No. 23-

IN THE

Supreme Court of the United States

DIANE ZILKA,

Petitioner,

v.

TAX REVIEW BOARD CITY OF PHILADELPHIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Commerce Clause requires states to consider a taxpayer's burden in light of the state tax scheme as a whole when crediting a taxpayer's out-of-state tax liability as the West Virginia and Colorado Supreme Courts have held and this Court has suggested, or permits states to credit out-of-state state and local tax liabilities as discrete tax burdens, as the Pennsylvania Supreme Court held below.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding are listed in the caption. No party to this proceeding is a corporation.

RELATED PROCEEDINGS

Counsel are aware of no directly related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Diane Zilka, respectfully petitions for a writ of certiorari to review the decision of the Pennsylvania Supreme Court.

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court is reported at *Zilka v. Tax Review Board City of Philadelphia*, 304 A.3d 1153 (Pa. 2023) and is reproduced in the appendix to this petition at Pet. App. 1a–66a.

The opinion of the Commonwealth Court of Pennsylvania is unpublished and is available at *Zilka v. Tax Review Board City of Philadelphia*, 272 A.3d 991 (Table) (Pa. Commw. Ct. 2022) and is reproduced at Pet. App. 67a–81a.

The opinion of the Court of Common Pleas of Pennsylvania is available at *Zilka v. City of Philadelphia Tax Review Board*, 2019 WL 4396294 (C.P. Phila. Cnty. Aug. 28, 2019) and is reproduced at Pet. App. 82a–98a.

The opinion of the Philadelphia Tax Review Board is reproduced at Pet. App. 99a–103a.

JURISDICTION

The Pennsylvania Supreme Court entered judgment on November 22, 2023 and this petition is filed within ninety days of that judgment. Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the U.S. Constitution provides that "Congress shall have Power ... To regulate

Commerce ... among the several States." U.S. Const. art. 1, § 8, cl. 3. This Court has "consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Okla. Tax Comm'n* v. *Jefferson Lines, Inc.,* 514 U.S. 175, 179, (1995).

STATEMENT OF THE CASE

The Pennsylvania Supreme Court's ruling creates an acknowledged conflict among state supreme courts on an important issue concerning how states credit taxpayers' out-of-state tax liabilities under the Commerce Clause. The Pennsylvania Supreme Court's conclusion that states are required to consider state and local tax liabilities in the aggregate only when the taxes are de facto indistinguishable conflicts with conclusions from the West Virginia and Colorado Supreme Courts that states must consider tax burdens at the state level and in light of the state's tax scheme as a whole. The Pennsylvania Supreme Court's decision also demonstrates states' confusion about how this Court's opinion in *Comptroller of Treasury of Maryland* v. *Wynne*, 575 U.S. 542 (2015) bears on the issue. Indeed, the concurring and dissenting opinions below suggested that this Court should grant certiorari to provide additional guidance about when a state's policy for crediting income earned interstate passes constitutional muster. In addition, the Pennsylvania Supreme Court's decision is unsound because the result is that taxpayers like Ms. Zilka who earn income interstate will often be subject to a higher tax burden than those who earn income intrastate solely because of their cross-border economic activity. This violates the federal Constitution and warrants this Court's review.

The Pennsylvania Supreme Court's conclusion that states may satisfy federal Constitutional restraints by applying credit piecemeal for out-of-state state and local tax liabilities creates an incentive for states to shift their taxes to the local level and avoid fully crediting their residents for taxes paid to other states on income earned in those states. This is precisely what this Court has held the Commerce Clause forbids. See *Tenn. Wine & Spirits Retailers Ass'n* v. *Thomas*, 139 S. Ct. 2449, 2460, (2019) ("[T]he proposition that the Commerce Clause by its own force restricts state protectionism is deeply rooted in our case law."); *Hughes* v. *Oklahoma*, 441 U.S. 322, 325 (1979) (noting the purpose of the Commerce Clause was to prevent "the tendencies toward economic Balkanization" prevalent before passage of the Constitution); see also *Wynne*, 575 U.S. at 564 n. 8 ("If state labels controlled, a State would always be free to tax domestic, inbound, and outbound income at discriminatory rates simply by attaching different labels.").

