No. 23-914

In the Supreme Court of the United States

DIANE ZILKA, PETITIONER

v.

CITY OF PHILADELPHIA, TAX REVIEW BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Philadelphia's local income tax, against which Philadelphia allows residents a credit for income taxes paid to other localities but not income taxes paid to States, fails this Court's internal-consistency test for evaluating whether a tax is inherently discriminatory against interstate commerce.

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

STATEMENT

From 2013 through 2016, petitioner was a resident of Philadelphia, Pennsylvania, who worked exclusively in Wilmington, Delaware. Pet. App. 7a, 99a-100a. Pennsylvania and Delaware both taxed petitioner's work income, as did the cities of Philadelphia and Wilmington. *Ibid.* This case presents the question whether Philadelphia's local income tax "inherently discriminate[s] against interstate commerce without regard to the tax policies of other States," which turns on whether it fails the Court's "internal consistency test." *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 562-563 (2015).

1. a. In 1932, Pennsylvania enacted the Sterling Act to delegate state authority to any "city of the first class"

to "levy, assess and collect * * * taxes on persons * * * within the limits of such city." 53 Pa. Cons. Stat. Ann. § 15971(a) (West 1998); see Pet. App 15a n.6. In 1939, Philadelphia—which was and remains Pennsylvania's only city of the first class, see 53 Pa. Cons. Stat. Ann. § 101 (West 2011); *Spahn* v. *Zoning Bd. of Adjustment*, 977 A.2d 1132, 1143 (Pa. 2009)—adopted the Nation's first municipal income tax. Pennsylvania Economy League, *The Sterling Act: A Brief History* 2-3 (Mar. 1999), https://www.economyleague.org/resources/sterling-act-brief-history. In 1947, Pennsylvania delegated similar taxing authority to its smaller political subdivisions, *id.* at 4-6, but the applicable statute generally caps those subdivisions' income-tax rate at 1%. 53 Pa. Cons. Stat. Ann. §§ 6924.301.1(a), 6924.311(3) (West 2011). In 1971, when Pennsylvania adopted its own state-level income tax for residents—which now imposes a flat 3.07% tax rate, 72 Pa. Cons. Stat. Ann. § 7302(a) (West 2022)—the State preserved its political subdivisions' authority to impose local income taxes, 72 Pa. Cons. Stat. Ann. § 7359(a) (West 2022).

The City of Philadelphia imposes two taxes on its residents' earned income: a flat tax for general city revenue purposes (2.422% in 2014), Phila. Code § 19-1502(1)(a) and (c) (13th ed. 2024), and, since 1991, an additional 1.5% tax for certain city fiscal purposes, § 19-2803(1)(a). Thus, in 2014, petitioner was assessed 3.922% in local Philadelphia taxes on her earned income —in addition to 3.07% in Pennsylvania state taxes. Pet. App. 7a & n.4.

Pennsylvania and Philadelphia also tax the income that nonresidents earn within their jurisdictions. Pennsylvania imposes the same flat 3.07% income-tax rate on nonresidents as on residents, but limits its nonresident

tax to income earned from sources in Pennsylvania. 72 Pa. Cons. Stat. Ann. §§ 7302(b), 7308 (West 2022). Philadelphia taxes nonresidents—whether they live in- or out-of-state—on income earned "in Philadelphia" at a flat rate (3.493% in 2014). Phila. Code § 19-1502(1)(b); see *id.* § 19-1501(7). Since 1983, Philadelphia's nonresident income-tax rate has been lower than (and before 1983 it was equal to) the City's income-tax rate for residents. See *id.* §§ 19-1502(1)(a) and (b), 19-2803(1)(a); see also City of Philadelphia, *Summary schedule of tax rates since 1952*, at 5 (rev. Aug. 4, 2023), https://www.phila.gov/media/20231116085343/Historic-Tax-Rates-Updated-Dec-2023.pdf.

Delaware and the City of Wilmington similarly tax the income that nonresidents (such as petitioner) earn within their jurisdictions. Delaware applies a marginal income-tax rate for nonresidents that increases from 2.2% to 6.6% as taxable income increases. Del. Code Ann. tit. 30, §§ 1102(a)(14), 1121 (2023). Wilmington imposes a flat 1.25% tax on nonresidents' income earned in Wilmington. Wilmington Mun. Code § 44.107(a)(2) and (b) (1993 & Supp. 2024). Thus, in 2014, Delaware and Wilmington assessed 5% and 1.25% taxes on petitioner's nonresident income. Pet. App. 7a.

b. Pennsylvania allowed petitioner a full credit for her 5% Delaware nonresident tax liability, which reduced petitioner's Pennsylvania state-income-tax liability from 3.07% to zero. Pet. App. 7a, 68a. Petitioner therefore paid a total state income tax of 5% (to Delaware), which was 1.93% more than the 3.07% total state tax that would have resulted if petitioner had lived and worked only in Pennsylvania. *Id.* at 7a, 72a.

