No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, prohibits the State of West Virginia from exempting from state taxation the retirement benefits of certain former state law-enforcement officers, without providing the same exemption for the retirement benefits of former employees of the United States Marshals Service.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

United States Law

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Other Authorities

INTRODUCTION

Like virtually all retired federal, state, and local employees in West Virginia, and unlike any private-sector retirees, James Dawson is entitled to exempt the first $2,000 of his retirement income when calculating his state income tax. W. Va. Code § 11-21-12(c)(5). Petitioners argue that West Virginia's refusal to allow them to claim a larger exemption available to a surpassingly small number of state retirees who participate in specific state-managed retirement plans unfairly discriminates against Mr. Dawson *as a federal retiree*. The West Virginia Supreme Court of Appeals rightly rejected this claim.

The intergovernmental tax immunity doctrine petitioners invoke, as codified in 4 U.S.C. § 111, does not police the minutia of state tax policy. The doctrine has always been concerned with how sovereigns relate to each other in our federal system—barring discrimination against co-sovereigns to avoid interference with the essential functions of one government through the taxing powers of another. Petitioners urge the Court to transform this structural protection into a tool for individual federal workers to force States into giving them the most favorable tax treatment available to any state employee. Yet where a State treats federal retirees the same as the vast majority of its own retired workforce, and even better than it treats all private-sector and some state retirees, the principles animating the tax immunity doctrine do not hold sway.

Petitioners' claim also fails because the state tax exemption they challenge, West Virginia Code § 11-21-12(c)(6), does not distinguish among taxpayers

based on whether the State or federal government signs a retiree's monthly benefits check. Petitioners cannot show that Mr. Dawson is similarly situated to the state retirees eligible for the exemption, as their attempts in state court to compare Mr. Dawson to different and sometimes inconsistent classes of state law enforcement officers show. There are also meaningful differences between retired U.S. Marshals like Mr. Dawson and the state retirees who contributed to (and now receive benefits from) the retirement plans Section 12(c)(6) names. These differences justify the State's policy choice not to expand its tailored, discrete exemption regime—particularly because they make clear that Mr. Dawson is more like the vast majority of state retirees who do *not* receive the challenged exemption than those who do.

STATEMENT

1. The doctrine of intergovernmental tax immunity constrains both States and the federal government from using their respective taxing authority to cause "undue interference, through the exercise of that power, with the governmental activities of the other." *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477-78 (1939). The States' immunity "arises from the constitutional structure and a concern for protecting state sovereignty"; the federal government's flows "from the Supremacy Clause." *South Carolina* v. *Baker*, 485 U.S. 505, 518 n.11 (1988). This Court first recognized the doctrine in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), which invalidated a state tax on notes issued by the Bank of the United States, but no state-

chartered banks. *Id.* at 436-37; see also, *e.g.*, *United States* v. *Cty. of Fresno*, 429 U.S. 452, 457-58 (1977).

In the century after *McCulloch*, the Court embraced an increasingly "expansive" view of intergovernmental tax immunity, "invalidating, among many others, state taxes on the income of federal employees; on income derived from property leased from the Federal Government; and on sales to the United States." *United States* v. *New Mexico*, 455 U.S. 720, 731 (1982) (citations omitted); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 173-74 (1989). Reasoning that a State's power to tax entities the federal government uses to execute its legitimate purposes could undermine those ends, see *McCulloch*, 17 U.S. (4 Wheat.) at 432, the Court began to find concern with nearly *any* state tax on the federal government or one of its instrumentalities. *E.g.*, *Cty. of Fresno*, 429 U.S. at 460 & n.8; *Weston* v. *City Council of Charleston*, 27 U.S. (2 Pet.) 449, 467 (1829). During this period the tax immunity doctrine was interpreted to bar not only direct taxation of federal entities, but also taxes on federal employees' salaries or income "derived from *any* contract with another government." *Baker*, 485 U.S. at 517; see also *Dobbins* v. *Comm'rs of Erie Cty.*, 41 U.S. (16 Pet.) 435, 449 (1842).

This broad approach to intergovernmental tax immunity soon became untenable; by the 1930s the doctrine had become "divorced both from [its] constitutional foundations" and "'the actual workings of our federalism,'" *New Mexico*, 455 U.S. at 731-32 (quoting *Graves*, 306 U.S. at 490). Now, the view that reigned after *McCulloch* "has been thoroughly

repudiated by modern intergovernmental immunity caselaw." *Baker*, 485 U.S. at 520.

Return to the *McCulloch* framework began with this Court's 1937 decision in *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), which "upheld a state tax on the gross receipts of a contractor providing services to the Federal Government." *New Mexico*, 455 U.S. at 731-32. The doctrinal shift became more apparent still a year later in *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), where the Court upheld a federal tax on state employees that did not unduly burden or obstruct the States' functions. *Id.* at 420-21.

In 1939, *Graves* used similar reasoning to overrule the Court's earlier cases that had prohibited state taxes on the salaries of federal employees. See 306 U.S. at 486. That interpretation had become a tool to unfairly relieve federal employees "from contributing their share of the financial support of the other government, whose benefits they enjoy." *Id.* at 483. More to the point, it did not advance the constitutional doctrine's goal of "prevent[ing] undue interference" with another sovereign's operations. *Id* at 484. Although some part of the burden from state taxes on federal employees will always be passed onto the federal government, *Graves* held that where the state tax is non-discriminatory, this burden is "the normal incident of the organization within the same territory of two governments, each possessing the taxing power." *Id.* at 487.

Also in 1939—after *Helvering* but before the decision came down in *Graves*—Congress considered a legislative solution to resolve uncertainty about

States' authority to tax federal employees. In Section 4 of the Public Salary Tax Act of 1939, Pub. L. No. 76-32, ch. 59, § 4, 53 Stat. 575, Congress ultimately gave its express consent to nondiscriminatory state taxation on the federal workforce. Now codified at 4 U.S.C. § 111(a) ("Section 111"), this statute provides:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

Section 111 essentially codified the narrow approach to intergovernmental tax immunity this Court adopted, as a constitutional matter, in *Graves*. *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 812-13 (1989). "[T]he retention of immunity in § 111" is thus "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Id.* at 813; see also *id.* at 813-14 ("Regardless of whether § 111 provides an independent basis for finding immunity or merely preserves the traditional constitutional prohibition against discriminatory taxes, however, the inquiry is the same.").

2. The Court revisited intergovernmental tax immunity almost thirty years ago in the context of state taxes on federal retirement benefits. In *Davis* v. *Michigan Department of Treasury*, the Court invalidated a state tax that broadly exempted "all retirement benefits" from state and local entities, but no "retirement benefits paid by all other employers, including the Federal Government." 489 U.S. at 805. Framing the inquiry, the Court explained that the "imposition of a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other] must be justified by significant differences between the two classes." *Id.* at 815-16 (alterations in original) (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)). Noting it was "undisputed" that the challenged exemption "discriminate[d] in favor of retired state employees and against retired federal employees," *id.* at 814, the Court proceeded to the second step in the analysis, and found no meaningful differences between state and federal retirees to warrant that treatment, *id.* at 816-17.

The Court applied the same two-part test three years later in *Barker* v. *Kansas*, 503 U.S. 594 (1992), holding that a tax regime exempting state, local, and most federal civil retirees' benefits, but not federal military retirement benefits, violated Section 111. *Id.* at 596 n.1, 605. Another seven years later, however, the Court refused to expand the intergovernmental tax immunity doctrine further, emphasizing "the tight limits" of Section 111 and the modern constitutional approach. *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 436 (1999). There, federal judges challenged a county

occupational tax on anyone who worked within the county and did not pay any state license fee, arguing that—as federal employees in an unlicensed occupation—they could never qualify for the exemption. *Id.* at 427, 433. Yet because the tax applied to other unlicensed *state* employees, not simply federal employees, the Court concluded that the "record show[ed] no discrimination . . . between similarly situated federal and state employees." *Id.* at 443.

3. In West Virginia, taxable income is defined by reference to federal adjusted gross income, and includes income derived from most private, federal, state, and local retirement plans. W. Va. Code § 11-21-12(a), (c); Pet. App. 2a. All retirees—from the private or public sectors—may subtract the first $8,000 of income from their adjusted gross income after age sixty-five, or if the taxpayer becomes permanently disabled. W. Va. Code § 11-21-12(c)(8).

West Virginia law provides additional exemptions for all federal and most state and local retirees. The West Virginia Public Employees Retirement System ("PERS") and the West Virginia State Teachers Retirement System ("TRS") are—by far—the largest state-run public retirement systems. In tax year 2010, these two plans encompassed 52,167 of the State's 53,184 retirees. J.A. 28; Pet. App. 13a. PERS is the general plan for state retirees not covered by a more specific plan, and also provides benefits to retirees from many participating counties, cities, and municipalities. J.A. 126. Active employees in PERS hired before 2015 contribute 4.5% of their gross monthly salary to fund the plan (those hired later

contribute 6%), and after retirement members receive a monthly annuity calculated as a factor of their highest three-year average salary. J.A. 44-46; W. Va. Code § 5-10-29(b) (2009), *amended in* 2015 W. Va. Acts, c. 204 (increasing contribution rate to 6% for individuals hired after January 1, 2015). TRS provides retirement benefits for public-school teachers and school personnel, and is partially funded by employee contributions at 6% of gross monthly salary. J.A. 53-56; W. Va. Code § 18-7A-14(a).

PERS and TRS members may subtract from their adjusted gross income the first $2,000 of their state retirement benefits. W. Va. Code § 11-21-12(c)(5). This Section 12(c)(5) exemption also applies to benefits paid from any federal retirement system. *Id.* It does not, however, apply to benefits from the Judges' Retirement System, which includes most retired state circuit judges and supreme court justices. Pet. App. 15a.