I. BACKGROUND OF THE CASE

A. Factual Background

Between 2013 and 2016 Diane Zilka lived in Philadelphia, Pennsylvania and earned income exclusively in Wilmington, Delaware. Pet. App. 7a. She was subject to four different income taxes with differing rates:[1] the Philadelphia Wage Tax (3.922%); the Pennsylvania Income Tax (3.07%); the Wilmington Earned Income Tax (1.25%); and the Delaware Income Tax (5%). *Id.*

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[1] These are the tax rates for the 2014 tax year and the rates used by the Pennsylvania courts in the decisions below. Pet. App. 7a n.4.

Pennsylvania and Philadelphia granted Ms. Zilka two tax credits. Pet. App. 7a. Pennsylvania credited her Delaware Tax liability against her Pennsylvania Tax liability. *Id.* Because of the differing rates, this credit completely offset her Pennsylvania Tax liability and left her 1.93% in Delaware Tax liability. *Id.* Philadelphia credited her Wilmington Tax liability against her Philadelphia Tax liability. *Id.* Because of the differing rates, after this credit, Ms. Zilka owed 2.672% in tax liability to Philadelphia. *Id.*

Ms. Zilka submitted two petitions to Philadelphia's Department of Revenue seeking refunds for the Philadelphia Tax she paid between 2013 and 2016. Pet. App. 7a n.3. She argued that the City should have granted an additional 1.93% credit against the Philadelphia Tax, or, in other words, the City should have credited her remaining Delaware Tax liability against her remaining Philadelphia Tax liability. *Id.* at 7a–8a.

The City refused to grant the additional credit, so Ms. Zilka appealed to the City's Tax Review Board. Pet. App. 8a. The Tax Review Board also denied Ms. Zilka's refund request. *Id.* It concluded that the tax scheme in *Wynne* was different from Philadelphia's policy and that Philadelphia's "'apple to apples' approach" of crediting state taxes to state taxes and local taxes to local taxes was "reasonable" under *Wynne*. *Id.* at 103a.

B. The Pennsylvania State Court Proceedings Below

Ms. Zilka's Lawsuit. Ms. Zilka appealed the Tax Review Board's denial to the Philadelphia County Court of Common Pleas. She then timely appealed to the Pennsylvania Commonwealth Court, and then to

the Pennsylvania Supreme Court. All three courts affirmed the Tax Review Board's decisions.

At all stages of the litigation, Ms. Zilka argued that the City was constitutionally required to consider her local and state level tax liabilities in the aggregate by crediting her remaining Delaware Tax liability against her remaining Philadelphia Tax liability. Otherwise, she was subject to a higher tax burden than Philadelphia residents who earned income in-state, solely because of her cross-border economic activity.

Specifically, she argued Philadelphia's failure to consider her local and state tax burdens in the aggregate violated the Commerce Clause under factors two and three of the four-factor test in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).[2] This was because the policy was neither internally nor externally consistent and because it discriminated against interstate commerce.

Ms. Zilka argued Philadelphia's policy[3] was similar to the Maryland tax scheme this Court inval-

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[2] As explained infra, under the *Complete Auto* test, a tax does not violate the Commerce Clause only "when [1] the tax is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc.*, 430 U.S. at 279. A tax is "fairly apportioned" when it is internally consistent (its identical application in every state would not disadvantage interstate commerce) and externally consistent (the tax reaches only value fairly attributable to activity within the taxing state). *Jefferson Lines, Inc.,* 514 U.S. at 185.