The City of Philadelphia similarly allowed petitioner a credit for her 1.25% local tax liability to Wilmington.

Pet. App. 7a. That credit reduced petitioner's tax liability to Philadelphia from 3.922% to 2.672%. See *ibid.*

Petitioner petitioned Philadelphia's Department of Revenue for an additional credit for her Delaware state income tax, seeking to further reduce her Philadelphia local tax liability by an amount equal to the 1.93% Delaware nonresident tax that exceeded (and thus was not credited against) her Pennsylvania state tax. Pet. App. 7a-8a, 83a. The Department denied that request, *id.* at 8a, 83a, and Philadelphia's Tax Review Board denied petitioner's administrative appeal, *id.* at 99a-103a.

Petitioner therefore paid more income taxes in the relevant years than if she had lived and worked only in Philadelphia. For example, in 2014, petitioner paid 8.922% in relevant income taxes: zero to Pennsylvania, 2.672% to Philadelphia, 5% to Delaware, and 1.25% to Wilmington. Pet. App. 7a; see Pet. 20. That 8.922% rate is 1.93% higher than the combined 6.992% rate for Pennsylvania (3.07%) and Philadelphia (3.922%) taxes that applied to income earned in Philadelphia by residents of Philadelphia. See Pet. 19-20.

2. On judicial review, a Pennsylvania trial court affirmed the Philadelphia Tax Review Board's decision. Pet. App. 82a-98a. The court applied the four-part standard in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977), for "determining whether state or local taxation imposes an unconstitutional burden upon interstate commerce." Pet. App. 92a-96a. As relevant here, the court rejected petitioner's contention that Philadelphia's tax was inconsistent with *Complete Auto*'s fair-apportionment requirement, concluding instead that the tax satisfied the so-called "internal consistency test" for that requirement as applied by this Court in *Wynne*, *supra*. Pet. App. 93a-95a.

3. A state intermediate appellate court affirmed. Pet. App. 67a-81a. Applying *Complete Auto*, *id.* at 73a-81a, the court concluded that Philadelphia's income tax satisfied the "internal consistency test," *id.* at 73a-75a, 78a-81a. The court noted that petitioner paid "1.93% more [in taxes] than her intrastate counterparts" in Philadelphia because Delaware "charges a higher income tax than Pennsylvania," *id.* at 72a (emphasis omitted), but the court recognized that "Philadelphia is not responsible for the [higher tax rate] that Delaware charges," *id.* at 81a.

4. a. The Pennsylvania Supreme Court affirmed. Pet. App. 1a-66a. Again applying *Complete Auto*, *id.* at 3a-7a, 33a-37a, the court determined that Philadelphia's income tax satisfied the "internal consistency test" for evaluating whether a taxing jurisdiction has taxed only its fair share of an interstate transaction. *Id.* at 5a-7a, 31a n.11, 33a-36a.

The state supreme court observed that, under this Court's dormant Commerce Clause jurisprudence, "'disparate incentives to engage in interstate commerce'"—including "'double taxation'"—can permissibly result "from the combined effect of two otherwise lawful income tax schemes" imposed by different taxing authorities. Pet. App. 3a, 5a (quoting *Wynne*, 575 U.S. at 562, and citing *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 279 (1978)); see *id.* at 37a. The court stated that the "internal consistency test" is therefore designed to "'isolate the effect of a defendant State's tax scheme'" in order to identify unlawful "'tax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States.'" *Id.* at 4a-5a (quoting *Wynne*, 575 U.S. at 562). To do so, the court explained, the test "hypothetically assum[es] that every

State has the same tax structure" as the challenged tax and asks whether, in that hypothetical scenario, the tax is one that "inherently discriminate[s] against interstate commerce." *Id.* at 5a (quoting *Wynne*, 575 U.S. at 562). As such, the court concluded, the internal-consistency test requires the assumption that every State applies "the *same* taxes and crediting systems as Pennsylvania and Philadelphia." *Id.* at 31a n.11. The court therefore rejected petitioner's contrary view that the test is properly applied in this case by assuming all States have the same practice of "providing credit" but that the States "maintain their own differing tax rates." *Id.* at 17a, 31a n.11.

