No. 17-419

# In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

*Petitioners*,

v.

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

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

In *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court applied the intergovernmental tax immunity doctrine—which is coextensive with 4 U.S.C. § 111(a)—to strike down a state law that exempted from taxable income the retirement income of all of Michigan's state employees, but not of federal government employees. This Court concluded that the law discriminated against federal retirees on the basis of their source of income, and was not "justified by significant differences between the two classes" of taxpayers. *Davis*, 489 U.S. at 815–16. Since *Davis*, five state courts of last resort have applied this fact-specific standard to aspects of their state tax regimes. Three of these courts struck down statutes that extended tax exemptions to all of a State's public retirees, while taxing fully the income of all or a subset of federal retirees. The other two courts rejected challenges to state tax laws that exempt the retirement income of a narrow class of state retirees only.

The question presented is:

Whether the doctrine of intergovernmental tax immunity requires a State to extend a tax exemption available to a narrow class of state retirees to federal retirees with job descriptions similar to some of the workers to whom the exemption applies, where federal retirees are treated as or more favorably than the vast majority of state-government retirees.

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The opinion of the West Virginia Supreme Court of Appeals is unpublished, but has been informally reported at 2017 WL 2172006. The opinion is reproduced in Petitioners' Appendix at Pet. App. 1a.

The order of the Circuit Court of Mercer County is reproduced in Petitioners' Appendix at Pet. App. 17a. This order is not published formally or informally.

## STATEMENT OF THE CASE

In the decision below, the West Virginia Supreme Court of Appeals held that a limited state-tax exemption applicable to less than 2% of West Virginia government retirees did not impermissibly discriminate against federal retirees with job descriptions similar to some of the workers to whom the tax exemption applies. Under 4 U.S.C. § 111(a) and this Court's intergovernmental tax immunity precedents, the court concluded that the tax scheme did not discriminate based on the source of retirees' income—as opposed to other cases in which States had granted blanket exemptions for their entire retired workforces, but not federal retirees. Here, because the exemption applies to so few state retirees and the State treats federal retirees the same as—or better than—the overwhelming number of state

retirees, there is no statutory or constitutional defect in the West Virginia law.

This Court's review is unnecessary because the decision below is consistent with all other state courts of last resort that have analyzed similar tax exemptions for all or part of a State's employees. The Petition provides no example where a court has invalidated a narrow tax exemption like West Virginia's. Instead, Petitioners point to decisions in which courts struck down blanket tax exemptions for state employees, and decisions in which courts (as below) have upheld much more limited exemption regimes. These decisions illustrate different *outcomes* under different facts, not different *legal principles* or disagreement about how this Court's precedents should be applied.

Further, the decision below is correct. The primary case on which Petitioners rely, *Davis v. Mich. Dept. of Treasury*, 489 U.S. 803 (1989), invalidated a blanket tax exemption for state employees, but did not suggest that the same result would hold for a limited, more tailored exemption scheme. To the contrary, ten years after *Davis* this Court upheld such a tailored state tax regime. *Jefferson Cty., Ala. v. Acker*, 527 U.S. 423 (1999). The decision below is fully consistent

with this Court's precedents and the doctrine of intergovernmental tax immunity.

Furthermore, the decision below is a poor candidate for review. The court below did not reach the fact-specific issue of whether significant differences between the relevant state and federal retirees might justify different tax treatment, which means that the outcome of the case may not change even if this Court were to grant certiorari and rule for Petitioners. There is also every reason to believe that review could unsettle decades of resolved state-law precedent on the scope of the intergovernmental tax immunity doctrine, which could create uncertainty for current and future government retirees alike as States readjust their tax regimes in response to this Court's decision. Especially where there is no evidence that States are treating federal workers unfairly in comparison to their own employees now—or that state courts are incapable of striking down any laws that might—there is no reason for this Court to intervene.

**1.** In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579 (1819), this Court held that a discriminatory state tax on the Bank of the United States improperly interfered with the federal government's constitutional powers, and thus violated the doctrine of intergovernmental tax immunity. Grounded in the "need to protect each sovereign's

governmental operations from undue interference by the other," *Davis*, 489 U.S. at 814, over time this doctrine became "expansively applied" beyond the context of government instrumentalities, to taxes on the salaries of federal and state employees as well, *Jefferson Cty.*, 527 U.S. at 436. In that context, "salaries of most government employees, both state and federal, generally were thought to be exempt from taxation," because to allow "any tax on income a party received under a contract with the government was a tax 'on' the government" in the sense that "it burdened the government's power to enter into the contract." *Davis*, 489 U.S. at 811 (citation omitted).