For tax years beginning after December 31, 2017, West Virginia also exempts from state income tax all federal military retirement income, W. Va. Code § 11-21-12(c)(7)(C)—an increase from a $20,000 exemption that applied from 2000 through 2017, *id.* § 11-21-12(c)(7)(B) (2016). The recent amendment to exempt all military retirement benefits is consistent with a larger state trend, after *Davis*, of increased exemptions for federal retirees: In 1989 the West Virginia Legislature added federal benefits to the general $2,000 exemption for public-sector retirees, 1989 W. Va. Acts, c. 201, and created the additional exemption for military retirees in 2000, 2000 W. Va. Acts, c. 263.

4. In addition to these broader exemptions, West Virginia Code § 11-21-12(c)(6) allows a small number of state and local retirees—comprising less than 2% of West Virginia's public retirees—to exempt all retirement benefits from their gross adjusted income. W. Va. Code § 11-21-12(c)(6); Pet. App. 16a. This Section 12(c)(6) exemption applies to income received from four small state-run retirement systems that provide benefits to some state and local firefighters and law enforcement officers: The State Police Death, Disability, and Retirement Fund ("Trooper Plan A"); the State Police Retirement System ("Trooper Plan B"); the Municipal Police Officer and Firefighter Retirement System ("MPFRS"); and the Deputy Sheriff Retirement System ("DSRS"). Pet. App. 3a.

Trooper Plan A was the original retirement system for the West Virginia State Police, covering officers hired before March 12, 1994. J.A. 68. Trooper Plan B covers state police officers hired after Trooper Plan A's cut-off date. J.A. 76. In tax year 2010, 701 retirees drew benefits from these plans. J.A. 28. Members who retire under Trooper Plans A and B are not eligible for social security benefits. J.A. 28, 33, 38.

A small number of municipal police officers and firefighters are members of MPFRS. Before this plan's creation in 2010, some municipalities managed separate retirement plans for their employees, and others elected to participate in PERS. J.A. 126, 233. Cities and municipalities may now choose to provide police and firefighter benefits through the state-

managed MPFRS, although few have chosen to do so. J.A. 28, 33, 38.[1]

DSRS members include all county deputy sheriffs hired on or after July 1, 1998, and deputy sheriffs hired earlier if they chose to transfer their years of service to the new plan. J.A. 84; Pet. App. 13a. Deputy sheriffs not covered by DSRS draw benefits from PERS, and are accordingly ineligible for the Section 12(c)(6) exemption. Pet. App. 13a, 15a-16a. In 2010, 260 retirees received benefits under DSRS. J.A. 28. Unlike members of Trooper Plans A and B, DSRS members are eligible to receive social security benefits. J.A. 28, 33, 38.

Although members of these four plans receive more favorable tax treatment after retirement than their counterparts in PERS and TRS, they are also required to contribute higher percentages of their monthly salaries while active employees. As compared to 4.5% and 6%, J.A. 46, 53, members of Trooper Plan A contributed 9% of their monthly gross income. J.A. 69; see also W. Va. Code § 15-2-26(b). Those in Trooper Plan B contribute 13%, and MPFRS and DSRS members contribute 8.5%. J.A. 28, 33, 38, 77, 85, 101; see also W. Va. Code §§ 7-14D-7(a), 8-22A-8(a)(1), 15-2A-5(a).

Significantly, Section 12(c)(6) is not a general law enforcement exemption. Many West Virginia state

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[1] A small, unknown number of retirees covered by municipal retirement plans predating MPFRS may also be eligible for the Section 12(c)(6) exemption. J.A. 233; W. Va. Code § 11-21-12(c)(6) (describing retirees under "any West Virginia police, West Virginia Firemen's Retirement System").

and local law enforcement officers may claim only the $2,000 exemption in Section 12(c)(5). The default retirement plan for county sheriffs, for example, is PERS; only sheriffs who served first as a deputy sheriff and meet other statutory requirements may participate in DSRS. J.A. 84; W. Va. Code §§ 5-10-17, 7-14D-24. West Virginia Department of Natural Resources ("DNR") police officers and state capitol police officers also draw benefits from PERS, even though they also possess law enforcement powers. Pet. App. 13a-14a; J.A. 167-68; see also W. Va. Code §§ 5-10-17, 15-2D-2, 20-7-1 *et seq.* Similarly, some retired law enforcement officers do not receive the Section 12(c)(6) exemption even though they had identical jobs to those who do—including police officers in the many municipalities that still participate in PERS, J.A. 126, and deputy sheriffs hired before 1998 who chose to remain in PERS, J.A. 84; Pet. App. 13a.

Further, the percentage of retirees eligible under Section 12(c)(6) is decreasing. In 1994, the exemption applied to roughly 1,600 retirees, or 4% of all state and local retirees. *Brown* v. *Mierke*, 191 W. Va. 120, 443 S.E.2d (W. Va. 1994); Pet. App. 15a. As of 2010, the number of retirees in the four enumerated state-run plans was under 1,000. J.A. 28. And with the number of retirees covered by PERS and TRS increasing during that same period, the percentage of retirees in the four exempted plans has fallen to under 2%. Pet. App. 16a; J.A 28; see also *id.* at 33 (similar percentage for 2011), 38 (similar percentage for 2012).

5. James Dawson is a retired U.S. Marshal for the Southern District of West Virginia. Pet. App. 4a; J.A.

175, 182-83. Before joining the United States Marshal Service, Mr. Dawson served for over a decade as a deputy sheriff in Nicholas County, West Virginia. J.A. 174-76. He left state law enforcement in 1987 to become a Deputy U.S. Marshal, and was appointed as a U.S. Marshal in 2002. J.A. 175, 195.

Mr. Dawson retired on March 31, 2008, J.A. 182, and began receiving a monthly annuity under the Federal Employees Retirement System ("FERS"). J.A. 8, 183. FERS was created in 1986 as the general retirement plan for federal civilian retirees. See Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986). Mr. Dawson's benefits under FERS—$56,724 for tax years 2010 and 2011, J.A. 254—are calculated based on a percentage of the average salary for his three highest compensation years, with adjustments for survivor benefits for his wife and supplemental payments until he becomes eligible to receive social security benefits. J.A. 9-10, 254.

Like all FERS members, while an active employee Mr. Dawson was required to contribute a portion of his salary to fund his retirement plan. J.A. 17; see also 5 U.S.C. § 8422(a)(2) (FERS contribution formula). Members' contribution rates are calculated starting from the base contribution rate for federal law enforcement officers set out in 5 U.S.C. § 8422(a)(3). Old-age, survivor, and disability insurance tax rates are then subtracted from that rate, as provided in 26 U.S.C. § 3101(a). Using this formula, Mr. Dawson was required to contribute between 1.3% and 1.8% of his gross monthly salary

toward FERS throughout his twenty-one years in the federal workforce.[2]

In October 2013, Mr. Dawson and his wife Elaine filed amended West Virginia state tax returns for tax years 2010 and 2011 claiming a full exemption for all income Mr. Dawson received under FERS. J.A. 251. The West Virginia State Tax Commissioner denied their request, explaining that under West Virginia Code § 11-21-12(c)(5) they were entitled to subtract from their adjusted gross income only the first $2,000 of Mr. Dawson's FERS retirement benefits. J.A. 252; Pet. App. 4a.

6. The Dawsons appealed the denial to the West Virginia Office of Tax Appeals ("OTA"). Pet. App. 4a. They argued that because Section 12(c)(6) allows some retired state and local law enforcement officers to exempt all state retirement benefits from reported income, refusing to treat Mr. Dawson's federal benefits the same violates 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. Pet. App. 4a-5a. Comparing Mr. Dawson primarily—although not exclusively—to deputy sheriffs who retire under the DSRS plan, J.A. 175-76, 241-42

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[2] The base contribution rate for Mr. Dawson was 7.5% between 1987 and 1998, 7.75% in 1999, 7.9% in 2000, and 7.5% from 2001 to 2008. 5. U.S.C. § 8422(3)(A)-(B). The tax rate for old-age, survivor, and disability insurance, in turn, was 5.7% in 1987, 6.06% in 1988 and 1989, and 6.2% from 1990 on. 26 U.S.C. § 3101 (2012), *amended by* Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, Div. A, Title II, § 221(a)(99)(A), 128 Stat. 4010, 4051 (2014), *and* Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, Div. U, Title IV, § 401(a)(207), 132 Stat. 348, 1194 (2018).

(comparisons to sheriffs, deputy sheriffs, and law enforcement officers generally), they argued that Mr. Dawson's responsibilities as a U.S. Marshal were substantially similar to the duties of state and local law enforcement officers in West Virginia. J.A. 175-77, 241. OTA rejected the Dawsons' arguments and affirmed the Tax Commissioner's decision. Pet. App. 5a.

The Dawsons next appealed to the Circuit Court of Mercer County, West Virginia. Here, Mr. Dawson compared himself to both deputy sheriff retirees under DSRS and the state police officers who retire under Trooper Plan A. J.A. 273-74. The circuit court reversed OTA's decision, in part based on its finding that it was "undisputed . . . that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in § 11-21-12(c)(6)." Pet. App. 22a. Reasoning that the intergovernmental tax immunity doctrine forbids providing different tax treatment to state and federal retirees who performed similar job duties, the circuit court deemed the Section 12(c)(6) exemption to impermissibly discriminate against federal retirees. Pet. App. 22a-25a.

7. The West Virginia Supreme Court of Appeals reversed the circuit court's order on May 17, 2017. Pet. App. 16a.

The Supreme Court of Appeals relied heavily on its 1994 decision in *Brown* v. *Mierke*, which, applying this Court's decision in *Davis*, Pet. App. 10a, had rejected a previous challenge to Section 12(c)(6) brought by federal military retirees. Pet. App. 9a-12a.