The state supreme court also rejected petitioner's contention that "state and local tax burdens must be aggregated" when applying the internal-consistency test, Pet. App. 12a. See *id.* at 26a-28a. The court recognized that local taxing authority is ultimately delegated from the state legislature, but it noted that Philadelphia's local income tax was independently authorized and adopted by the City's government "solely for the benefit of the City and its citizenry." *Id.* at 27a-28a. The court concluded that local taxes are not so "indistinguishable" from state-level taxes that they "*must* be aggregated for purposes of a dormant Commerce Clause analysis." *Id.* at 28a.

The state supreme court accordingly applied the internal-consistency test by assuming that "all local taxing jurisdictions adopt the Philadelphia Tax rate of 3.922% and the City's corresponding practice of crediting taxpayers for local taxes paid to other jurisdictions." Pet. App. 34a. Under that assumption, the court determined that Philadelphia's tax satisfied the internal-consistency test because "in-state and out-of-state tax-

payers would yield the same tax obligation": "April, who lives in State A and works exclusively in State A, would pay 3.922% once to State A, while Bob, who lives in State A but works in State B, would also pay only 3.922% once, to State B, because State A would permit him a credit against its own tax." *Ibid.*

The state supreme court further observed that the result would be the same if state and local taxes were aggregated, stating that the "in-state and out-of-state taxpayers" would still incur the same overall tax obligation "even if we add the Commonwealth's state tax to this hypothetical." Pet. App. 34a. The court explained that "each taxpayer [in the hypothetical] would simply incur an additional state tax obligation of 3.07%," because each would incur a 3.07% state-level tax and the second 3.07% state-level tax would be reduced to zero by the "practice of offsetting [the state tax] with state taxes paid elsewhere." *Id.* at 34a-35a. The court therefore concluded that, in this case, any "'disparate incentives to engage in interstate commerce' stem solely from 'the interaction of two different but nondiscriminatory and internally consistent schemes'" and that "any excess taxes paid by [petitioner] were simply the result of Delaware's higher income tax rate of 5%, rather than any inherent discrimination contained in the Philadelphia Tax." *Id.* at 35a (quoting *Wynne*, 575 U.S. at 562).

b. Justice Wecht concurred. Pet. App. 38a-53a. He agreed that Philadelphia's tax "passes the internal consistency test" applied in *Wynne*, *id.* at 38a, 50a-52a, and articulated his "reluctan[ce] to expand upon the holding in *Wynne* given the protean and unpredictable nature of [this Court's] dormant Commerce Clause jurisprudence," *id.* at 38a; see *id.* at 39a-40a, 44a-47a, 52a-53a.

c. Justice Dougherty dissented, joined by Justice Mundy. Pet App. 54a-66a. His opinion acknowledged that *Wynne* did not resolve whether "state and local taxes must be aggregated," *id.* at 54a-55a, but concluded that aggregation was required to ascertain the "practical effect" and "economic impact of the tax" here, *id.* at 55a-56a, 63a (quoting *Wynne*, 575 U.S. at 551-552). In the dissenters' view, Philadelphia's tax "unconstitutionally discriminated against interstate commerce" because petitioner paid a higher overall tax rate on her income from Wilmington than a taxpayer who lived and worked only in Philadelphia. *Id.* at 63a-65a.

DISCUSSION

Petitioner contends (Pet. 18-21) that the Pennsylvania Supreme Court erroneously applied this Court's "internal consistency test" by disregarding "guidance in [*Comptroller of the Treasury* v.] *Wynne*, [575 U.S. 542, 562-563 (2015),]" that petitioner views as suggesting that the proper analysis requires that "state and local taxes" be "aggregate[d]." Pet. 18. Petitioner further contends (Pet. 13-17) that review is warranted because the decision below conflicts with decisions of two other state supreme courts. The Pennsylvania Supreme Court correctly determined that Philadelphia's income tax does not violate this Court's "internal consistency test," and that decision does not conflict with any decision of this Court or any other state supreme court. No further review is warranted.