In the Public Salary Tax Act of 1939, however, Congress both made state and local employees subject to federal income tax, and "expressly waived whatever immunity would have otherwise shielded federal employees from nondiscriminatory state taxes." *Davis*, 489 U.S. at 812. This waiver of immunity is limited by Section 111 of the statute, which provides that "[t]he United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States" *only if* "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111(a) ("Section 111"). This Court has held that Section 111 is "coextensive with the prohibition against discriminatory taxes embodied in the modern

constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 813.[1]

This Court revisited the intergovernmental tax immunity doctrine's scope in its 1989 decision in *Davis v. Michigan Department of Treasury*. Applying Section 111, *Davis* invalidated a Michigan tax scheme in which retirement benefits received by all state retirees were eligible for a blanket exemption from taxation, but retirement benefits received by federal retirees were not. 489 U.S. at 806. The Court held that this regime was overt discrimination "because of the source of" retirees' pay, and the distinction between federal and state employees was not "justified by significant differences between the two classes" of employees. *Id.* at 815 (quoting 4 U.S.C. § 111(a), *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

In *Jefferson County v. Acker*, however, the Court rejected an interpretation of Section 111 that "extend[ed] the doctrine [of intergovernmental tax immunity] beyond the tight limits this Court has set." 527 U.S. 423, 436 (1999). There, Jefferson County, Alabama, imposed a licensing tax on state and federal judges, but exempted taxpayers who held a license under other state or county laws. *Ibid.* Two federal

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[1] In light of this holding, this brief, like the Petition (at 8 n.2), will at times refer to Section 111 and the intergovernmental tax immunity doctrine interchangeably.

judges argued that the tax discriminated against federal taxpayers because, as a practical matter, only state and local judges would ever be eligible for the exemption—but this Court rejected their challenge. *Id.* at 443. Instead, the Court reemphasized its "narrow approach to intergovernmental tax immunity," *id.* at 437 (citation omitted), and found no discrimination "between similarly situated federal and state employees," *id.* at 443.

**2.** West Virginia taxes the retirement income of most local, state, and federal employees, with certain exemptions. Any taxpayer 65 or over may exempt up to $8,000 from their taxable income. Pet. App. 3a; W. Va. Code § 11-21-12(c)(8). For retirees under 65, those receiving income from the West Virginia Public Employees Retirement System ("PERS") and the State Teachers Retirement System—as well as all federal retirees—are entitled to exempt up to $2,000 of their retirement benefits from their taxable income. Pet. App. 2a–3a; W. Va. Code § 11-21-12(c)(5). Military retirement benefits are exempt up to $20,000. Pet. App. 3a; W. Va. Code § 11-21-12(c)(7)(B).

As an exception to this general scheme, West Virginia's tax code also allows a small number of state government retirees to exempt from their taxable income all benefits received from four discrete retirement plans. These plans are the Municipal

Police Officer and Firefighter Retirement System; the Deputy Sheriff Retirement System; the State Police Death, Disability and Retirement Fund (which compensates retired West Virginia State Troopers); and the West Virginia State Police Retirement System. W. Va. Code § 11-21-12(c)(6) ("Section 12(c)(6)").

The West Virginia Legislature's intent in creating the Section 12(c)(6) exception was "to give a benefit to a very narrow class of former state and local employees." *Brown v. Mierke*, 191 W. Va. 120, 124, 443 S.E.2d 462, 466 (1994), *cert. denied sub nom. Brown v. Paige*, 513 U.S. 877 (1994). The facts bear out this goal: Less than two percent of all state government retirees are eligible for the exemption. Pet. App. 13a. Further, not all state retirees who may appear to qualify for the exemption based on their job description and the name of one of the enumerated retirement plans are, in fact, eligible. Some retired deputy sheriffs receive retirement benefits from the more general PERS system instead of the Deputy Sheriff Retirement System, for example, and thus—like the vast majority of retired state employees—are eligible for only the standard $2,000 exemption. *Ibid.* The exemption is also not available for law enforcement officers employed by the West Virginia

Department of Natural Resources or the State Capitol Police. Pet. App. 13a–14a.