The court noted that in cases where this Court "found a state tax exemption improperly discriminated against federal retirees under 4 U.S.C. § 111," the challenged law "had afforded a blanket exemption to *all* retirees." Pet. App. 10a. By contrast, "West Virginia's limited, multi-tiered series of tax exemptions" in Section 12(c)(6) indicated no intent to discriminate against federal retirees. Pet. App. 10a-11a. When *Brown* was decided the exemption applied to roughly 4% of state and local retirees. Pet. App. 11a. The challengers in *Brown* received better treatment than all private-sector retirees, and the same or better treatment than state and local retirees, Pet. App. 11a-12a. Thus, under a "totality of the circumstances" approach, *Brown* held that the Section 12(c)(6) exemption does not "discriminate against [federal retirees] because of the *source* of pay or compensation." Pet. App. 11a (quoting Syl. pt. 2, *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463).

The state supreme court reached the same result below. Although recognizing the parties' arguments that the Dawsons' tax treatment was justified by significant differences between the relevant classes of retired state and federal employees, Pet. App. 12a-13a, the court did not reach this question. Instead, it held that Section 12(c)(6) "did not discriminate against Mr. Dawson" "[i]n light of the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme." Pet. App. 15a.

The court emphasized that Section 12(c)(6) "applies to a narrow but diverse class of state retirees." Pet. App. 13a. In the two decades since

Brown, the percentage of retirees eligible for the exemption had decreased from 4% to "less than two percent." Pet. App. 13. Mr. Dawson's retirement income was treated more favorably than state private-sector retirees and retired state supreme court justices and circuit judges, and the same as that of "the vast majority of all state retirees." Pet. App. 15a. The court also emphasized that not all state and local law enforcement officers receive the exemption, including some deputy sheriffs who (like Mr. Dawson) started working before DSRS was created in 1998. Pet. App. 13a, 15a-16a. Viewed in context with the entire West Virginia retirement tax scheme, the court concluded that "Section 12(c)(6) gives a benefit to a very narrow class of former state and local employees," and therefore does not violate Section 111 and intergovernmental tax immunity. Pet. App. 16a.

SUMMARY OF THE ARGUMENT

A state tax violates intergovernmental tax immunity where it imposes "a heavier tax burden on [those who deal with one sovereign] than is imposed on [those who deal with the other]," and where that inconsistent treatment is not "justified by significant differences between the two classes." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 815-16 (1989) (alterations in original) (citations omitted). Neither condition is satisfied here.

West Virginia Code § 11-21-12(c)(6) provides a tax exemption for a small number of state and local retirees drawing benefits from a handful of state-managed plans. Eligibility for Section 12(c)(6) does not turn on whether a retiree worked for the state or the federal government. Rather, like other federal

and state retirees, U.S. Marshals like Mr. Dawson may not claim the exemption because they receive benefits from a different retirement plan. Section 12(c)(6) accordingly does not discriminate against federal retirees "because of the source of [their] pay or compensation." 4 U.S.C. § 111(a).

I. Section 12(c)(6) passes the first step in the intergovernmental tax immunity analysis because this granular exemption, providing a benefit to a very small number of state and local retirees, does not create the type of inconsistent tax treatment with which Section 111 is concerned.

A. From the doctrine's earliest days, its purpose has been to prevent discrimination against sovereigns in our federal system. Intergovernmental tax immunity was never intended to confer benefits on individual taxpayers, but rather to prevent interference with the sovereign functions of one government through the exercise of a co-sovereign's taxing power. In the 1930s, the Court reined in an earlier line of cases that had expanded the doctrine beyond this core purpose, emphasizing that the "only possible basis" for constitutional immunity from a state income tax is the concern that its economic burden will be passed onto the federal government. *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 481 (1939). So too for the modern version of the doctrine, codified in 4 U.S.C. § 111, which consciously retained this historical, purpose-driven rationale.

Viewed in context with West Virginia's income-tax structure as a whole, Section 12(c)(6) has no more than remote consequences for the federal government. Unlike tax exemptions struck down in previous cases

that broadly preferred all state retirees, Section 12(c)(6) applies to less than 2% of West Virginia's public-sector retired workforce. This Court has never endorsed petitioners' theory, Pet. Br. 24, that a State discriminates where even one state employee receives more favorable tax treatment than federal employees. To the contrary, it upheld another narrow exemption where, as here, some state employees were also required to pay the tax. *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 443 (1999). Section 12(c)(6)'s limited reach also means that the political process provides meaningful accountability against discriminatory taxation: Here, the interests of all private-sector retirees, all federal retirees, and the overwhelming majority of state retirees are aligned.

B. Section 12(c)(6) survives the first step of the Section 111 analysis even under an approach focused less on sovereigns, and more on the interests of individual taxpayers. At a minimum, the tax immunity doctrine is not offended where a State treats similarly situated state and federal retirees the same. Looking at the distinction Section 12(c)(6) draws—membership in one of four state-managed retirement plans—makes clear that West Virginia does not have a general tax exemption covering all state and local law enforcement officers. Not all law enforcement officers may receive the exemption, including some with identical job titles to those who do. Mr. Dawson is treated no differently than those state retirees who, like him, draw benefits from different public-retirement plans. Petitioners' contrary framework would have the Court focus on Mr. Dawson's job duties as a U.S. Marshal, but that

approach cannot answer whether he is similarly situated to the state law enforcement officers who receive the exemption, or to those who do not.

II. Even if Section 12(c)(6) subjected comparable state and federal retirees to different tax treatment, significant differences between the classes of retirees more than justify that decision. Financial distinctions related to the contribution- and benefits-structures of the exempted state plans warrant different treatment between their members and those of other *state-managed* retirement plans, as well as members of federal retirement plans like the one covering retired U.S. Marshals. Tax policies based on plan-specific distinctions like these are essential to the State's role as employer, and help ensure that federal retirees receiving benefits from plans with meaningfully different features—like Mr. Dawson—do not receive *better* treatment than their true state counterparts.

ARGUMENT

Not all taxes treating state and federal employees differently violate the intergovernmental tax immunity doctrine. As reflected in 4 U.S.C. § 111, this doctrine prohibits only those distinctions that discriminate against federal employees "because of the source of the pay or compensation." The Court uses a two-part test to discern whether a challenged tax is one of the many, permitted distinctions among taxpayers common throughout state (and federal) tax codes, or instead turns on the one basis Section 111 forbids: the name at the bottom of a public retiree's benefits check. *First*, the challenged provision must result in "inconsistent," discriminatory tax treatment against those who deal with the federal government;

and *second*, there must be no significant differences to justify that distinction. *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992) (citation omitted). Section 12(c)(6) passes on both counts.

I. Section 12(c)(6) Does Not Discriminate Against The Federal Government Or Federal Employees.

Davis v. *Michigan Department of Treasury*, 489 U.S. 803 (1989), does not answer what it means for a State's income-tax exemption regime to discriminate against federal retirees. It was "undisputed" in *Davis* "that Michigan's tax system discriminates in favor of retired state employees and against retired federal employees," *id.* at 814, and for good reason: The State exempted *all* state and local retirement benefits, but collected income tax on retirement benefits from *every* other source, including the federal government. *Id.* at 805. *Barker*, involving a similarly broad state-exemption regime, did not delve into this fundamental question either. See 503 U.S. at 596; Pet. Br. 16 (acknowledging there was "no dispute" in *Barker* "[a]t the first step of the analysis").

Petitioners are thus wrong that, under this Court's precedents, the threshold question of discrimination against retired federal employees is satisfied "as long as *any* state retirees were treated better than federal retirees." Pet. Br. 24. *Davis* and *Barker* did not resolve whether a statute like Section 12(c)(6)—which applies to a decreasingly small number of state employees and is part of a state tax code that otherwise treats federal retirees the same as or better than most of its own workforce—violates

Section 111. As the West Virginia Supreme Court of Appeals correctly held, it does not.

In the almost three decades since *Davis* was decided, no state or federal court has invalidated a discrete, tailored tax provision like Section 12(c)(6). This result was not for lack of legislative or judicial vigilance: In *Davis*'s wake many States amended their tax codes to remove provisions broadly favoring state employees at the expense of federal workers. See, *e.g.*, 1989 Ariz. Sess. Laws, c. 312, § 12 (replacing full tax exemption for state retirement benefits with equal $2,500 exemption for state and federal retirees); 1989 Colo. Sess. Laws, c. 332, § 1 (expanding $20,000 exemption for all sources of state and private retirement income to include federal military retirement benefits); 1989 N.Y. Laws, c. 664, § 1 (adding total exemption for federal pensions to match pre-existing exemptions for state and local retirees). Courts, too, invalidated statutes that looked much like *Davis*'s total exemption for all state retirees. See, *e.g.*, *Pledger* v. *Bosnick*, 306 Ark. 45, 47, 811 S.W.2d 286, 288 (1991), *abrogated on other grounds*, *State, Dep't of Fin. & Admin.* v. *Staton*, 325 Ark. 341, 344, 942 S.W.2d 803, 807 (1996).

What legislatures and courts did not do, however, was amend or strike down tax provisions at Section 12(c)(6)'s degree of granularity. This is because Section 111 has never been understood to apply to cases like these—and nothing in this Court's intergovernmental tax immunity precedents supports ruling now that it does. *First*, the history and purpose of the doctrine make clear that it is concerned with big-picture, broad-strokes interactions between

sovereigns, and how those interactions shape internal government operations. Individual employees benefit from this immunity, but Section 111 is not defined by reference to them. Section 12(c)(6) does not hinder the federal government's operations and, viewed in context with West Virginia's tax regime as a whole, its minimal scope does not discriminate against the federal government or its employees. *Second*, even removing Section 111 from its proper historical vantage point and applying the individual-focused framework petitioners urge, Section 12(c)(6) still does not offend intergovernmental tax immunity because West Virginia tax law treats similarly situated state and federal retirees the same. The Court should affirm.