A. Philadelphia's Income Tax Satisfies The Internal-Consistency Test Regardless Of Whether The Proper Analysis Aggregates State And Local Taxes

The Commerce Clause affirmatively grants Congress the power to "regulate Commerce * * * among the

several States." U.S. Const., Art. I, § 8, Cl. 3. But this Court has long held that the Clause also "contain[s] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995); see *National Pork Producers Council* v. *Ross*, 598 U.S. 356, 368 (2023). The "early stages" of that jurisprudence arose after the Civil War but "the Court's understanding of the dormant Commerce Clause has taken some turns." *Jefferson Lines*, 514 U.S. at 180-183 (recounting history); see *Wynne*, 575 U.S. at 572-574 (Scalia, J., dissenting). In 1977, the Court in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, "categorically abandoned" the formalism of its earlier jurisprudence in favor of a "four-part test." *Jefferson Lines*, 514 U.S. at 183. Under that approach, a state tax is deemed constitutional if it satisfies all four requirements, one of which requires that the tax be "fairly apportioned." *Ibid.* (citation omitted).

The fair-apportionment requirement is a jurisprudential "descendant" of the Court's earlier "prohibition of multiple taxation" and reflects the principle that each State must "'tax[] only its fair share of an interstate transaction.'" *Jefferson Lines*, 514 U.S. at 184 (citation omitted). A tax must be both "internally consistent" and "externally consistent." *Id.* at 185. This case, as it comes to this Court, concerns only "the internal consistency test." Pet. 18-20. The Pennsylvania Supreme Court correctly determined that Philadelphia's income tax satisfies that aspect of *Complete Auto*.[1]

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[1] Because petitioner does not address whether Philadelphia's tax violates other aspects of *Complete Auto*'s four-part test, neither does this brief.

1. a. The internal-consistency test reflects the Court's recognition that the vice of impermissible discrimination is not present simply because simultaneous taxation by two States produces a relatively higher tax rate for interstate transactions. *Wynne*, 575 U.S. at 566. "The prevention of [such] duplicative taxation * * * would require national unform rules" governing each State that taxes interstate transactions—rules that would necessarily embody complex "policy decisions" that "the Constitution has committed" to Congress, rather than this Court. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 279-280 (1978). Accordingly, "double taxation" is "constitutional" where it "results only from the interaction of two different but nondiscriminatory tax schemes." *Wynne*, 575 U.S. at 566. Because "[a State] is not responsible for [taxation by any other State]," a State that fairly treats "local and foreign concerns" is not "necessarily at fault in a constitutional sense" for higher taxation resulting from "the combined effect" of two States' taxing schemes. *Moorman*, 437 U.S. at 277 & n.12.

The internal-consistency test therefore helps evaluate whether a tax disparity is "attributable to the taxing State's discriminatory policies alone." *Wynne*, 575 U.S. at 563. The test is designed to "*isolate* the effect of a defendant State's tax scheme" in order to determine whether that single State's tax scheme "inherently discriminate[s] against interstate commerce *without regard to the tax policies of other States*." *Id.* at 562 (emphases added). Under that test, a State's tax has "[i]nternal consistency" if "the imposition of a tax identical to [it] by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Jefferson Lines*, 514 U.S. at 185. But if

"the logical consequence[] of cloning" that tax through the universal application of "an identical tax" by "every State" would be the higher taxation of interstate transactions vis-à-vis identical intrastate transactions, then that result "shows as a matter of law that [the] State [actually imposing that tax] is attempting to take more than its fair share of taxes from the interstate transaction." *Ibid.* The "'internal consistency' test" thus requires that a court "hypothetically assum[e] that every State has the same tax structure" in order to "'see whether [the challenged tax's] identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Wynne*, 575 U.S. at 562 (citation omitted).

b. *Wynne* applied the internal-consistency test in its analysis of Maryland's "county" income tax on residents, which offered no credit for income taxes paid to other jurisdictions. See 575 U.S. at 561-569. Maryland taxed its residents, including the Wynnes, by (1) imposing a "'state' income tax" and (2) "a so-called 'county' income tax" on income earned from sources both inside and outside of Maryland. *Id.* at 546. If, like the Wynnes, "Maryland residents pa[id] income tax to another jurisdiction for income earned there, Maryland allow[ed] them a credit against the 'state' tax but not the 'county' tax." *Id.* at 546-547. "Maryland also tax[ed] the income of nonresidents" from "sources within Maryland" with (1) a state-level tax and (2) "a 'special nonresident tax' in lieu of the 'county' tax." *Id.* at 546. Analyzing Maryland's tax scheme under the internal-consistency test, the Court ignored Maryland's state-level taxes and focused only on how the county-related taxes were applied to residents and nonresidents. *Id.* at 564 n.8. The Court thus explained that it "evaluate[d] the Maryland

income tax scheme as a whole" by considering the "three separate categories of income" covered by the county-related taxes: "(1) the 'county tax' on income that Maryland residents earn in Maryland; (2) the 'county tax' on income that Maryland residents earn in other States; and (3) the 'special nonresident tax' on income that nonresidents earn in Maryland," *ibid.*, which Maryland imposed "in lieu of the 'county' tax," *id.* at 546.

