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

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Not surprisingly, the Solicitor General's response to this Court's invitation in this case is to recommend that the Court deny the petition because Pennsylvania's taxing scheme is, in the Solicitor General's view, constitutional. The reason this is not a surprise is that the United States embraced Maryland's taxing scheme in *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542 (2015). Of course, this Court in *Wynne* rejected the United States's argument that Maryland's tax was constitutional. Undeterred by that holding, the United States stubbornly stands by its view that the plainly discriminatory and burdensome tax imposed by Pennsylvania via delegated authority to Philadelphia is nevertheless constitutional. What the United States largely ignores is the acknowledged conflict between State Supreme Courts, which all of the Justices on the Pennsylvania Supreme Court recognized and which is outcome determinative. Also, the Solicitor General completely ignores both of the amicus briefs filed in support of the petition and the academic writers cited in the petition and reply, which demonstrate that the aggregation issue presented by the decision below needs to be resolved now in order to provide clarity for both taxpayers and tax professionals in determining how much taxes are owed.

The question that the Government's brief invites is what would its position be if this were a petition by the State of West Virginia or Colorado seeking review of its highest court's decision striking down an effort to disaggregate state and local taxes for purposes of a dormant Commerce Clause challenge. The answer seems quite clear: the Solicitor General would urge the Court to grant certiorari, just as it did in

Wynne. The need for this Court's intervention on this issue should not turn on which side won. It should be decided on the basis that there is a square and acknowledged conflict among the lower courts based on the proper interpretation of one of this Court's prior decisions, and only this Court can prevent the outcome of these cases to turn solely on geography.

The Government attempts to wish away the conflict in the State Supreme Courts by arguing that they can be distinguished, but that was not the view of the Pennsylvania Supreme Court. It recognized that the dormant Commerce Clause analysis adopted by the West Virginia and Colorado courts, which was fully consistent with this Court's dictum in *Wynne*, would have resulted in Philadelphia's tax being declared unconstitutional. The majority simply disagreed with them, which was why the concurring and dissenting justices urged this Court to decide the issue. While the Court reasonably invited the Solicitor General's views because it did so in *Wynne*, what is clear is that those views do not justify denying certiorari. They simply tell the Court what the United States believes is the correct outcome if the Court were to grant certiorari. Given the absence of any programmatic or litigating interest of the United States in this case or any effort to refute the fundamental importance of the question presented, the Solicitor General's views do not warrant deference at the certiorari stage. The Court should grant the petition and decide the merits of the United States's position on the basis of full briefing and argument.

ARGUMENT

I. THE UNITED STATES PRESENTS NO ARGUMENTS WHY THIS COURT SHOULD DECLINE TO GRANT CERTIORARI; INSTEAD, IT PREMATURELY FOCUSES ON MISGUIDED MERITS ARGUMENTS.

A. The Decision Below Is At Odds With *Wynne*, Regardless of Application Of The Internal Consistency Test.

The Solicitor General's brief devotes its entire argument to trying to make the "internal consistency" test the beginning and end of the analysis.[1] Where this endeavor fails in the first instance is that it is an effort to focus the Court on beside-the-point details to prevent the Court from seeing the relevant, and bigger-picture, issue. The issue in this case is even easier than the one in *Wynne*. It is simply whether Pennsylvania's income taxes must be aggregated with Philadelphia's in order to determine whether that scheme in its entirety violates the dormant Commerce Clause. The Solicitor General concedes that the aggregation issue "might warrant resolution" in an appropriate case. S.G. Br. 19. What is clear is that this is that case. And that fact follows directly from what this Court held in *Wynne* and how the Pennsylvania Supreme Court majority avoided that holding here.

This Court held in the very first page of its opinion in *Wynne* that "Maryland does not offer its

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[1] The Solicitor General claims that Petitioner has addressed only the internal consistency element of the four-part *Complete Auto* test. S.G. Br. 9. n.1. In fact, Petitioner has always argued that the Pennsylvania Supreme Court's decision also violates the *Complete Auto* test's separate prohibition on discrimination against interstate commerce. *See* Pet. 17, 20; Reply 7, 10.

residents a full credit against the income taxes that they pay to other States. The effect of this scheme is that some of the income earned by Maryland residents outside the State is taxed twice." 575 U.S. at 545. And that taxing approach "creates an incentive for taxpayers to opt for intrastate rather than interstate economic activity." *Id.* The key defect in Maryland's taxing scheme was its failure to give full credit to taxes paid in other States.

Pennsylvania's scheme, if it includes both the State's and the City of Philadelphia's taxes, does exactly what this Court held is invalid in *Wynne*. By allowing Philadelphia to ignore taxes paid in Delaware, the scheme taxes Petitioner's income twice and clearly incentivizes her not to work out-of-state. The answer offered by the majority of the Pennsylvania Supreme Court is that Philadelphia's taxing statute should be ignored for purposes of determining the impact of Pennsylvania's taxing scheme. This Court in *Wynne* in dicta anticipated this problem and said that "it is immaterial that Maryland assigns different labels (i.e. 'county tax . . .)' to these taxes." 575 U. S. at 564 n.8. But it is the decision below that reads the dicta to allow an "ad hoc" approach in deciding when to aggregate state and local taxes. Thus, it is that court's refusal to aggregate state and local taxes that saved the Pennsylvania statute here and gives rise to the question presented. There is no need to focus excessively as the United States does about the "internal consistency" test to know that Pennsylvania's scheme, if not properly aggregated, does exactly what Maryland's did—burden and discriminate against out-of-state activities by its residents—and is for that reason unconstitutional.