A. A Discrete, Narrow Tax Regime Benefiting A Small Number Of State Retirees Does Not Implicate The Intergovernmental Tax Immunity Doctrine's Concerns.

1. From this Court's decision in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), holding that States may not single out a federal bank for a tax they decline to impose on their own institutions, the focus of intergovernmental tax immunity has always been to prevent discrimination against sovereigns. The tax in *McCulloch* "was aimed specifically at national banks and thus operated to discriminate against the exercise by the Congress *of a national power*." *Helvering* v. *Gerhardt*, 304 U.S. 405, 413 (1938) (emphasis added). The doctrine's applications multiplied with time, but "*[s]uch discrimination*" remained the basis "for holding invalid any form of state taxation adversely affecting the use or

enjoyment of federal instrumentalities." *Id.* (emphasis added).

Of course, after *McCulloch* the doctrine became untethered from this original understanding of the type of discrimination it bars. At its extreme, intergovernmental tax immunity was extended to bar even most *indirect* taxes on the federal government, including state taxation of federal employees' and contractors' income. See *United States* v. *New Mexico*, 455 U.S. 720, 731 (1982). The Court, however, eventually course-corrected, returning to the doctrine's "constitutional foundations," *id.*, and setting "tight limits" for the future," *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 436 (1999).

This means that the nondiscrimination clause in Section 111—"coextensive" with and "consciously drafted against the background of the Court's tax immunity cases"—must be understood in reference to the purposes the doctrine has advanced "from the time of *McCulloch*." *Davis*, 489 U.S. at 812-13. At bottom, those purposes reflect "the need to protect each sovereign's governmental operations from undue interference by the other." Pet. App. 7a (quoting *id.* at 814). Intergovernmental tax immunity exists to prevent "clashing sovereignty." *New Mexico*, 455 U.S. at 735 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 430); see also *Cal. State Bd. of Equalization* v. *Sierra Summit, Inc.*, 490 U.S. 844, 847 (1989). It strikes down taxes that create "crippling obstruction of any of the Government's functions," or "sinister effort[s] to hamstring its power." *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495 (1958). And it "provide[s] a safeguard for federal operations." PAUL J. HARTMAN,

FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 6.1, at 220 (1981).

This Court's 1930s precedents, marking a return to the doctrine's roots, only underscore the importance of viewing tax immunity in functional, historical terms. Those cases again explained that a primary reason non-discriminatory state taxes do not offend intergovernmental tax immunity is because "there is only a remote, if any, influence upon the exercise of the functions of the government." *New Mexico*, 455 U.S. at 732 (citation omitted). Indeed, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) emphasized that "the *only possible basis* for implying a constitutional immunity from state income tax" on federal employees "is that the economic burden of the tax is in some way passed on so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 481 (emphasis added). In *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937), by contrast, the Court did not hesitate to uphold a tax that did not "interfere in any substantial way with the performance of federal functions." *Id.* at 161.

These purposes make clear that the tax immunity doctrine is not an individual right to avoid less-favorable tax treatment, nor can it bear the weight of an interpretation that would strike down state laws with no more than "remote" consequences for the federal fisc.

To be sure, individual retirees may invoke the doctrine, *Davis*, 489 U.S. at 814-15, but that means they may benefit from it, not that it should be

redefined in individual terms. Both the House and Senate Reports on the Public Salary Tax Act of 1939 indicate that Section 111's nondiscrimination clause was not drafted to be an individual protection against state taxation, but "[t]o protect the Federal Government" from "State and local taxation" of federal compensation "which is aimed at, or threatens [its] efficient operations." H.R. Rep. No. 76-26, at 5 (1939); S. Rep. No. 76-112, at 12 (1939). Even in *Davis*, the Court grounded its holding in the doctrine's purpose to protect sovereigns from each other's taxing powers, *Davis*, 489 U.S. at 810-12, and emphasized that Section 111's "nondiscrimination clause closely parallels the nondiscrimination component of the constitutional immunity doctrine" dating back to *McCulloch*. *Id.* at 812.

Further, the doctrine was never intended to be used as a tool to "confer benefits on the [federal] employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy." *Graves*, 306 U.S. at 483; see also *South Carolina* v. *Baker*, 485 U.S. 505, 525 (1988). To the contrary, Section 111 was crafted to eliminate the injustice of exempting public employees from "shar[ing] in the cost of their State and local governments to the same extent as private employees." S. Rep. No. 76-112, at 4; see also H.R. Rep. No. 76-26, at 1. Absent an unduly broad interpretation of intergovernmental tax immunity, federal employees thus have no basis to challenge state tax provisions with consequences for the federal government so slight that it is impossible to say they "interfere in any substantial way with the

performance of federal functions." *Dravo*, 302 U.S. at 161.

2. The Court should reject petitioners' attempt to transform a shield for co-sovereign relations into a sword for taxpayers seeking preferred treatment.

As an initial matter, petitioners object (at 18-19) to the state court's reliance on "the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme." Pet. App. 15a. There is no error in this approach. Step 1 in the Section 111 analysis—whether a challenged tax imposes a "heavier burden" on federal employees than on state employees, *Davis*, 489 U.S. at 815-16—was undisputed in both *Davis* and *Barker*. *Id.* at 814; *Barker*, 503 U.S. at 596; Pet. Br. 16. These cases thus do not "clearly reject[]," Pet. Br. 18-19, a robust inquiry into a state tax code and the interests intergovernmental tax immunity protects. At most, they teach that the first step is satisfied where a tax discriminates against federal employees in terms similar to the *Davis* exemption's breadth. Far from "refus[ing] to apply *Davis*," Pet. Br. 22, the state supreme court therefore approached this unresolved question mindful of the same purposes animating the doctrine on which *Davis* itself relied. See *Davis*, 489 U.S. at 810-12. Indeed, petitioners would replace the state court's multi-faceted analysis with a rule deeming the first step satisfied whenever "*any* state retirees [are] treated better than federal retirees," Pet. Br. 24—with no explanation how this mechanistic approach advances the immunity doctrine's historical ends.

Whether styled a totality-of-the-circumstances or purpose-based inquiry, applying the proper framework makes clear that Section 12(c)(6) does not discriminate against federal employees in any way relevant to the doctrine of intergovernmental tax immunity.

First, any concerns about interfering with the sovereign functions of the United States government are at their lowest where, as here, a tax exemption applies to only a small number of state and local employees: less than 2%. Pet. App. 16a. At that point, the idea that the "economic burden" the tax poses could somehow be passed onto the federal government so as to interfere with its functions—the "only possible basis" for constitutional immunity from state taxes on federal employees, *Graves*, 306 U.S. at 481—becomes mere fiction.

By contrast, tax regimes that do offend intergovernmental tax immunity discriminate against federal employees in broad strokes, where the federal government *does* feel their repercussions. *Davis* and *Barker* exempted *all* retirement income from *all* state and local employees, while withholding the same treatment from federal retirees writ large, or the substantial category of federal military retirees. Similarly, *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376 (1960), struck down a tax that preferred almost all lessees who contracted with the State above all lessees who contracted with the federal government. And the Court's language there is telling: It describes the tax difference, "attendant upon the identity of [the] lessor," as "extreme," "substantial[,] and

transparent." *Id.* at 382, 387. The Supreme Court of Appeals was therefore right to find that the minimal differences Section 12(c)(6) works do not offend Section 111.

Petitioners (at 27-28; see also U.S. Br. 23-25) take issue with the state court's focus on Section 12(c)(6)'s intent to "benefit . . . a very narrow class of former state and local employees," rather than to "discriminate against former federal marshals." Pet. App. 16a. Yet while a good motive may not salvage an otherwise discriminatory tax, see *Davis*, 489 U.S. at 816 ("The State's interest in adopting the *discriminatory tax*, no matter how substantial, is simply irrelevant." (emphasis added)), petitioners are wrong that intent has no role to play. Lack of a *discriminatory* motive can be a relevant touchpoint in a way that existence of a *benevolent* motive is not: Evidence that a State singled out a federal entity for disfavored treatment was dispositive in *McCulloch*, for instance, see *Helvering*, 304 U.S. at 413, and *Phillips Chemical* spoke of "segregat[ing] federal lessees and impos[ing] on them a heavier tax burden," and the danger of "singl[ing] out those who deal with the Government," 361 U.S. at 382-83.

More importantly, though lack of animus or deliberate design to disfavor federal retirees was one part of the state court's analysis, it was not controlling. By emphasizing the "very narrow class" of state retirees who can claim the Section 12(c)(6) exemption, Pet. App. 16a, the court instead considered evidence of discriminatory intent as reflected in "the whole tax structure of the state." *Phillips Chem.*, 361 U.S. at 383; see also Pet. App. 15a. This approach—

looking beyond legislative motives to how a challenged provision actually operates—is another method to determine whether the tax draws distinctions based on source of income or some other (acceptable) factor, and whether its incidental effects on the federal government are the sort Section 111 forbids.

Petitioners and the United States also argue that Section 12(c)(6)'s minimal scope is irrelevant because *Davis* should extend to even small tax distinctions among state and federal employees. Pet. Br. 22-26; U.S. Br. 22-23. They are correct that *Davis* does not expressly limit its holding to cases involving blanket exemptions favoring all state retirees. But neither does *Davis* suggest the same outcome is appropriate, much less required, in cases involving narrow, discrete exemptions—as here.

Petitioners argue first that *Davis* referred to the challenged exemption as "blanket" only in the sense that it did not distinguish among taxpayers by income levels, and therefore the State could not justify it "by reference to such differences." Pet. Br. 22-23. That analysis is irrelevant here, however, because Section 12(c)(6) is not "blanket" in *any* sense: It does not apply to all state retirees, and it actually distinguishes taxpayers on the same basis that it purports to—by reference to their specific retirement plans. W. Va. Code § 11-21-12(c)(6). More to the point, the Court's choice of adjective does nothing to alter the nature of the challenged exemption, which, unlike Section 12(c)(6), favored all state retirees.