To conduct the internal-consistency analysis, *Wynne* "[a]ssume[d] that every State imposed [a set of] taxes, which [we]re similar to Maryland's 'county' and 'special nonresident' taxes: (1) a 1.25% tax on income that *residents* earn in State, (2) a 1.25% tax on income that *residents* earn in other jurisdictions, and (3) a 1.25% tax on income that *nonresidents* earn in State." 575 U.S. at 564-565 (emphases added). The Court then posited that "two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B." *Id.* at 565. In those circumstances, the Court concluded, the tax scheme failed the internal-consistency test because "Bob will pay more income tax than April solely because he earns income interstate": "April will have to pay a 1.25% tax only once, to State A"; whereas "Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income." *Ibid.*

The Court then demonstrated how providing "a credit against income taxes paid [by residents] to other States" for their county-equivalent nonresident taxes would satisfy the internal-consistency test. *Wynne*, 575 U.S. at 568. The Court modified the hypothetical above by "assum[ing] that all States impose a 1.25% tax on all three categories of income but also allow a credit against income taxes that residents pay to other juris-

dictions." *Ibid.* "In that circumstance, April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax": "April would pay a 1.25% tax only once (to State A), and Bob would pay a 1.25% tax only once (to State B, because State A would give him a credit against the tax he paid to State B)." *Ibid.*

Two features of *Wynne*'s mode of analysis are significant here. First, *Wynne* illustrates that the internal-consistency test focuses *exclusively* on the taxing scheme and tax rates of the jurisdiction whose tax is challenged as unlawful. Because the test assumes that "*every State*" imposes "a *tax identical* to the one in question," *Jefferson Lines*, 514 U.S. at 185 (emphases added), the Court in *Wynne* had no occasion to (and did not) examine the particular taxing schemes—including the tax rates—imposed by any of the 39 States other than Maryland to which the Wynnes had paid nonresident income taxes. See 575 U.S. at 546-547, 564-565. Instead, the Court's application of the internal-consistency test (1) "[a]ssume[d] that *every State* imposed" taxes "similar to Maryland's 'county' and 'special nonresident' taxes" and (2) used a tax rate of 1.25%, *id.* at 564 (emphasis added), because the relevant Maryland rates were "equal to the [State's] lowest county income tax rate," which was 1.25%. *Id.* at 546; see *Frey* v. *Comptroller of the Treasury*, 29 A.3d 475, 483 (Md. 2011) (cited in *Wynne*, 575 U.S. at 546), cert. denied, 566 U.S. 905 (2012). That approach properly serves the internal-consistency test's sole purpose: to "*isolate* the effect of a defendant State's tax scheme" to determine if it "*inherently* discriminate[s] against interstate commerce *without regard to the tax policies of other States*." *Wynne*, 575 U.S. at 562 (emphases added).

Second, the Court's analysis in *Wynne* did not aggregate Maryland's state-level and county taxes. The Court examined only the county-related taxes—*i.e.*, the "'county' and 'special nonresident' taxes" that were county-tax substitutes—to determine whether the "county" taxes satisfied the internal-consistency test. *Wynne*, 575 U.S. at 564 & n.8. Although *Wynne* does not foreclose the possibility that the aggregation of state and local taxes could be warranted in some contexts, it provides no affirmative support for petitioner's contention that aggregation is required here.

c. Philadelphia's income tax satisfies this Court's internal-consistency test. Assume that every State imposes local taxes similar to Philadelphia's income tax for residents and nonresidents: (1) a 4% tax (rounded up from 3.922% for mathematical simplicity) on income that *residents* earn in the locality, (2) a 4% tax on income that *residents* earn outside of the locality, and (3) a 3.5% tax (rounded up from 3.493%) on income that *nonresidents* earn in the locality. See pp. 2-3, *supra*. Further assume that, like Philadelphia, all States allow a credit against local taxes for the local taxes that their residents pay (as nonresidents) to other States. In those circumstances, "April (who lives and works in State A) and Bob (who lives in State A but works in State B) would pay the same tax." *Wynne*, 575 U.S. at 568. April would pay a total of 4% in local taxes (to her State A locality). Bob would also pay a total of 4% in local taxes because he would pay a 3.5% nonresident tax (to the State B locality where he works) and a 0.5% resident tax (to his state A locality, reflecting the 4% resident rate for non-local income minus a 3.5% credit for the tax paid to the State B locality). So long as the nonresident local-tax rate does not exceed the resident

local-tax rate—which it does not do in Philadelphia, see p. 3, *supra*—the result of the analysis will remain the same.