**3.** In 2008, Petitioner James Dawson retired from the U.S. Marshals Service. Pet. App. 4a. As a federal employee, Mr. Dawson was never enrolled in one of the four retirement programs enumerated in Section 12(c)(6); rather, he receives benefits under the Federal Employee Retirement System. Pet. App. 4a. It is undisputed that Mr. Dawson is eligible to exempt at least $2,000 from this retirement income under the general West Virginia government retirement income provision, and will be entitled to exempt up to $8,000 after he turns 65. *Ibid.*

In 2013, Mr. Dawson and his wife, Petitioner Elaine Dawson, filed amended tax returns claiming a full exemption under Section 12(c)(6) for tax years 2010 and 2011. Pet. App. 4a. The West Virginia State Tax Department denied the claimed exemption, and the Dawsons appealed the denial to the West Virginia Office of Tax Appeals. Pet. App. 4a–5a. The Dawsons argued that there are no significant differences between state and federal law enforcement officers, and thus to deny Mr. Dawson eligibility for an exemption that applies to some (but not all) state law enforcement offers would constitute unlawful discrimination based on source of income under Section 111. *Ibid.* The Office of Tax Appeals affirmed

the denial of the Section 12(c)(6) exemption. Pet. App. 5a.

The Dawsons then appealed to the Circuit Court of Mercer County, which reversed the decision of the Office of Tax Appeals. Pet. App. 5a. The Circuit Court determined that there were no substantial differences between the job responsibilities of a U.S. Marshal and those of state law enforcement officers, and thus, under *Davis*, denying the Section 12(c)(6) exemption to U.S. Marshals violated Section 111 and the doctrine of intergovernmental tax immunity. Pet. App. 22a, 24a.

**4.** On May 17, 2017, by memorandum decision, the West Virginia Supreme Court of Appeals reversed the Circuit Court. Pet. App. 16a.

Relying on *Brown v. Mierke*, a 1994 West Virginia Supreme Court of Appeals case that had applied *Davis* to the same state retirement tax provisions at issue here, the court held that there is "no intent in the West Virginia scheme to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees." Pet. App. 10a (quoting *Brown*, 191 W. Va. at 124, 443 S.E.2d at 466) (emphasis in original). In *Brown*, the court had held that "West Virginia's limited, multi-tiered series of tax exemptions differed from" regimes this Court has invalidated under Section 111, and thus that there was no intent to

discriminate on the basis of a retiree's source of income, as Section 111 prohibits. 191 W. Va. at 121, 443 S.E.2d at 463.

The same factors guided the court's reasoning below. Under the "narrow" eligibility requirements in Section 12(c)(6), "only *some* [state] law enforcement officers" can claim the exemption—not all. Pet. App. 15a–16a (emphasis added). The Dawsons also received more favorable tax treatment than non-government retirees, "whose status as retirees affords them no special exemption," and more favorable tax treatment than even some *state* government retirees, including "state justices and circuit judges." Pet. App. 15a. And, "[m]ost importantly," the Dawsons received the same tax treatment as "the vast majority of all state retirees" in West Virginia. *Ibid.* Thus, "[i]n light of the totality of the circumstances, and the totality of the structure of West Virginia's tax and retirement scheme, Section 12(c)(6) did not discriminate against Mr. Dawson." *Ibid.*

## REASONS FOR DENYING THE PETITION

### I. Courts Nationwide Consistently And Correctly Apply The Intergovernmental Tax Immunity Doctrine To State Tax Laws Regulating Government Retirement Income.

Petitioners argue that this Court should intervene to resolve "division among state courts of last resort" over whether States may "exempt[] groups of state

retirees from taxation" without also extending the exemption to "similarly-situated federal retirees." Pet. 7–8. No such division exists. Petitioners identify no case in any court striking down a tax scheme that offers narrow exemptions for some state retirees, yet treats federal retirees the same as (or better than) the overwhelming majority of state retirees.

In reality, there is no confusion in the courts over proper application of the intergovernmental tax immunity doctrine. The division Petitioners allege is illustrated by the different outcomes courts have reached when applying this Court's precedents to the fact-specific contexts of various state tax codes. For the three cases on one side of the purported split in authority, the courts resolved challenges to laws that offered blanket tax exemptions to state retirees, but not federal retirees. Unsurprisingly, given the similarity of these laws to the Michigan statute this Court considered in *Davis*, the courts invalidated each law. On the other side of Petitioners' division, two state courts of last resort and one intermediate state appellate court faced materially different state laws: Narrow exemptions that applied to vanishingly small numbers of state retirees, not preferential treatment for state retirees as a whole. Because nothing in *Davis* or this Court's precedents supports Petitioners' theory that these laws violate the intergovernmental tax immunity doctrine, these decisions are both correct

and fully consistent with each other and the other cases on which Petitioners rely.

### A. The decision below is consistent with the decisions of state courts of last resort striking down blanket tax exemptions for state retirees.

Petitioners identify decisions from three state courts of last resort that—like *Davis*—invalidated state laws that exempted the retirement benefits of all state employees, but not federal retirees' benefits. Both the holdings and reasoning of these decisions are consistent with the decision below.