Petitioners next assert (at 23) that "it was irrelevant to the Court's analysis whether the class of

individuals who received the exemption consisted of all state retirees or just a subset of them." The United States similarly notes (at 22) that *Davis* and *Barker* turned on a lack of significant differences between state and federal retirees, not on "the number of state employees who were exempt." Yet the Step 1 inquiry was undisputed in both cases. Both were resolved at the second stage of the analysis, and the factors relevant *at step 2* say nothing about the appropriate considerations when the *initial* step is very much in dispute. For the same reasons, petitioners reach too far in claiming it "mere happenstance that the particular tax scheme [in *Davis*] applied to all state retirees." Pet. Br. 24. That "detail," *id.*, was the very reason the threshold question was "undisputed." *Davis*, 489 U.S. at 814. Indeed, the opinion's opening sentence emphasizes that the challenged regime exempted "all" state retirees' benefits while levying taxes on benefits paid by "all" other entities. *Id.* at 805.

The Court should also decline to read a categorical rule into *Davis*'s silence because it has already rejected that over-broad approach. *Jefferson County*, decided ten years after *Davis*, upheld a non-global tax exemption at Step 1 because it—like Section 12(c)(6)—applied to some state employees as well as federal. 527 U.S. at 443. The county's tax distinguished taxpayers based on their membership in a licensed or unlicensed profession, *id.* at 428-29, and like the hypothetical tax code *Davis* described, this was acceptable state tax policy because "an evenhanded application of the rationale . . . resulted in inclusion of some [state employees] in the

disfavored class," 489 U.S. at 817. Petitioners' approach, by contrast, would have reached a different result: Because Jefferson County's tax exemption treated at least some state employees better than federal employees, petitioners would have had the Court "proceed to consider whether 'significant differences'" justified the "differential treatment." Pet. Br. 24.

Petitioners also place more weight on *Jefferson County* than it can bear. Relying on dicta describing a "starkly different case" if the county had "exempted state officials while leaving federal officials (or a subcategory of them) subject to the tax," *Jefferson Cty.*, 527 U.S. at 443, petitioners argue that the Court would have reached the opposite outcome had the county "exempt[ed] just some of its employees," Pet. Br. 26. *Jefferson County* is the only time this Court has directly addressed exemptions affecting "subcategories" of state and federal employees, and—tellingly—it expressed concern about taxes on all "or a subcategory" of *federal* employees only. With every opportunity to make clear that the same concerns apply when a State exempts a subset of its own employees, the Court said nothing about "subcategories" on the state side. *Jefferson Cty.*, 527 U.S. at 443.

Finally, the United States (at 20-22) relies on Section 111's mandatory tenor to urge extending *Davis* to narrow exemption cases like this one. Yet this case does not require parsing "rigorous textual requirements" in a vacuum. *Id.* at 20-21 (quoting *Ross* v. *Blake*, 136 S. Ct. 1850, 1857 (2016)). Section 111 must be interpreted "coextensive" with the

"traditional constitutional prohibition against discriminatory taxes," including the doctrine's original aim to avoid interference with a sovereign's operations. *Davis*, 489 U.S. at 813-14. Like petitioners, the United States does not explain how an exceedingly narrow state tax provision like Section 12(c)(6) could have more than a "remote" effect on federal operations. Likewise, there is no doubt that Section 111 forbids even "*some* discrimination *based on source of pay*." U.S. Br. 20 (second emphasis added). The sticking point is how to determine when differential treatment is based on that prohibited factor. As *McCulloch*, *Helvering*, *Graves*, and more make clear, exemptions too narrow to affect the federal government are not. Because the purposes undergirding Section 111 are stretched too thin when applied to such discrete exemptions, the state supreme court correctly concluded that Section 12(c)(6) is too far beyond *Davis*'s—and Section 111's—bailiwick.

Second, there is an additional check against federal discrimination here that was lacking in *Davis* and *Barker*: the oversight and accountability of the ordinary political process. Where this safeguard is powerful enough to ward against discrimination, the grounds for applying intergovernmental tax immunity break down further still.

From its beginning, one of the key rationales for intergovernmental tax immunity has been a lack of adequate political checks against discriminatory tax policy. *McCulloch*, for instance, reasoned that when the *federal* government taxes state entities, it acts through representatives of the States, and

"consequently [those representatives] are subject to political restraints which can be counted on to prevent abuse." *Helvering*, 304 U.S. at 412; see also *McCulloch*, 17 U.S. (4 Wheat.) at 435-36. When, however, the Court recognized an implicit constitutional immunity doctrine against some forms of *state* taxation, the cornerstone of its analysis was this opposite reality: "State taxation of national instrumentalities is subject to no such restraint." *Helvering*, 304 U.S. at 412; see also *United States* v. *Cty. of Fresno*, 429 U.S. 452, 463 (1977) (describing "[t]he political check against abuse of the taxing power found lacking in *McCulloch*, where the tax was imposed solely on the Bank of the United States").

To be sure, this Court found the political-process rationale unpersuasive in *Davis* in light of the broad nature of the exemption regime under review. 489 U.S. at 815 n.4. Specifically, the majority rejected the view Justice Stevens championed in his dissent that Section 111 is not implicated where a tax "draws no distinction between the federal employees or retirees and the vast majority of voters in the State." *Id.* (quoting *id.* at 823 (Stevens, J., dissenting)); see also *Barker*, 503 U.S. at 606 (Stevens, J., and Thomas, J., concurring) ("A state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees."). The *Davis* majority relied on *Phillips Chemical*, where the Court struck down a tax that treated private and federal entities the same, yet gave a benefit to those who dealt with the State. 489 U.S. at 815 n.4. The missing piece from Justice Stevens's analysis, the majority emphasized, was consideration

of the distinct "danger" of discrimination that both cases highlighted "when the State acts to benefit *itself and those in privity with it*." *Id.* (emphasis added). In other words, *Davis* rejected the idea that political checks are sufficient to guard against federal discrimination where federal employees and private parties are on one side, and all state employees are on the other—the special danger of state favoritism is too heavy a thumb on that scale.

Yet as the state court recognized, Pet. App. 12a, 15a, the same result does not follow where federal employees, private parties, and the vast majority of state employees are on the same side. The Court should not expand *Davis* to hold that it does. Although modern tax immunity challenges focus increasingly on personal income tax exemptions rather than, as in earlier cases, direct taxes on federal property, the doctrine's rationales remain the same. The *Davis* majority expressly emphasized that the "nondiscrimination clause [in Section 111] closely parallels the nondiscrimination component of the constitutional immunity doctrine" as understood from "the time of *McCulloch,*" 489 U.S. at 812—the same *McCulloch* that weighed carefully the power political constituencies can wield to check abusive tax policy, 17 U.S. (4 Wheat.) at 435-36.

Davis accordingly did not "make[] clear that a state's treatment of private-sector retirees is irrelevant to the § 111 analysis." Pet. Br. 29. How a State treats retired private-sector employees is not the *sole* factor in this inquiry, but it would throw the pot out with the soup to find error in considering their treatment *alongside* evidence that "the vast majority

of all state retirees" receive similar treatment. Pet. App. 14a-16a. In any event, *Davis* certainly did not discard political accountability as a historical curiosity irrelevant to any future Section 111 case, regardless of its facts.

Under different facts—these facts—pressure from the political process is enough to outweigh the concern that States may discriminate against the federal government to benefit those with whom they deal. Here, the political checks found lacking in *McCulloch* are near their zenith: West Virginia treats federal retirees like Mr. Dawson "as well as it treats" *all but 2%* of "those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4; Pet. App. 16a. This means that the interests of 100% of the private sector, 100% of federal employees, and over 98% of state employees push together. The danger when a State acts to benefit its own employees is significantly diminished where it acts to benefit so few of its own—and where, similar to the rest of the State's taxpayers, so many of its own employees pick up the tab for exemptions they cannot claim.

Further, political accountability is not a mere academic protection: The facts strongly bear out its reality. Since the Supreme Court of Appeals's decision in *Brown* v. *Mierke*, 191 W. Va. 120, 443 S.E.2d (W. Va. 1994), both the number and percentage of covered employees have gone down significantly. Pet. App. 13a, 16a. The Section 12(c)(6) exemption has not been expanded since 2000. See 2000 W. Va. Acts, c. 263 (adding DSRS to the list of exempted retirement plans). During the same time the exemption for state retirees diminished, the West

Virginia Legislature also enacted more preferential tax policies for *federal* retirees—adding a $20,000 exemption for federal military retirement income in 2002, 2002 W. Va. Acts, c. 312, and, just a year ago, making that exemption unlimited, W. Va. Code § 11-21-12(c)(7)(C) (2017). Where the line trends toward *better* tax treatment for federal retirees, not worse, there is no Section 111 violation. Indeed, it should come as no surprise that the political check "found lacking in *McCulloch*," *Cty. of Fresno*, 429 U.S. at 463, is alive in West Virginia: Banks cannot vote, but federal workers no less than state and local employees are citizens of the States where they live.

Finally, this is not a margins case. Undoubtedly, there will be difficult cases testing the line between a nondiscriminatory tax scheme and the total exemptions in *Davis* and *Barker*. This, however, a challenge to a statute applying to a dwindling percentage (now 2%, Pet. App. 16a, J.A. 28, 33, 38) of West Virginia's state retirees, is not one of them.