B. The Decision Below Is Unconstitutional Under The Internal Consistency Test In Any Case.

Even if this Court were to delve into the Solicitor General's unnecessarily complicated internal consistency analysis, the Government's arguments present no basis to deny certiorari; the Government is wrong both as to this Court's application of the test in *Wynne* and its claim that Philadelphia's tax position passes the internal consistency test regardless of whether it aggregates local and state level tax liabilities.

The internal consistency test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Wynne*, 575 U.S. at 562 (quoting *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)). *Wynne* made clear that the internal consistency test considers "the total tax burden on interstate commerce" and for that reason, the Court "evaluate[d] the Maryland income tax scheme as a whole." *Id.* at 567, 564 n. 8.[2] When doing so—again by looking at the "structure of the tax," not the particular tax rates as the Solicitor General appears to suggest is appropriate—this Court held that Mary-

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[2] This makes sense: "Because a state's political subdivisions are creatures of the state, their exercises of tax power are treated as the exercise of state tax power and adjudicated according to the standards restraining the exercise of state tax power." Walter Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable ? (Revised)*, 103 Tax Notes State 743, 744 (Feb. 14, 2022) (footnote omitted). Otherwise, and under the Pennsylvania Supreme Court's decision, municipalities could impermissibly attempt to claim for themselves the power of the state. The Solicitor General does not suggest otherwise.

land's taxing position violated the internal consistency test—and therefore the dormant Commerce Clause —because "it taxes income earned interstate at a higher rate than income earned intrastate." *Wynne*, 575 U.S. at 567.

An identical situation occurs with Philadelphia's tax practice, or in other words—and contrary to the Solicitor General's position—when local and state level tax liabilities are not aggregated.

If every jurisdiction imposed a wage tax which made 100% of the income earned by its residents subject to tax and 100% of the income earned by nonresidents for work performed in the taxing jurisdiction subject to tax, and if every local jurisdiction did not allow its residents to claim a full credit by aggregating the state and local taxes paid to their resident jurisdictions and to other jurisdictions, every resident working in interstate commerce would have 100% of their income subject to tax by the jurisdiction where they work and some portion of their income additionally taxed by the jurisdiction where they live. Without a full credit, individuals working interstate pay tax upon more than 100% of their income simply because they worked interstate. In this case, Petitioner was subject to income taxes upon 100% of her income four times, once each by Pennsylvania, Delaware, Wilmington, and Philadelphia. After the Pennsylvania credit and partial Philadelphia credit were allowed, Petitioner remained subject to Philadelphia Wage Tax based upon 100% of her income, all of which was earned in Delaware, and upon 49.2% of her income subject to Delaware tax. As a result, 149.2% of her income would be subject to state and local income taxes simply because she worked interstate.

The unconstitutionality is clear: if every State or locality adopted Philadelphia's tax practice, interstate income would be subject to multiple taxation nationwide. Philadelphia's tax practice is thus internally inconsistent because adoption of an identical position by every other State or locality would "add [a] burden to interstate commerce that intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185; see also *Cent. Greyhound Lines, Inc.* v. *Mealey*, 334 U.S. 653, 662-663 (1948); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, 439 (1939); *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938).

C. The Case Warrants This Court's Review.

This case presents a recurring and important question of federal constitutional law and warrants this Court's review. See Pet. 16–17; Reply 5–8. The Solicitor General fails to grapple with this fact, including the numerous calls from the court below, industry groups, and practitioners requesting the Court to grant certiorari. See, e.g., Pet. 11–12; Br. of the Am. Coll. of Tax Couns. 2 ("ACTC Br.") ("This Court should take this opportunity to clarify its dormant Commerce Clause jurisprudence with respect to the thousands of local taxes throughout the Nation."); Doug Sheppard: *Diane Zilka: The Taxpayer Who Crossed the Delaware Into SALT History,* 114 Tax Notes State 743, 743 (Dec. 23, 2024) (quoting Steven N.J. Wlodychak's opinion that "if Zilka isn't the case where the Court must examine the aggregation of state and local income taxes . . . I don't know what case would [be]"); Steven N.J. Wlodychak, *Zilka: A SALT Case the Court Must Take*, 111 Tax Notes State 607, 607 (Feb. 26, 2024) ("[T]his is an appeal the U.S. Supreme Court must take.").

Indeed, the Pennsylvania Supreme Court's decision raises a real threat that states could discriminate against interstate commerce by shifting tax burdens to the local level where they are not subject to full credit. 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); Audrey E.P. Pollitt, *Zilka*: *A No*-Wynne *Situation?* 112 Tax Notes State 345, 350 (Apr. 29, 2024) ("If *Zilka* is correct, then states can delegate their taxing authority to localities and avoid the responsibility to credit state taxes."). Not only do 38 states authorize their municipalities to impose local sales taxes,[3] but the growing prevalence of remote work environments has exponentially increased the instances of cross-border economic earnings among the nation's taxpayers, making this issue particularly important to the current workforce. Br. of Nat. Taxpayers Union Found. 2 ("[S]purred on by the pandemic, more Americans than ever before are living in one place while working in another."); See ACTC Br. 13 ("The Philadelphia tax . . . distort[s] the labor market and preclude[es] tax-neutral economic choices by employees and employers.").

Given the broad sweep of citizens who are impacted by the question presented, and explicit disagreement among tax professionals about whether the decision below was correctly decided, Sheppard, *supra*, at 743–44, it is crucial that this Court grant cer-

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[3] *See* Jared Walczak, Tax Found., *State and Local Sales Tax Rates, Midyear 2024*, (July 9, 2024), https://taxfoundation.org/data/all/state/2024-sales-tax-rates-midyear/.

tiorari to clarify its dormant Commerce Clause jurisprudence and prevent interstate workers from being subject to impermissibly higher tax burdens based solely on where they live.

CONCLUSION

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

Respectfully submitted,

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