[3] Ms. Zilka has also argued that Philadelphia's failure to credit her remaining Delaware Tax liability was not a formal written policy but a practice. The Pennsylvania Supreme Court did not consider this issue and it is not at issue here.

idated as internally inconsistent in *Wynne*, and that *Wynne* teaches that state and local taxes must be considered collectively because the relevant constitutional question is whether the tax scheme as a whole burdened interstate commerce. In *Wynne*, the Court concluded that Maryland's failure to credit against its county taxes the income taxes its residents paid to other states on income earned in those states failed the internal consistency test because if every state adopted the same scheme, taxpayers who earned income interstate would be taxed on the same income by the states where they lived and where they worked. See 575 U.S. at 564–65. Taxpayers who earned purely intrastate income, by contrast, would be taxed only once. *Id.*

Court of Common Pleas Decision. After briefing and oral argument, the Court of Common Pleas denied Ms. Zilka's appeal. When Ms. Zilka timely appealed the Court of Common Pleas' decision, that court ordered Ms. Zilka to file a Concise Statement of Matters Complained of on Appeal under Pennsylvania Rule of Appellate Procedure 1925, and then issued an opinion in support of its ruling denying her appeal from the Tax Review Board. Pet. App. 84a.

In its opinion, the Court of Common Pleas concluded that Philadelphia's tax policy did not discriminate against interstate commerce by subjecting Ms. Zilka to a higher tax burden than her intrastate counterparts as she "was never subject to double taxation, or even the risk of double taxation, because at all times Appellant was only subject to one state tax by the state of Delaware, and one municipal tax by the City of Philadelphia." Pet. App. 88a. It rejected her argument that local and state taxes should be considered in the aggregate, concluding that *Wynne* did so only because the county tax at issue was actu-

ally a state tax as it was "administered, collected, and distributed by the Comptroller of the Treasury for the state of Maryland." *Id.* at 89a. The Philadelphia tax, in contrast, "is levied by the Philadelphia City Council, and is solely administered, collected, and distributed by the Philadelphia Department of Revenue for the sole benefit of the city, thus the tax is wholly separate, and distinct from any levied by the state of Pennsylvania." *Id.* Further, Philadelphia had been granted authority by Pennsylvania to impose its own taxes. *Id.* at 96a–97a.

The court concluded Philadelphia's tax policy was both internally and externally consistent based solely on Ms. Zilka's municipal-level tax liabilities. The policy was internally consistent because if "every local taxing authority adopted Philadelphia tax policies" a taxpayer who worked out of state would be subject to the same tax burden as a taxpayer who worked in state. Pet. App. 94a. It was externally consistent because Philadelphia was justified in taxing a portion of Ms. Zilka's income even though she did not work there because Ms. Zilka "performs multiple activities within the state and receives numerous benefits, and protections from the City of Philadelphia." *Id.* at 95a.

Commonwealth Court Decision. Ms. Zilka appealed The Court of Common Pleas' decision and the Tax Review Board's denials to the Commonwealth Court, which consolidated the decisions for review.

The Commonwealth Court affirmed. It likewise concluded Philadelphia's tax policy did not violate the Commerce Clause because Ms. Zilka never paid more than one local tax and one state tax. Pet. App. 72a. It reasoned that Ms. Zilka's higher tax burden was permissible "because Taxpayer chose to work

in Delaware, which charges a higher income tax than Pennsylvania." *Id*. (emphasis omitted).

The Commonwealth Court also agreed that *Wynne* did not require considering a taxpayer's local and state tax liabilities in the aggregate for constitutional purposes. In its view, *Wynne* stands for the proposition that "for a tax to satisfy the internal consistency test, there must be a credit for similar taxes paid by a resident taxpayer to other jurisdictions based on income earned there." Pet. App. 78a. Thus, considering only Ms. Zilka's local tax liability, the Commonwealth Court concluded Philadelphia's tax policy was internally consistent because "[i]f every jurisdiction imposed a tax scheme identical to Philadelphia's, all individuals earning income outside of their home locality would receive a credit for income taxes paid to the foreign locality and would pay no more than their intrastate counterpart." *Id*. at 75a.