Petitioners argue (at 26) that "[l]imiting *Davis* to only those tax policies that discriminate in favor of *all* state retirees" would lead to "absurd results." Yet this is not the rule the state supreme court applied. Under a functional, purpose-based approach, taking an exemption "away from one unlucky state retiree," or even a narrow subset of state retirees, would not have "cured the violation in *Davis*," Pet. Br. 26; the potential for government interference and lack of sufficient political checks would have been almost as strong as for the *Davis* exemption itself. So too for a scheme of "narrow exemptions for many groups of state retirees" adding "up to something very similar to

an exemption for all state retirees." *Id.* Because Section 111's constitutional purposes are offended whether a state exempts its entire workforce piecemeal or whole cloth, a proper view of Section 111 is able to look beyond a statute's form. See *Jefferson Cty.*, 527 U.S. at 439 (explaining that Section 111 challenges turn on "[t]he practical impact [of the tax], not the State's name tag").

Petitioners' rigid framework is therefore unnecessary to guard against absurdity. Adopting it, in fact, would cause the incongruous result of leaving *no* cases where the immunity doctrine's purposes bear weight. Yet because the doctrine consciously holds in tension "competing constitutional imperatives," the importance of "giving full range to each sovereign's taxing authority" demands a "narrow approach." *New Mexico*, 455 U.S. at 735-36; see also *Murray Corp.*, 355 U.S. at 493 (applying the doctrine with "[d]ue regard for the State's power to tax"). If the historical framework and constitutional rationales Section 111 embodies have any continuing place in tax immunity jurisprudence, then this is the case where they must matter. At a minimum, the Court should be skeptical of an approach that would expand the doctrine anew, in a different form than the first time it exceeded its proper bounds, but one no less "divorced both from the constitutional foundations of the immunity doctrine and from 'the actual workings of our federalism.'" *New Mexico*, 455 U.S. at 731 (quoting *Graves*, 306 U.S. at 490).

B. The Intergovernmental Tax Immunity Doctrine Is Not Violated Under Any Theory Because Mr. Dawson Is Not Similarly Situated To The Exempt State Retirees.

Petitioners' claim would still fail even if an exemption for a discrete and dwindling class of state retirees were the type of discrimination Section 111 bars—that is, if the Court rejects the purpose-based framework and deems intergovernmental tax immunity properly understood in more individual terms. At a minimum, the first step in *Davis*'s test requires petitioners to show that West Virginia treats Mr. Dawson differently than *comparable* state retirees. Yet no federal retirees, much less Mr. Dawson, draw benefits from any of the retirement plans Section 12(c)(6) names. If anything, Mr. Dawson's disconnect from these specialized plans situates him more closely to members of West Virginia's general public retirement plan, PERS—who receive no more than the $2,000 exemption Mr. Dawson may indisputably claim. The Court should reject petitioners' contrary, untethered theory of discrimination, which would require West Virginia to treat Mr. Dawson *better* than his true state counterparts.

1. Although the state supreme court rejected petitioners' claim based primarily (and properly) on the disconnect between Section 12(c)(6) and the purposes of the tax immunity doctrine, it also relied on *Davis*'s teaching that a tax falls only where it affords unequal treatment to "classes" of federal and state employees. *E.g.*, Pet. App. 8a (citing *Davis*, 489 U.S. at 815-16). The court emphasized that Section

12(c)(6) applies to a "very narrow class of former state and local employees," Pet. App. 16a, and Mr. Dawson is not similarly situated to that class.

Indeed, under any reading of Section 111, a state tax that treats similarly situated federal and state retirees the same is not discriminatory. See Pet. Br. 26, U.S. Br. 8, 10, 14, 26. *County of Fresno*, for instance, explained that there is no discrimination threat where "the tax is imposed equally on other similarly situated constituents of the State." 429 U.S. at 462. *Phillips Chemical* stressed that "a State may not single out those who deal with the Government, in one capacity or another, for a tax burden not imposed on others similarly situated." 361 U.S. at 383. *Jefferson County* found the "record show[ed] no discrimination . . . between similarly situated federal and state employees." 527 U.S. at 443. And *Davis* addressed "significant differences" only after finding this threshold step "undisputed." 489 U.S. at 814.

Yet although the rule is easily stated, satisfying the "similarly situated" test is not always simple. Cf. *Ala. Dep't of Rev.* v. *CSX Transp., Inc.*, 135 S. Ct. 1136, 1143 (2015) ("picking a class is easy, but it is not easy to establish that the selected class is 'similarly situated' for purposes of discrimination in taxation" (Railroad Revitalization and Regulatory Reform Act)). At least three principles guide this inquiry.

First, as long as "[t]he class defined is not an arbitrary or invidiously discriminatory one," *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958), identifying similarly situated taxpayers "must focus on the nature of the classification" a challenged tax statute *itself* draws, viewed in context with "the whole

tax structure of the state." *Phillips Chem.*, 361 U.S. at 383; see also Pet. App. 15a (considering "the totality of the structure of West Virginia's tax and retirement scheme").

In *County of Fresno*, for instance, the challenged tax fell on the fair rental value of houses owned by the federal government and supplied to U.S. Forest Service employees as part of their federal compensation. 429 U.S. at 454-55. Even though the forestry employees were required to live in the homes as a condition of employment, *id.*, the particularities of their employment were largely irrelevant to the analysis—because they were not relevant to the distinction the tax code itself drew. *Id.* Instead, the Court deemed the apt comparison class to be "those who work for private employers and rent houses in the private sector," *id.* at 465, and found no intergovernmental tax immunity violation in "a tax on 'the interest which the citizens . . . may hold (in a federal instrumentality) in common with other *property of the same description* throughout the State.'" *Id.* at 463-64 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 436 (emphasis added)).

Where, by contrast, a statute distinguishes on the basis of occupation, a taxpayer's job duties may become relevant. In *Jefferson County* the challenged tax fell on workers who "are not otherwise required to pay a license fee under state law," 527 U.S. at 427, 443-44, and the Court accordingly considered whether the tax discriminated against either "federal judges in particular, or federal officeholders in general." *Id.* at 443.

The United States urges the same view. In a Section 111 challenge, determining "which federal workers or retirees are similarly situated to the state employees receiving more favorable tax treatment will depend *on how the State has defined the favored class*." U.S. Br. 14 (emphasis added). This analysis may require considering aspects of an employee's job, as in *Jefferson County*, but job duties are relevant only to the extent the challenged statute defines the favored class "by reference to employees who perform specific job duties." *Id.* at 14-15. If the statute divides taxpayers on any other grounds, then classes of similarly situated employees must be determined by reference to those bases instead. See *id.* at 15.

Second, the fact that federal employees may never be able to qualify for a particular state tax exemption does not alter this rule. The Court rejected the federal taxpayers' argument in *Jefferson County* that, "as federal judges can never fit within the county's exemption for those who hold licenses under other state or county laws, that exemption unlawfully disfavors them." 527 U.S. at 443. What mattered instead was whether similarly situated state employees paid the tax—that is, those who also did not have a license under state or local laws, including state judges. *Id.* Indeed, as long as the distinction the challenged provision draws is "facially neutral," even a tax "whose burden falls *predominantly* on federal employees is not discriminatory for that reason alone." U.S. Br. 16 n.5 (emphasis added) (citing *Cty. of Fresno*, 429 U.S. at 464).

Third, it is not enough to show kinship with some set of state employees; the federal employee must be

treated differently than the most comparable class of state employees. In the dormant commerce clause context, for instance, "any notion of discrimination assumes a comparison of substantially similar entities," *Gen. Motors Corp.* v. *Tracy*, 519 U.S. 278, 298 (1997), and a court may reject a challenger's proposed comparison class where the entity is in fact more similar to another, *id.* at 300-01 (analyzing *Alaska* v. *Arctic Maid*, 366 U.S. 199, 204 (1961)). Similarly, plaintiffs bear the burden under Title VII[3] to show they received different treatment than similarly situated employees, see, *e.g.*, *Tex. Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 258 (1981), and even when job duties are relevant to this question, they are not sufficient if other factors call into question the strength of a purported comparison, see LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 8.04[2], 8-80 to 8-82 (Rel. 104-4/2018, 2018). Here, these principles mean that petitioners' claim "could properly be rejected" if Mr. Dawson "were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do." U.S. Br. 27-28.

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[3] Because the intergovernmental tax immunity doctrine protect the rights of sovereigns, and the effects of a challenged tax on individual federal employees are a way to measure discrimination against the federal government, the framework from Title VII and other statutes prohibiting individual discrimination are only partially relevant to the Section 111 inquiry. Under any approach, however, petitioners should at least be held to standards similar to those under Title VII for establishing discrimination relative to a similarly situated class of state employees. See Pet. Br. 26; U.S. Br. 27 n.6.

2. Applying this framework demonstrates that West Virginia law treats Mr. Dawson the same as similarly situated state retirees—and thus that there is no discrimination in West Virginia's decision not to extend the Section 12(c)(6) exemption to federal retirees.

It was readily apparent in cases like *Davis* and *Barker* that the challenged statutes treated comparable retirees differently—because those statutes dealt in absolutes. In *Davis*, for instance, the State exempted "*all* retirement benefits" to state and local entities, but taxed "retirement benefits paid by *all* other employers, including the Federal Government." 489 U.S. at 805 (emphases added); see also *Barker*, 503 U.S. at 596 ("The State of Kansas taxes the benefits received from the United States by military retirees but does not tax the benefits received by retired state and local government employees."). Section 12(c)(6) does not make similarly broad distinctions between federal and state retirees, but the analysis is no less plain under that statute's terms.

Rather than referring to broad categories of retirement income, Section 12(c)(6) lists specific state-managed retirement plans: "any West Virginia police, West Virginia Firemen's Retirement System or the West Virginia State Police Death, Disability and Retirement Fund, the West Virginia State Police Retirement System or the West Virginia Deputy Sheriff Retirement System." W. Va. Code § 11-21-12(c)(6). Critically, it does not name *all* state-managed retirement plans, nor even all plans covering state and local law enforcement retirees.