***Arkansas.*** In *Pledger v. Bosnick*, the Supreme Court of Arkansas struck down a tax scheme that allowed "retired employees of the State of Arkansas and local government employees" a full exemption for retirement income, yet capped the exemption for retirement income of other employees at $6,000. 306 Ark. 45, 47, 811 S.W.2d 286, 288 (1991), *abrogated on other grounds by State, Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996). There, a certified class of federal military and civil service retirees, as well as retirees from the agencies of other States and political subdivisions, had challenged Arkansas's tax regime under Section 111 and the intergovernmental tax immunity doctrine. 306 Ark. at 47, 811 S.W.2d at 288. The Arkansas Supreme Court agreed, relying on *Davis* for its holding that "the

tax discriminates based upon the source of the payment, since the source of one payment is the State of Arkansas and the source of the military pay is the federal government, and the source of the pay to a retiree from the civil service of another state is that other state's government." *Id.* at 53–54, 811 S.W.2d at 292.

There is no tension between the decision below and the Arkansas Supreme Court's straightforward application of *Davis* to a state tax regime that gave blanket preferential treatment to all state retirees.

The "crux" of the court's analysis in *Pledger* was whether the Arkansas tax scheme distinguished taxpayers based on the *source* of their compensation—which Section 111 prohibits—or the *nature* of the compensation—which it does not. 306 Ark. at 53, 811 S.W.2d at 291. Accordingly, much of the court's analysis focused on whether the federal retirees' income was analogous to the pension state retirees received, or rather was "reduced pay for reduced service." *Ibid.* Once the court determined that the pay was best classified as pension income, it readily found that the tax regime discriminated based on source of income, and thus was invalid under *Davis*. *Ibid.*

Petitioners argue (at 12) that the Arkansas Supreme Court's failure to say anything "about *Davis* being applicable only to challenges of blanket tax

exemptions" suggests a different view of this Court's precedent than in the decision below. Yet because the key issue in *Pledger* was the nature of the distinction between taxpayers, this "omission" is unsurprising. Once that question was resolved, the case fit squarely within *Davis*'s rubric for blanket tax exemptions applicable to state retirees only. There was no need for the court to opine on the merits of a different, hypothetical law. *Pledger* thus neither held nor suggested that the court would reach the same result in a case involving a law—like West Virginia's—that treats federal retirees the same as the vast majority of state retirees.

***Colorado.*** Similarly, in *Kuhn v. State Department of Revenue*, the Supreme Court of Colorado invalidated a tax scheme that allowed a $20,000 exemption on retirement benefits for all state and private retirees and federal nonmilitary retirees under the age of 55, but only a $2,000 exemption for federal military retirees, regardless of age. 817 P.2d 101, 103 (Colo. 1991) (en banc).

As in *Pledger*, the critical issue in *Kuhn* was whether military retirement benefits are *different in kind* from other sources of retirement income. 817 P.2d at 108 (rejecting State Department of Revenue's argument that military retirement benefits are "current compensation for responsibilities accrued after retirement"). Also as in *Pledger*, the Supreme

Court of Colorado concluded that military retirement pay "must be viewed realistically as compensation for past, not present services," and thus "is a pension." *Ibid.*

Having concluded that military retirement pay is equivalent to non-military retirement benefits for purposes of intergovernmental tax immunity analysis, the court in *Kuhn*—again—reached the same result as in *Pledger*: the state tax code "discriminate[d] between taxpayers based on the source of their income." *Ibid.* And because the "state has failed to show significant differences that would justify the discriminatory tax scheme," the court held that it "was unconstitutional under the doctrine of intergovernmental tax immunity and violated [Section] 111." *Id.* at 109.

Petitioners again rely on the fact that *Kuhn* "said nothing to indicate that the holding in *Davis* is limited to blanket tax exemptions" as purported evidence of division between this case and the decision below. Pet. 13. Yet in a case involving a blanket tax exemption for all state retirees and where much of the analysis focused on whether the tax discriminated based on source of income, there is nothing remarkable about the Colorado Supreme Court's

failure to speculate about how this Court's precedent might be applied in a *different* case.

***Missouri.*** Finally, in *Hackman v. Director of Revenue*, the Supreme Court of Missouri struck down a tax scheme that exempted the retirement benefits of state employees without extending the same exemption to federal retirees. 771 S.W.2d 77, 79–80 (Mo. 1989). Unlike the Michigan law at issue in *Davis* (and the laws in *Pledger* and *Kuhn*), where one provision of the tax code exempted the retirement benefits of all state employees, the Missouri "legislature provide[d] the income tax exemptions in the statutes that create the various retirement systems" applicable to state employees. *Id.* at 79. Petitioners characterize this choice to place individual exemptions throughout the tax code (rather than enacting a single blanket exemption) as a scheme of "narrow" exemptions, Pet. 14—which purportedly places *Hackman*'s holding invalidating that scheme at odds with the decision below.