The Commonwealth Court also found the tax scheme was not discriminatory because Ms. Zilka was taxed at the same rate as individuals who earned income in the City. Pet. App. 76a–77a. Philadelphia taxed all residents at 3.92%; because of the Wilmington Tax credit, Ms. Zilka paid 2.67% in income tax to Philadelphia, whereas residents earning income exclusively in the City paid the full 3.92%. *Id*. The court therefore concluded "[t]here is no disparate treatment or discrimination between Taxpayer and other resident taxpayers of Philadelphia." *Id*. at 77a.

Pennsylvania Supreme Court Decision. Ms. Zilka then filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. The Pennsylvania Supreme Court granted the Petition. In a badly di-

vided set of opinions, the Pennsylvania Supreme Court affirmed.[4]

The Majority Opinion. The majority concluded that local and state taxes need not be considered in the aggregate when determining whether a state's tax policy survives under the Commerce Clause. See Pet. App. 2a. It noted that the question was "a matter of first impression" in Pennsylvania and placed "paramount importance on the high Court's decision in *Wynne*." *Id*. at 26a. Like the lower courts, it concluded that *Wynne* does not require aggregation; rather, *Wynne* considered the local tax along with the state tax only because the local tax "was essentially little more than a state tax masquerading as a local tax, given that the state imposed the tax via state legislation and the state's comptroller collected the tax." *Id.* at 26a–27a. *Wynne*, therefore, "sanctioned an *ad hoc* approach" to determine whether state and local taxes were de facto indistinguishable. *Id*. at 27a. Applying that ad hoc approach, the majority concluded the Philadelphia Tax was not like the county tax in *Wynne* because it was "enacted by Philadelphia's City Council and is collected by the City's Department of Revenue solely for the benefit of the City and its citizenry." *Id*. The majority also rejected that state and local taxes are indistinguishable because municipalities have jurisdiction to tax only if authorized by the state. *Id*. at 27a–28a.

Aside from *Wynne*, the majority declined to find similar cases from the West Virginia and Colora-

[4] At the time of the Pennsylvania Supreme Court's decision, there were six justices on the Court. The decision in this case was split 3–2 as Justice Brobson did not participate in consideration or decision of the case.

do Supreme Courts persuasive.[5] To the majority, the Colorado Supreme Court's conclusion in *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 69 (Colo. 1999) that "[i]nternal consistency [under *Complete Auto*] requires that states impose identical taxes when viewed in the aggregate — as a collection of state and sub-state taxing jurisdictions" was "of limited value" given the brevity of its analysis, and the West Virginia Supreme Court's reliance on *General Motors* to conclude West Virginia's tax scheme violated the Commerce Clause where it offered a credit for taxes paid to other states but not other localities was therefore similarly unpersuasive. Pet. App. 30a–33a; See *Matkovich* v. *CSX Transp., Inc.*, 793 S.E.2d 888, 897 (W. Va. 2016). The majority also concluded the West Virginia Supreme Court misapplied *Wynne* because it did not use the ad hoc approach the majority understood *Wynne* to endorse. Pet. App. 32a–33a.

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[5] The majority also found unpersuasive an Arizona appeals court decision that concluded Arizona was required to credit the taxpayer for gross receipt taxes it paid to the state of New Mexico and to McKinley County, New Mexico. Pet. App. 29a–30a; *Ariz. Dep't of Revenue* v. *Ariz. Pub. Serv. Co.*, 934 P.2d 796, 799 (Ariz. Ct. App. 1997). The Arizona appeals court concluded the term "under the laws of another state" in the relevant Arizona statute encompassed the New Mexico county tax because (1) the county's taxing authority was derived from the state and (2) any other interpretation would violate the Commerce Clause because, when the "New Mexico state and county rates are combined," the taxpayer's total tax rate was more than the corresponding Arizona sales tax rate and thus more than the tax rate of an in-state purchaser. *Ariz. Dep't of Revenue*, 934 P.2d at 799. The Pennsylvania Supreme Court considered the Arizona court's holding to turn primarily on the Arizona statute and thus it did not "support the novel practice of aggregating state and local taxes for purposes of a dormant Commerce Clause analysis." Pet. App. 30a.