Missing from Section 12(c)(6) are the Judges' Retirement System, TRS, and PERS—which, in turn, covers county sheriffs, DNR officers, capitol police, and others. Pet. App. 13a-14a. The statute also does not apply to all state and local retirees who might appear to qualify based on their job titles and the names of the listed plans. Deputy sheriffs hired before 1998, for example, are presumptively covered by PERS, as well as many local firefighters and police officers. Pet. App. 13a; J.A. 84, 126.

There is no reason not to take these plan-based distinctions at face value when searching for retired state employees comparable to Mr. Dawson. See *City of Detroit*, 355 U.S. at 473. When read in context with "the whole tax structure of the state," *Phillips Chem.*, 361 U.S. at 383, Section 12(c)(6)'s limited scope makes clear that West Virginia's choice to designate specific state retirement plans was not pretextual or the functional equivalent of a blanket or otherwise broadly applicable tax exemption. *Cf. Hackman* v. *Dir. of Revenue*, 771 S.W.2d 77, 79-82 (Mo. 1989) (striking down exemption scheme scattered throughout state retirement plan statutes that, taken together, had the effect of exempting all state—but no federal—retirees' income). Similarly, the distinctions Section 12(c)(6) draws are not a "cloak for discrimination," *Barker*, 503 U.S. at 605, because there is no suggestion that the statute is applied less than evenhandedly. All retirees drawing benefits from one of the covered plans receive the exemption, and retirees in any other plan—federal, private, *or state*—do not. Cf. *Davis*, 489 U.S. at 817 (explaining that "evenhanded application of the [State's] rationale

would have resulted in inclusion of some [taxpayers who deal with the State] in the disfavored class as well" (citing *Phillips Chem.*, 361 U.S. at 384-85)).

Viewed under the statute's plan-specific terms, Mr. Dawson is not similarly situated to the retirees Section 12(c)(6) exempts.

First, Mr. Dawson—like other federal retirees—does not receive retirement benefits from one of the enumerated state-managed plans. This makes the class of federal retirees similarly situated to those who receive the exemption a null set. But just as in *Jefferson County*, it is irrelevant that Mr. Dawson and other U.S. Marshals could "never fit within the [state] exemption." 527 U.S. at 443. Because other state retirees pay the same tax as their federal counterparts—that is, because the line Section 12(c)(6) draws leaves both federal and state retirees in the disfavored class—then there is no discrimination "between similarly situated federal and state employees." *Id.*

Second, somewhat shifting the angle, Mr. Dawson *is* similarly situated to the state retirees who pay the tax, because PERS—not the plans named in Section 12(c)(6)—is the state-managed plan most similar to Mr. Dawson's federal retirement plan. Mr. Dawson draws an annuity from FERS, the general federal retirement plan for civilians, J.A. 183-84, much like PERS is the general retirement plan for West Virginia public employees, J.A. 44. FERS and PERS are both partially funded by member contributions; both calculate benefits using an average of the member's highest three-year salary; both allow members to opt for survivorship benefits with a corresponding

adjusted monthly annuity; and both allow their members to remain eligible for social security benefits. J.A. 9-11, 28, 46; see also 5 U.S.C. § 8403. And members of both may claim the $2,000 tax exemption under West Virginia Code § 11-21-12(c)(5), but not the larger exemption under Section 12(c)(6). In *Barker*, the fact that "military benefits are determined in a manner very similar to that of the Kansas Public Employee Retirement System" was an important factor supporting this Court's conclusion that members of both plans must receive similar treatment under state tax law. See 503 U.S. at 600. West Virginia tax law already treats FERS and PERS members the same.

3. Petitioners' contrary methods to identify comparable sets of employees fail. At its most extreme, petitioners' theory argues that "as long as *any* state retirees were treated better than federal retirees, the differential treatment might have been based on source of income," and the Court must proceed to the second step in the analysis. Pet. Br. 24 (emphasis in original). As explained above, p. 31, *supra*, this approach cannot account for *Jefferson County*'s holding. It would also eviscerate the similarly situated analysis. This Court's insistence on comparing apples to apples cannot be squared with searching a State's tax codes to find even one state employee who receives more favorable tax treatment than federal employees. See also U.S. Br. 16 n.5 ("Some state tax exemptions will be unproblematic even though they result in particular federal employees receiving less favorable tax treatment than particular state retirees.").

Petitioners' alternate tact—comparing job descriptions of federal and state employees— fares no better. See Pet. Br. 19 (framing the inquiry as whether Mr. Dawson and "other federal *law enforcement* retirees are taxed more heavily than state *law enforcement* retirees" (emphases added)). This approach wrongly assumes that two retirees with similar job duties are *per se* similarly situated, irrespective of the distinctions Section 12(c)(6) itself draws. Indeed, petitioners stumble at the outset, acknowledging that West Virginia exempts state retirees' "income from certain state *plans*," yet alleging discrimination because the State "denies that favorable tax treatment" to federal "law enforcement *retirees*." Pet. Br. 1 (emphases added). Comparing job duties may be an adequate method to classify sets of employees in some cases, but this is not one of them.

Critically, Mr. Dawson's federal job description cannot answer which class of state law enforcement officers he is comparable to—the class that receives the Section 12(c)(6) exemption, or the class that does not. See U.S. Br. 28 (agreeing that petitioners' claim would fail if Mr. Dawson "were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do"). For example, petitioners claim that Section 12(c)(6) applies to "the vast majority of state law enforcement retirees." Pet. Br. 19. Even assuming this statement is correct (and it almost certainly is not—MPFRS applies to only a small number of municipal law enforcement officers, J.A. 28, 33, 38, and the exemption does not cover other entire categories of law enforcement officers, like those employed by DNR,

Pet. App. 13a-14a), petitioners offer no way to tell whether Mr. Dawson is comparable to the majority or minority.

The reality is that West Virginia does not have a general tax exemption for law-enforcement retirees. Section 12(c)(6) looks at specific retirement plans, not categories of jobs—a distinction that matters given the particulars of this claim. Petitioners' job-duties approach has proven supremely malleable; at various points in state court petitioners compared Mr. Dawson's federal position to a state deputy sheriff, state trooper, or law enforcement officer more generally, see, *e.g.*, J.A. 241-42 (OTA appeal), 274-75, 281 (circuit court), J.A. 286-87 (state supreme court), with deputy sheriff the most frequent comparison, see, *e.g.*, J.A. 175-77, 241. Yet although Mr. Dawson began his federal career as a deputy, he retired as a full U.S. Marshal. Under federal law, U.S. Marshals and deputy marshals alike have authority, when "executing the laws of the United States within a State," to "exercise the same powers which a *sheriff* of the State may exercise in executing the laws thereof." 28 U.S.C. § 564 (emphasis added). Throughout litigation, however, petitioners avoided direct comparisons to state sheriffs, who typically do not qualify for the Section 12(c)(6) exemption. J.A. 84; W. Va. Code §§ 5-10-17, 7-14D-24.

To be sure, the circuit court found it undisputed that there were no material differences between Mr. Dawson's duties as a U.S. Marshal and "the powers and duties of the state and local law enforcement officers listed in § 11-21-12(c)(6)," including some deputy sheriffs. Pet. App. 22a. But that is as far as it

went—it did not find that he was *dissimilar* to other, non-exempt state law enforcement officers like county sheriffs. Nor could it have, as sheriffs no less than their deputies have authority to investigate crimes, execute warrants, and make arrests, just as Mr. Dawson testified he did as a U.S. Marshal. See J.A. 174-76.

Further, the same weakness persists looking only at deputy sheriffs as a potential comparison class. Deputy sheriffs hired before July 1, 1998—*like Mr. Dawson*, who was a deputy sheriff before leaving the State's payroll in 1987 to become a deputy U.S. Marshal, J.A. 175, 195—were not automatically enrolled in DSRS, but had to choose to transfer into that plan. J.A. 84; Pet. App. 13a. It is therefore doubtful that Mr. Dawson has more in common with the deputy sheriffs in DSRS than with those who draw benefits from PERS and receive the standard $2,000 exemption.

"Job duties" cannot be the measure of similarly situated state and federal employees; this approach leaves too many open questions. Indeed, it suggests that Mr. Dawson is *more* closely similar to the state law enforcement officers who generally do not receive the Section 12(c)(6) exemption than to those who do.[4]

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[4] The United States notes (at 28) that the Supreme Court of Appeals "did not suggest, or identify any reason to believe, that Mr. Dawson is more similarly situated to" the state law enforcement officers who do not receive the Section 12(c)(6) exemption. The state high court did, however, rely on the fact that only some state law enforcement officers are eligible for the exemption. Pet. App. 13a-14a, 15a-16a. And even under a more taxpayer-friendly standard like Title VII's framework, it is Mr.

A theory incapable of explaining whether Mr. Dawson is more like the state retirees who receive the Section 12(c)(6) exemption or those who (despite performing similar job duties) do not, is a theory unable to clear the gate.

Finally, this Court should reject petitioners' theory because making "job duties" the key factor muddies what should be a straightforward question: If Section 12(c)(6) violates intergovernmental tax immunity, what is the appropriate remedy? The solution for a discriminatory state tax should be evident from the scope of the violation. See U.S. Br. 21 ("if the state exemption is limited to a narrow subset of state retirees, the State can comply with Section 111 by exempting only the comparable class of federal retirees"). And so it would be under an approach tracking the distinctions a challenged provision itself draws. An exemption open to state retirees over 75, for example, can be rescinded or applied evenhandedly to federal retirees over 75. See *id.* at 15. It is far less clear what West Virginia would need to do under petitioners' approach. Would the Tax Commissioner be required to accept claims for total exemptions from every federal law enforcement officer, even though the West Virginia Legislature manifestly did not authorize him to do so for every *state* law enforcement officer? Or if the distinction turns on specific job titles, like "deputy sheriff," is every federal retiree who, like Mr. Dawson, had authority to investigate and make arrests entitled to

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Dawson who bore the burden to establish a proper comparison class. See, *e.g.*, *Burdine*, 450 U.S. at 258.

an exemption that not all state deputy sheriffs can claim? Petitioners stand silent on this critical score.