Aggregating local and state-level taxes would not alter the result here. Modify the above hypothetical by further assuming that every State imposes state-level taxes similar to Pennsylvania's state income tax for residents and nonresidents: (1) a 3% (rounded from 3.07%) tax on residents' in-state income, (2) a 3% tax on residents' out-of-state income, and (3) a 3% nonresident tax on income earned in the State, with (4) a credit to residents for parallel state taxes paid to another State. See pp. 2-3, *supra*. April and Bob would still pay the same tax. April would pay 7% in aggregate taxes: 3% to State A and 4% to her State A locality. Bob would also pay 7% in aggregate taxes. Bob would be assessed 13.5% in aggregate taxes: 6% to States A and B (3% each) plus 4% to his State A locality and 3.5% to the State B locality in which he works. But Bob, just like April, would pay only 7% in aggregate taxes because he would be given an aggregate credit of 6.5%: 3% by State A and 3.5% by his State A locality. Thus, as the Pennsylvania Supreme Court recognized, aggregation makes no difference in this case because the result of the internal-consistency test is the same "even if [one] add[s] the Commonwealth's state tax to th[e] hypothetical." Pet. App. 34a.

2. a. Petitioner contends (Pet. 20) that her "total tax liability is [about] 2% higher than [that of] her intrastate counterpart" and that the "disparity is precisely what the Commerce Clause prohibits as a burden on interstate activity." In petitioner's view (*ibid.*), that disparity underscores the "deficiencies in the Pennsylvania Supreme Court's application of the internal consistency test," but petitioner is incorrect.

Petitioner misapplies the internal-consistency test by analyzing the taxes imposed not only by Pennsylvania and Philadelphia (the proper focus of the analysis) but also by Delaware and Wilmington. See Pet. 19-20. Petitioner thereby identifies a 1.93% tax-rate disparity that results from the *combined effect* of two States' taxing regimes. But double taxation resulting from taxes imposed by multiple States that yields higher taxation for interstate transactions is *not* in itself unconstitutional. See p. 10, *supra*. The internal-consistency test examines only the challenged tax in order to "isolate [its] effect" and determine whether it "inherently discriminate[s] against interstate commerce *without regard to the tax policies of other States*." *Wynne*, 575 U.S. at 562 (emphasis added). The analysis therefore proceeds by assuming that "a tax *identical* to the one in question" is imposed "by *every State*," making it possible to evaluate whether the "identical application" of "an identical tax" nationwide would "place interstate commerce at a disadvantage." *Jefferson Lines*, 514 U.S. at 185 (emphases added). As the Pennsylvania Supreme Court concluded, that aspect of the test forecloses petitioner's attempt (Pet. 19-20) to identify a relevant disparity based on the combined effect of Delaware's 5% state tax, Pennsylvania 3.07% state tax, Philadelphia's 3.922% tax, and Wilmington's 1.25% tax. See Pet. App. 17a, 31a n.11 (rejecting petitioner's reliance on the "differing tax rates" because the internal-consistency test requires the assumption that "all states and local taxing authorities * * * adopt the *same* taxes and crediting systems as Pennsylvania and Philadelphia").

The "simple hypothetical" identified by the Pennsylvania Supreme Court illustrates the flaw in petitioner's mix-and-match tax-rate approach. Pet. App. 35a. As-