Thus, proceeding under the premise the Pennsylvania and Philadelphia Taxes should be considered in separate analyses for constitutional purposes, the majority concluded Philadelphia's tax policy satisfied the *Complete Auto* test. Pet. App. 33a. It determined it was internally consistent because any additional tax burden Ms. Zilka incurred was the result only of Delaware's higher income tax, not any inherent discrimination in Philadelphia's policy of crediting only taxes paid to other local taxing jurisdictions. *Id*. at 35a. The policy was also externally consistent, as the lower courts had also concluded, because Philadelphia's provision of municipal benefits to residents justified taxing even its residents who did not earn income in the City. *Id*. at 36a–37a.

Concurring Opinion. Justice Wecht wrote separately to highlight that although he agreed with the majority that neither *Wynne* nor other authority required states to consider taxpayers' local and state tax liabilities in the aggregate, "without some form of state-level aggregation, a state potentially could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by authorizing cities or political subdivisions to impose a portion of the tax directly. And allowing the result in any one case to hinge on whether a given tax is labeled state, local, county, city, or non-resident is reminiscent of the unworkable formalism that the Court's modern dormant Commerce Clause cases have eschewed since *Complete Auto*." Pet. App. 52a. Thus, the concurrence concluded "this case may be worthy of certiorari so that the Court can consider whether the internal consistency test should be applied as a state-level inquiry." *Id*.

Dissenting Opinion. Two justices dissented. The dissent concluded that "failing to aggregate state and

local taxes plainly results in discrimination against interstate commerce." Pet. App. 54a. The dissent disagreed that *Wynne* was controlling but found "particularly instructive" *Wynne*'s language that the relevant inquiry is "the economic impact of the tax." *Id.* at 55a (quoting 575 U.S. at 552). Notwithstanding that local and state taxes may have different purposes and are thus distinguishable, the dissent concluded that because municipalities may not impose taxes unless granted that power by the state, "for validity purposes, local taxes are considered state taxes." *Id.* at 58a. So the fact that the Philadelphia Tax "was enacted by the City Council and is collected by the City's Department of Revenue are of no constitutional significance." *Id.* The dissent found the Colorado and West Virginia Supreme Court cases, which the majority had rejected, persuasive on this point. *Id*. at 61a–63a.

When the Pennsylvania and Philadelphia Taxes were considered together under the internal consistency test, Philadelphia's tax policy impermissibly discriminated against interstate commerce because Ms. Zilka's total tax rate was higher than a taxpayer who lived and worked in Philadelphia. Pet. App. 64a–65a. If, however, Philadelphia had credited her remaining Delaware Tax liability against her remaining Philadelphia Tax liability, her tax burden would be the same as her intrastate counterpart. *Id*. The dissent concluded that because without the credit, Philadelphia's tax policy provided "a direct commercial advantage to those who live and work in Philadelphia," it violated the Commerce Clause. *Id*. at 65a. But like the concurrence, the dissent noted that "[i]t may well be this case is worthy of *certiorari* so that the Court can provide further guidance with re-

spect to its dormant Commerce Clause jurisprudence." *Id*. at 66a n.8.

REASONS FOR GRANTING THE PETITION

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

A. The Pennsylvania Supreme Court's Ruling Creates An Acknowledged State Court Split.

The Pennsylvania Supreme Court acknowledged that the proper way to consider local and state tax liabilities to determine whether a state's tax policy survived the *Complete Auto* test presented a question of first impression to that court. Pet. App. 26a. The Pennsylvania Supreme Court's ruling on this issue created a square and acknowledged state court conflict because it expressly rejected the West Virginia and Colorado Supreme Courts' views that the proper inquiry looks at the tax scheme as a whole. *Id*. at 30a–33a. This split on an important federal constitutional issue—whether a state's tax policy passes muster under the Commerce Clause—unquestionably warrants this Court's review. The split emanates, at least in part, from courts' disagreement about the proper application of *Wynne;* indeed, the concurring and dissenting opinions below suggested the Court should grant certiorari to provide further guidance on the issue. *Id*. at 52a, 66a n.8. In addition, the Pennsylvania Supreme Court's decision could open the door to rampant state discrimination of interstate commerce by encouraging states to hide behind a

tax's label to impose taxes at the local level that would be not subject to full credit. In this case, for example, Ms. Zilka's cross-border economic earnings were subject to impermissible multiple taxation because Philadelphia refused to allow a credit against its tax for the tax Ms. Zilka paid on the same income to Delaware.