Under any theory of Section 111, the Court should hold that West Virginia's tax code does not discriminate against federal retirees. Because West Virginia does not treat all state and local law enforcement retirees the same—*even some who held the exact same job*—petitioners have not shown that Mr. Dawson was treated differently than similarly situated state retirees.

II. Any Heavier Burden Section 12(c)(6) Imposes On Federal Retirees Is Justified By Meaningful Differences Between The Classes Of Employees.

If the Court determines that Section 12(c)(6) reflects the type of discrimination with which the intergovernmental tax immunity doctrine is concerned, it should still affirm or (as the United States urges, U.S. Br. 17) remand to the state supreme court. Section 12(c)(6) survives the second step in the Section 111 inquiry because any differential treatment is justified by significant differences between the state retirees eligible for the Section 12(c)(6) exemption and federal retirees, like Mr. Dawson, who are not.

Section 111 does not prohibit all forms of inconsistent treatment between state and federal employees. After all, federal and state tax codes alike are rife with differential treatment, granting separate exemptions and different tax treatment to married taxpayers and those filing individually, homeowners and renters, and government and private-sector employees. Distinctions among taxpayers violate the

tax immunity doctrine only where they are drawn "based on the source of the pay or compensation." 4 U.S.C. § 111(a); *Davis*, 498 U.S. at 813. An essential part of that inquiry, this Court has held, turns on whether the treatment is "justified by significant differences between the two classes." *Phillips Chem.*, 361 U.S. at 383.[5]

Here, significant differences between Mr. Dawson and the state and local retirees eligible for the Section 12(c)(6) exemption are an independent basis to reject petitioners' challenge. Petitioners emphasize the circuit court's finding that it was undisputed there are no material differences between Mr. Dawson's job duties as a U.S. Marshal and the job duties of the state retirees to whom Section 12(c)(6) applies. Pet. Br. 11, 20. Yet the circuit court did not find it undisputed that no *other* meaningful differences exist between the two classes. Pet. App. 22a. The Supreme Court of Appeals, in turn, did not reach this issue, although the parties pressed it at every stage, see, *e.g.*, Pet. App. 4a, 12a-13a. If this Court rejects the state supreme court's holding at the first step of the Section 111 analysis, it should nonetheless affirm or remand at Step 2 on the basis of these "meaningful differences," *Davis*, 489 U.S. at 814; see also *McGoldrick* v.

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[5] Respondent agrees with the United States that the significant differences test helps discern whether discrimination against federal employees "is (impermissibly) 'because of' the federal employee's source of pay or (permissibly) because of something else." U.S. Br. 17 (quoting *Davis*, 489 U.S. at 816). Indeed, this additional caveat distinguishes Section 111 from the "categorical" ban on discrimination on which the United States later relies. U.S. Br. 22 (citing Interstate Commerce Act, Pub. L. No. 49-104, ch. 104, Pt. I, § 2, 24 Stat. 379-380 (1887)).

Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940) ("where the constitutionality of a statute has been upheld in the state court, [this Court] consistently refuses to consider any grounds of attack not raised or decided in that court").

"[J]ob duties are not the only potentially relevant difference under Section 111." U.S. Br. 14 (citing *Barker*, 503 U.S. at 598-600). Financial distinctions flowing from the structural aspects of a retirement plan can also constitute significant differences. *Davis*, for instance, left open the possibility of permissible state tax exemptions accounting for "differences in retirement benefits." 489 U.S. at 817. Distinctions between "current income" and "deferred income" may also potentially justify differing tax treatment, otherwise it would have been unnecessary for *Barker* to determine at the significant-differences stage that military and state benefits are both "deferred." 503 U.S. at 599-605. The different treatment against which petitioners chafe—eligibility for Section 12(c)(5)'s $2,000 exemption rather than the larger exemption under Section 12(c)(6)—is justified by financial distinctions like these.

The Tax Commissioner argued in state court that the structure and benefits of the plans Section 12(c)(6) names support treating members of those plans different from other state and federal retirees. Pet. App. 23a-24a; J.A. 196-203, 253-54, 261-62, 287-94; see also *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 90 n.2 (1988) (provided that a claim is asserted in state court, on a federal question "[p]arties are not confined [in this Court] to the same arguments which were advanced in the courts below"). For

instance, unlike the blanket exemption in *Davis* drawn irrelevant to the amount of state employees' retirement income, see 489 U.S. at 817, the state retirees eligible for the more tailored Section 12(c)(6) exemption are either ineligible for social security benefits or otherwise receive lower benefits than retired U.S. Marshals like Mr. Dawson. *E.g.*, J.A. 253-54 (finding that Mr. Dawson received greater benefits than retired deputy sheriffs), 116 (similar for each class of exempted retirees), 219 (explaining that State Troopers are not eligible for social security).

Other structural differences are the contributions retirees covered by the exempted plans made while active employees. The lion's share of West Virginia public employees are members of either PERS or TRS. See J.A. 28 (in 2010, over 98% of state retirees). Active employees enrolled in PERS contribute either 4.5% or 6% of their gross salary to fund that system, J.A. 44-46, and employees enrolled in TRS contribute 6%, J.A. 53, 55-56. The picture is much different, however, for members of the specific retirement plans the state legislature singled out in Section 12(c)(6). These employees contribute significantly higher percentages of their gross salaries to fund their respective retirement plans: MPFRS and DSRS members contribute 8.5%, members of Trooper Plan A 9%, and members of Trooper Plan B 13%. J.A. 69, 77, 85, 101. These higher contribution levels are another "meaningful difference" indicating that Section 12(c)(6) does not discriminate because of the source of retirement income, but based on the specific features of the retirement plans from which that income flows.

Of course, a State must apply financial or structural distinctions like these evenhandedly. *Davis*, 489 U.S. at 817. A permissible finance-based distinction, for example, would be used "as a determinative factor in distinguishing the *state* retirees who receive a total tax exemption from the state retirees who do not." U.S. Br. 19. This is precisely what Section 12(c)(6) does: By making retirement plans the dividing factor, the statute excludes *over 98%* of state retirees, including some law enforcement retirees who held the exact same positions as others who receive the exemption. Mr. Dawson is also part of—and receives tax treatment identical to—this large category of public-sector retirees.

Finally, these plan-based justifications are not just idle distinctions, but factors important enough to satisfy the significant differences test. The "significance" of a purported difference depends on its "impact" on "government operations," not its consequences for individual taxpayers. *Phillips Chem.*, 361 U.S. at 385. Here, the differences justifying Section 12(c)(6) are critical to the State's role as *employer*. Basing tax policy on the relative features of different state-managed retirement plans, as Section 12(c)(6) does, is about management and accounting decisions just as much as tax policy writ large. Some employees paid more into their retirement on the front end in the form of salary contributions, and are now able to exempt more of their retirement income on the back-end as retirees. Rather than reflecting a desire to "reduce[] the State's employment costs at the expense of the federal

government," *Davis*, 489 U.S. at 816 n.4, Section 12(c)(6) is more properly understood as an internal accounting calculus between the State and its employees.

Differences between the exempted plans and other state-managed plans thus provide more than enough reason for West Virginia to treat some of its *own* retirees differently than others. *Cf. Phillips Chem.*, 361 U.S. at 385 (describing States' power to classify its own citizens as "extremely broad," and "limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary"). Viewed through Section 111's lens, the same bases also justify the State's decision not to extend the Section 12(c)(6) exemption to federal retirees like Mr. Dawson—who not only did not pay the higher salary contributions eligible state retirees paid, but contributed to his own, federal plan at rates between 1.3% and 1.8%, significantly lower than even *non-exempt* state and local retirees. See pp. 12-13 & n.2, *supra*.

Indeed, ignoring the differences between the retirement plans Section 12(c)(6) names and Mr. Dawson's federal retirement plan would afford Mr. Dawson significantly better treatment than comparable state employees. Although petitioners compare Mr. Dawson to a retired deputy sheriff, as a federal employee he did not pay into DSRS. Petitioners' theory would allow him to enter a doubly preferred class above every state employee, not paying into the DSRS fund *and* not paying taxes on his benefits after retirement.

The intergovernmental tax immunity doctrine does not require this result. The doctrine's purpose was never "to confer benefits on [federal] employees," *Graves*, 306 U.S. at 483-84, nor to give some taxpayers "a distinct economic preference" over others, or the ability to "escap[e] their fair share of local tax responsibility," *City of Detroit*, 355 U.S. at 474. And while *Davis* requires a State to "treat those who deal with the [federal] Government as well as it treats those with whom it deals itself," 489 U.S. at 815 n.4 (quoting *Phillips Chem.*, 361 U.S. at 385), it does not go so far as to mandate that *all* federal retirees receive the best tax treatment available to *any* state retiree. See *id.* at 823 (Stevens, J., dissenting) ("The intergovernmental immunity doctrine simply does not constitute a most favored nation provision requiring the States to accord federal employees and federal contractors the greatest tax benefits that they give any other group subject to their jurisdiction."). In short, petitioners seek the benefits Section 12(c)(6) offers without shouldering the burdens that it requires—and that the state retirees who receive it already paid.

* * *

West Virginia's choice not to extend the Section 12(c)(6) exemption to retired U.S. Marshals like Mr. Dawson has nothing to do with the U.S. seal stamped on his benefits checks. Section 12(c)(6) accordingly does not discriminate against the United States or its employees, and the intergovernmental tax immunity doctrine is no barrier to its enforcement.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted.

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