sume two states impose state-level taxes like Pennsylvania and Delaware: States C and D both tax their residents on all income, tax nonresidents on in-state income, and allow a full credit for taxes paid to other States, but State C imposes a 3.07% flat tax rate while State D imposes a 5% tax rate. Neither state has local taxes. Posit further that Charles lives and works in State C, while Donna lives in State C but works in State D. Charles would pay 3.07% in taxes to State C. Donna would pay no taxes to State C (due to its tax credit) but would still pay 5% in taxes to State D. Donna would thus pay 1.93% more income tax than Charles because she earns income interstate. But that is because State D, like Delaware, has a higher income-tax rate. The only way State C could preserve its lower 3.07% tax rate and eliminate that tax disparity would be to subsidize State D's higher rate of taxation by *paying* Donna an amount equal to the 1.93% disparity. Federal courts, however, lack authority to make the "policy decisions" necessary to impose such a "national unform rule[]" for equal state taxation. *Moorman*, 437 U.S. at 279-280. That is precisely why the internal-consistency test focuses only on the taxes—including the tax rates—imposed by a single State when determining whether *that* State's "tax scheme is inherently discriminatory." *Wynne*, 575 U.S. at 565.

Petitioner simply ignores the Pennsylvania Supreme Court's determination that the internal-consistency test requires an analysis in this case under which every State is assumed to apply the identical tax—and tax rates—applied by Pennsylvania and Philadelphia, Pet. App. 17a, 31a n.11. Petitioner instead attempts (Pet. 18-21) to focus on the aggregation of state and local taxes. But as explained above, aggregation makes no differ-

ence in this case. See p. 15, *supra*. What drives the outcome here is the understanding that the internal-consistency test requires the assumption that *every State* applies *taxes identical* to the tax being challenged. Petitioner has offered no basis to dispute that understanding, which, in any event, lies outside petitioner's aggregation-focused question presented. See Pet. i.

b. Although aggregation would not have made any difference here, petitioner has identified (Pet. 18-19) a potentially good reason to aggregate state and local taxes when that might affect the analysis: Philadelphia's income tax is in one important sense a "state" tax because the City, like any municipality, "is merely a political subdivision of the State from which its authority derives." *United Bldg. & Constr. Trades Council* v. *Mayor & Council of Camden*, 465 U.S. 208, 215 (1984). Thus, "what would be unconstitutional if done directly by the State" under the dormant Commerce Clause presumably would "no more readily be accomplished by a city deriving its authority from the State." *Ibid.*; cf. pp. 1-2, *supra*.

Even so, *Wynne* did not need to resolve that question for purposes of its dormant Commerce Clause analysis. The Maryland statute at issue there required a "county" income tax of at least 1% but authorized each county to increase that rate to 3.2%. 575 U.S. at 546; see Md. Code Ann., Tax-Gen. § 10-106(a)(1) (LexisNexis 2010). The State itself then collected the "county" tax and "distribut[ed] a portion of [it] to various State funds designated by statute" before distributing the balance to each county to which any balance was attributable. *Frey*, 29 A.3d at 483 (cited in *Wynne*, 575 U.S. at 546). In that context, where the State *required* the imposition

of each "county" tax and then used that tax at least in part for the *State's own purposes* as specified by state statute, the Court observed that, regardless of their labels, Maryland's "state" tax and "county" taxes "both [we]re State taxes." *Wynne*, 575 U.S. at 546; see *id.* at 564 n.8.

Here, Pennsylvania merely authorized the Philadelphia government to impose a local tax, which the City uses exclusively for local purposes. The question whether such state authorization and local use would require a local tax to be deemed a state tax for the purpose of aggregating state-level and local taxes in a dormant Commerce Clause analysis might warrant resolution in a case in which such aggregation would matter. But this is not such a case.

B. This Court's Review Is Not Warranted

1. Petitioner contends (Pet. 13-17) that review is warranted because the decision below conflicts with *General Motors Corp.* v. *City & County of Denver*, 990 P.2d 59 (Colo. 1999), and *Matkovich* v. *CSX Transportation, Inc.*, 793 S.E.2d 888 (W. Va. 2016), cert. denied, 583 U.S. 816 (2017). But there is no clear conflict, much less one warranting this Court's review of petitioner's aggregation question.

a. The Colorado Supreme Court in *General Motors* addressed Denver's automobile-use tax, which credited sales or use taxes paid to other municipalities. 990 P.2d at 64-65. The court stated that "[i]nternal consistency *requires* that *states impose identical taxes* when viewed in the aggregate—as a collection of state and sub-state taxing jurisdictions"—on the theory that "the interstate taxpayer should never pay more sales or use tax than the intrastate taxpayer." *Id.* at 69 (emphasis added). That conclusion in the sales-and-use-tax context is in

significant tension with the no-aggregation ruling below in this income-tax case. Pet. App. 26a-28a. But *General Motors*' underlying theory of tax-rate-equalization has since been superseded by this Court's explanation in *Wynne* that identical taxation by every State is not required and that double taxation is not itself unconstitutional. *Wynne*, 575 U.S. at 566 (discussing the "critical distinction" between (1) permissible "double taxation that results only from the interaction of two different but nondiscriminatory tax schemes" and (2) double taxation from inherently "discriminatory tax schemes").