The Court has long held the Commerce Clause contains a negative command that prohibits states from "tax[ing] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State. Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Wynne*, 575 U.S. at 449–50 (internal citation omitted). A state avoids these federal constitutional restrictions when its tax, in relevant part, is fairly apportioned between intrastate and interstate commerce, and relatedly, does not discriminate against interstate commerce. *Complete Auto Transit, Inc.*, 430 U.S. at 279. To meet these standards, a tax must be internally consistent—that is, if every state imposed the same tax scheme interstate commerce would not be subject to impermissible multiple taxation, and externally consistent—that is, the state taxes only what is fairly attributable to in-state activity. *Jefferson Lines*, 514 U.S. at 185.

According to the Colorado Supreme Court, when applying the internal consistency test, the state's tax scheme must be "viewed in the aggregate—as a collection of state and sub-state taxing jurisdictions." *Gen. Motors Corp,* 990 P.2d at 69. This is necessary to ensure that "the interstate taxpayer should never pay more sales or use tax than the in-

trastate taxpayer." *Id*. Based on this view, the Colorado Supreme Court concluded that Denver must credit against its use tax the sales or use tax General Motors paid not only to out-of-state municipalities but also to other states. *Id*.

Drawing on the Colorado Supreme Court's decision and *Wynne*[6], the Supreme Court of Appeals of West Virginia concluded that, to be constitutional, a West Virginia statute offering credit against a motor fuel use tax must offer that credit against sales tax paid to other states *and* municipalities of other states. *Matkovich,* 793 S.E.2d at 897. The West Virginia high court explained its conclusion was consistent with *Wynne*'s application of the internal consistency test and particularly *Wynne*'s language that the relevant inquiry is whether the "'total tax burden on interstate commerce [] is higher' than a purely intrastate transaction." *Id*. at 898 (quoting *Wynne*, 575 U.S. at 567). To consider the total tax burden, the West Virginia high court applied a hypothetical in which an out-of-state state tax and local tax were considered together to demonstrate that West Virginia's failure to offer credit against local sales taxes could result in higher tax burdens on interstate commerce than intrastate transactions, in violation of the Commerce Clause.[7]

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[6] The West Virginia court also relied on the Arizona court of appeals decision that the Pennsylvania Supreme Court found unpersuasive. *Matkovich*, 793 S.E.2d at 897 (citing *Ariz. Dep't of Revenue*, 934 P.2d at 799).

[7] The fact that the Colorado and West Virginia courts considered use taxes rather than an income tax does not matter for constitutional analysis. The Commerce Clause equally protects the free flow of labor and of goods. *See Wynne*, 575 U.S. at 551 (explaining there was no difference for constitutional purposes between gross receipts and net income, especially because the

The Colorado and West Virginia courts' view has been endorsed by a leading commentator on state tax matters, Walter Hellerstein.[8] Hellerstein, in an article updated because of the Pennsylvania Commonwealth Court's decision below, concludes that "the constitutional analysis should view the exercise of tax power by the state or its political subdivisions collectively rather than subjecting each state or local exaction to an individualized inquiry regardless of the existence of other exactions imposed under state authority." W. Hellerstein, *Are State and Local Taxes Constitutionally Distinguishable ? (Revised)*, 103 Tax Notes State 743, 748 (Feb. 14, 2022). Hellerstein also notes the conflict between the West Virginia court's decision in *Matkovich* and the lower Pennsylvania court's decision in this case; while the West Virginia court "evaluated all the taxes at issue at the state level, regardless of whether they were imposed by the state or a locality," the Pennsylvania Commonwealth Court's analysis was "fundamentally flawed because it fails to examine the constitutional issues, particularly the commerce clause's internal consistency doctrine, at the state level." *Id*. at 747, 755.

