17–18. As the concurring and dissenting opin-

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[2] Indeed, the implications of the Pennsylvania Court's decision are far reaching. According to the Tax Foundation, 38 states authorize their municipalities to impose local sales taxes. *See* Jared Walczak, *State and Local Sales Tax Rates, 2024*, Tax Foundation (Feb. 6, 2024), https://taxfoundation.org/data/all/state/2024-sales-taxes/. The decision below, therefore, raises issues well beyond Pennsylvania, West Virginia, and Colorado.

ions below, *amici* briefs, and practitioners have urged, the Court should grant certiorari.

In any event, Respondent's merits arguments are wrong. Respondent ignores that the purpose of considering local and state taxes in the aggregate—and therefore assessing how a tax scheme operates as a whole—arises from the relationship between a state and its political subdivisions, not because state and local taxes are indistinguishable. As *amici* point out, this Court has long held that, as creatures of the state, localities are subject to the same constitutional restraints as the state itself. NTUF Br. 7; ACTC Br. 5–6; see Pet. 19. Thus, considering a state's tax scheme as a whole avoids the risk that the scheme will impermissibly burden interstate commerce.

Instead, Respondent doubles down on the Pennsylvania Supreme Court's conclusion that *Wynne* considered the Maryland tax scheme as a whole only because it concluded the state and county taxes at issue were in fact both state-level taxes. Phila. Opp. 17–18. Respondent argues *Wynne* does not endorse aggregating local and state tax liabilities because if the Court agreed that aggregation was per se necessary, it would have had no cause to point out that Maryland's "county" tax was actually a state-level tax. Phila. Opp. 17. But as the ACTC brief explained, "that observation has no bearing on the Court's reasoning that the overall scheme was unconstitutional because it discriminates against interstate commerce. Had the 'county tax' in the Court's estimation been true to its name, the result in *Wynne* would have been the same." ACTC Br. 9–10. Indeed, the *Wynne* Court noted that the "critical point" was the "total tax burden on interstate commerce." 575 U.S. at 567. Regardless, Respondent's entrenched view of *Wynne* on-

ly highlights the need for this Court to grant certiorari to clarify the meaning of its precedent.

Respondent's final argument is that Philadelphia's tax policy is internally consistent because if every state adopted a scheme in which it applied credits separately to each of two taxes, taxpayers who earned income interstate would not be taxed more than purely intrastate workers. Phila. Opp. 18–19. This argument dovetails with Respondent's claims that Ms. Zilka's higher tax burden occurred only as the result of the interaction of two non-discriminatory tax schemes. Phila. Opp. 13. But Respondent misses the constitutional question. Its conclusions proceed from the premise that the internal consistency test allows for local and state tax burdens to be analyzed separately. When Ms. Zilka's tax burdens are considered in the aggregate, however, it is clear that Ms. Zilka's tax burden is higher than her in-state counterpart not as the result of the ordinary reality of differential tax rates but because of Philadelphia's impermissible discrimination against interstate commerce based solely on cross-border economic activity. See Pet. 19–20.[3] This disparity is precisely what the Commerce Clause prohibits as a burden on interstate activity. See *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979) (noting the purpose of the Commerce Clause was to prevent "the tendencies toward economic Balkanization" prevalent before passage of the Constitution).

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[3] As Respondent correctly points out, Phila. Opp. 13 n. 2, Petitioner's explanation of Ms. Zilka's impermissibly higher tax burden contained a slight mathematical error. That, however, does not change the substance or merit of the argument.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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