Furthermore, *General Motors*' internal-consistency analysis was erroneous under *Wynne* because it assumed that States "impose[] different tax rates," *General Motors*, 990 P.2d at 70, rather than assuming that every State imposes taxes identical to the challenged tax, Pet. App. 31a n.11. Had the Colorado Supreme Court not made that distinct error, it presumably would have found that the Denver tax satisfied the internal-consistency test, and aggregation (as here) would not have made any difference to that analysis.

Perhaps because *Wynne* has undermined *General Motors*' views on aggregation, no Colorado court has applied those views in any other tax context—including with respect to income taxes. As a result, the State of Colorado—which has "no power to delegate" its "exclusive" authority to impose income taxes to municipalities, *City & County of Denver* v. *Sweet*, 329 P.2d 441, 446-447 (Colo. 1958)—allows a credit against Colorado state income taxes for income taxes paid "to another state" but *not* for taxes paid to "local jurisdiction[s]." 1 Colo. Code Regs. § 201-2:39-22-108(2)(a) (2024).[2]

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[2] Although Colorado municipalities lack authority to impose income taxes, *City & County of Denver* v. *Duffy Storage & Moving*

b. The West Virginia Supreme Court in *Matkovich* interpreted a state statute that imposed state-level sales-and-use taxes and provided a credit for equivalent taxes paid to other States. 793 S.E.2d at 891. After quoting *General Motors*, *id.* at 896-897, the court construed the West Virginia statute to allow credit for taxes paid directly to another State, including state "subdivisions," because "[a]ny other construction" would "violate the Commerce Clause's prohibition on subjecting interstate transactions to a greater tax burden." *Id.* at 897. The court illustrated that tax differential with a purportedly "simple math analysis" that erroneously assumed that the relevant States had imposed *different* taxes. *Id.* at 897-898 (assuming one State has a 5% state-level tax, while a second State has a 3% state-level tax and a 2% local tax). And whatever the merits of *Matkovich*'s approach in the context of West Virginia's single-level tax structure (without a local tax) and its credit for taxes paid to other States with a two-level (state and local) tax structure, *Matkovich* did not consider the situation here, where both relevant States have state and local taxes.

Moreover, only one (unpublished) decision has cited *Matkovich* favorably—and only for propositions that are irrelevant here. See *Antero Res. Corp.* v. *Irby*, No. 22-48, 2023 WL 3964054, at *4 n.6 (W. Va. June 13, 2023), cert. denied, 144 S. Ct. 380 (2023). Because no court has extended *Matkovich*'s analysis to income taxes, West Virginia allows a state income-tax credit for "any income tax paid to another state," W. Va. Code

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Co., 450 P.2d 339, 341 (Colo. 1969), they may impose "excise taxes" for conducting work in a municipality if the quantum of tax is not based on the amount of income earned, *id.* at 343-344 (citation omitted). See, *e.g.*, Denver Rev. Mun. Code § 53-203 (Supp. 2024).

Ann. § 11-21-20(a) (LexisNexis Supp. 2024), but *prohibits* any such credit for taxes paid to a "political subdivision of a state," W. Va. Code R. § 110-21-20.1 (2024).[3] Thus, West Virginia's and Colorado's income-tax systems each mirror Philadelphia's tax-credit approach, underscoring the absence of any practical division of authority.

2. Petitioner suggests (Pet. 20-21) that States could "eas[il]y" discriminate against interstate commerce by converting state-level taxes to local taxes. But no State has apparently done so. Br. in Opp. 12. And given the marginal increase in overall tax revenue that might potentially result, it seems unlikely that any state legislature would adopt such a significant change in state authority, which would transfer substantial fiscal power from the legislature itself to local governments.

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[3] Although West Virginia municipalities may impose user fees for municipal services, W. Va. Code Ann. § 8-13-13(a) (LexisNexis 2023), they appear to lack authority to impose income taxes. See *Cooper* v. *City of Charleston*, 624 S.E.2d 716, 721-722 (W. Va. 2005) (per curiam); cf. Charleston Mun. Code § 2-737 (Supp. 2024) ($3/week employment fee).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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