This conflict among state supreme courts warrants this Court's review. If Ms. Zilka had resided in Colorado or West Virginia, those courts would have considered whether the tax policy passed constitutional muster by considering her local and state tax liabilities together, or in other words, the combined amount Ms. Zilka owed to Pennsylvania and Philadelphia and the combined amount she owed to Dela-

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relevant inquiry is the "practical effect" of the tax) (quoting *Complete Auto Transit, Inc.*, 430 U.S. at 279).

[8] This Court routinely cites Hellerstein on state tax matters implicating the Commerce Clause. *See, e.g., Wynne*, 575 U.S. at 561; *Jefferson Lines, Inc.*, 514 U.S. at 180, 194.

ware and Wilmington. Applying the internal consistency test by examining the state's tax scheme as a whole in that fashion would have resulted in a reduction of Ms. Zilka's tax liability.

Federal constitutional issues concerning taxation of cross-border economic activity should not be decided by the vagaries of geography. See Ass'n of Int'l Certified Pro. Accts., *Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals* at 7 (2017) ("Certainty, rather than ambiguity, of a person's tax liability is vital."); *Am. Trucking Ass'ns* v. *Scheiner,* 483 U.S. 266, 286 (1987) ("Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause."). The Commerce Clause prohibits states from discriminating against interstate commerce, yet if the issues this case presents are not resolved, taxpayers who earn income interstate would be subject to an impermissibly higher tax burden because of their cross-border economic activity in some states, like Pennsylvania, but not in others. This is precisely the sort of inconsistency in federal law that this Court grants certiorari to prevent. See Pet. App. 52a (Wecht, J., concurring) ("[T]his case may be worthy of certiorari so that the Court can consider whether the internal consistency test should be applied as a state-level inquiry, as Zilka and Professor Hellerstein suggest."); *id.* at 66a n.8 (Dougherty, J. and Mundy, J., dissenting) ("It may well be this case is worthy of *certiorari* so that the Court can provide further guidance with respect to its dormant Commerce Clause jurisprudence.").

B. The Pennsylvania Supreme Court's Ruling Is Wrong.

The Pennsylvania Supreme Court's ruling further merits this Court's review because declining to analyze the tax scheme as a whole by considering state and local taxes in the aggregate under the internal consistency test is wrong and conflicts with the guidance in *Wynne*.

As Professor Hellerstein explains, "[t]he taxpayer's constitutional right to a tax credit against Pennsylvania's state and local taxes for payment of Delaware's state and local taxes should be evaluated collectively at the state level and should not be subdivided into separate analyses of the state and local taxes in question." Hellerstein, *supra*, at 754. This conclusion is consistent with this Court's guidance in *Wynne*. Although the precise issue was not before the Court, the Court's examination of Maryland's failure to provide credit for its county tax examined Maryland's tax scheme as a whole and at the state level. The Court stated:

> In order to apply the internal consistency test in this case, we must evaluate the Maryland income tax scheme as a whole. . . . For Commerce Clause purposes, **it is immaterial that Maryland assigns different labels** (i.e., "county tax" and "special nonresident tax") to these taxes. In applying the dormant Commerce Clause, they must be considered as one.

Wynne, 575 U.S. at 564 n.8 (emphasis added). The Pennsylvania Supreme Court disregarded this language, however, and instead concluded that *Wynne* had considered the county and state taxes at issue in the aggregate only because the county tax was "masquerading" as a state tax. Pet. App. 26a. Thus, the

Pennsylvania Supreme Court concluded that *Wynne* endorses an ad hoc analysis of the circumstances surrounding the relevant taxes and requires aggregation only when the local and state taxes are de facto indistinguishable. *Id.* at 27a.

But the purpose of considering local and state taxes in the aggregate under the internal consistency test is not because local and state taxes are the same thing but because doing so avoids the risk a tax will not be fairly apportioned between intrastate and interstate commerce or will discriminate against interstate commerce. Hellerstein explains that a state's broad authority to distribute taxing power within the state imposes on municipalities the same federal constitutional restraints that are imposed on the state. Hellerstein, *supra*, at 744 ("Because a state's political subdivisions are creatures of the state, their exercises of tax power are treated as the exercise of state tax power and adjudicated according to the standards restraining the exercise of state tax power."). This means that the relevant constitutional inquiry is how the tax scheme operates as a whole. *Id.* at 748–50.

Considering Ms. Zilka's tax liabilities in the aggregate compared to assessing her state and local tax liabilities separately shows that when the tax scheme is not aggregated, she is subject to a higher tax burden due to her interstate income than Philadelphians who earn income exclusively intrastate:

A Philadelphian who lives and works in Philadelphia is subject to a total tax liability of **6.922**% (3.922% in tax liability to Philadelphia and 3.07% in tax liability to Pennsylvania).

Before credits, Ms. Zilka's total tax liability was 13.242%. That number is derived from her tax liability at the Pennsylvania state level (6.922%) plus

her tax liability at the Delaware state level, which was 6.25% (1.25% in tax liability to Wilmington and 5% in tax liability to Delaware).

After credits, if her Delaware tax liability had been credited at the state level, she, just like the in-state worker, would be subject to a total tax liability of **6.922**% (13.242% – 6.25%).

But if the credits are applied on a one-to-one basis, that is, state against state and local against local, Ms. Zilka's total tax liability is **8.922**% (13.242% – 3.07% in Pennsylvania Tax credit – 1.25% in Wilmington Tax credit). Her total tax liability is thus 2% higher than her intrastate counterpart. This disparity is precisely what the Commerce Clause prohibits as a burden on interstate activity.

Apart from constitutional deficiencies in the Pennsylvania Supreme Court's application of the internal consistency test, its decision has practical implications that are unsound. As demonstrated in the mathematical equations above, it is a simpler equation, and thus easier as a matter of tax administration, to apply credits on a state-level basis. See Ass'n of Int'l Certified Pro. Accts., *supra*, at 7 ("The more complex the tax rules and system, the greater likelihood that the certainty principle is compromised."). It is not sensible to expect tax experts to decide whether a credit is available based on an ad hoc assessment of the relationship between the State and a local tax. The Pennsylvania Supreme Court's decision cuts against that logic by endorsing a crediting system that is inherently more difficult to apply than the system it rejects. The Pennsylvania Supreme Court's reliance on the distinction between local and state taxes also provides an easy path for states to discriminate against interstate commerce by shifting tax burdens to the local level where they are not subject

to full credit. See Pet. App. 52a (Wecht, J., concurring) ("[W]ithout some form of state-level aggregation, a state potentially could avoid providing full credits to its residents for taxes paid to other states on income earned in the other states by authorizing cities or political subdivisions to impose a portion of the tax directly).

C. The Pennsylvania Supreme Court's Ruling Presents A Recurring And Important Question And Is An Ideal Vehicle For Resolving This Question.

This case presents a recurring and important question of federal constitutional law. The uncertainty and unfairness created by the existing state court split are detrimental to taxpayers nationwide. And importantly, the Pennsylvania Supreme Court's explicit rejection of the Colorado and West Virginia courts' decisions makes clear that the conflict will not resolve itself. Compare *Mallory* v. *Norfolk S. Ry.*, 600 U.S. 122, 127 (2023) (granting certiorari to decide conflict between Pennsylvania Supreme Court and Georgia Supreme Court on due process limits on exercise of personal jurisdiction). The Pennsylvania Supreme Court's decision was based in part on its interpretation of *Wynne* and its view that the West Virginia high court had misapplied *Wynne*. It is therefore vital that this Court grant review to clarify the meaning of *Wynne*.

The Pennsylvania Supreme Court's decision includes three separate opinions on the issue—two of which explicitly noted the case "worthy of certiorari." Pet. App. 52a, 66a n.8. This case thus presents an ideal vehicle for the Court to resolve the state court split and ensure uniformity in this important area of constitutional law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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