The similarity is illusory: *Hackman* emphasized that "[t]he effect of Missouri's scattered retirement benefit exemption statutes *is identical to that of Michigan's statute* for purposes of a *Davis* analysis." 771 S.W.2d at 80 (emphasis added). In other words, the Missouri Supreme Court recognized that the *form* a discriminatory tax regime takes is irrelevant where the *effect* is to provide more favorable treatment for a

State's employees than their federal counterparts. Because Missouri's tax code offered, in practice, the same type of blanket exemption for state retirees that this Court struck down in *Davis*—nothing like the system of isolated exemptions applicable to less than 2% of state retirees at issue here—there is no conflict between *Hackman* and the decision below.[2]

In short, *Pledger*, *Kuhn*, and *Hackman* do not "conflict[] with the decision[s] of [other] state court[s] of last resort." Sup. Ct. R. 10(b). In each case, the court was simply faced with a tax regime markedly similar to the blanket exemption for state retirees at issue in *Davis*, and applied this Court's precedent accordingly. None, as here, involved a state tax regime in which only a small number of state retirees are eligible for an additional exemption, but federal retirees receive the same (or better) tax treatment as the lion's share of state retirees. Without confronting or deciding the question—or even, for that matter, addressing it in dicta—there are *no* courts on the other side of the "division" that Petitioners claim the decision below "exacerbates." Pet. 7.

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[2] Petitioners' reliance on *Hackman* is further misplaced because the court found Missouri's tax regime to be even *less* favorable to federal retirees than the statute *Davis* struck down, which (like West Virginia's tax code, Pet. App. 2a–3a), allowed a partial exemption for federal retirement benefits. 771 S.W.2d at 80.

### B. The decision below is consistent with previous state court decisions that correctly applied this Court's precedent to uphold tax exemptions for subsets of state employees.

In contrast to the three cases discussed above, Petitioners argue that the lower court's decision incorrectly applies this Court's intergovernmental tax immunity precedents, and thus joins similar decisions from another state court of last resort and an intermediate state appellate court on the other side of Petitioners' purported "split" in state-court authority. In ruling against the federal taxpayers, however, these decisions apply the same legal principles and reasoning as the courts that—on different facts—ruled in their favor.

***West Virginia.*** Petitioners' first example of a decision on the other side of the (nonexistent) division among state courts is also from the West Virginia Supreme Court of Appeals: the 1994 *Brown v. Mierke* decision on which the decision below relies. In *Brown*, the court upheld the same discrete set of exemptions for certain state retirees at issue here, finding that West Virginia's scheme did not violate the doctrine of intergovernmental tax immunity, as interpreted by *Davis*. *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463.

Far from lacking "legal support" and "ignor[ing] *Davis*," Pet. 16–17, *Brown* considered the principles

animating the doctrine of intergovernmental tax immunity in this Court's precedents, and weighed them against a careful comparison of West Virginia's statutes and the Michigan scheme at issue in *Davis*. *Brown*, 191 W. Va. at 121–24, 443 S.E.2d at 463–66. Unlike Michigan's system—or the Arkansas, Colorado, or Missouri laws discussed above—West Virginia (at that time) exempted "less than four percent of all State government retirees in West Virginia." *Id.* at 123, 443 S.E.2d at 465. Federal retirees received the same treatment as most of the other 96% of state retirees. *Ibid.* Additionally, federal retirees received more favorable treatment than West Virginia residents retired from civilian jobs, and "*substantially more favorabl[e]*" treatment than even some state retirees. *Id.* at 125, 443 S.E.2d at 467 (emphasis added). In light of these critical distinctions, the court found "no intent in the West Virginia scheme to discriminate against federal retirees." *Id.* at 124, S.E.2d at 466. Instead, its intent was "to give a benefit to a very narrow class of former state and local employees." *Ibid.*

In short, *Brown*'s result differs from the outcomes in *Pledger*, *Kuhn*, and *Hackman* not because the West Virginia Supreme Court of Appeals applied a different

understanding of *Davis*, but because *Davis* dictated a different result when applied to a vastly different law.

To be sure, neither *Brown* nor the decision below turned on a finding that discriminatory tax treatment was "justified by significant differences between the two classes of employees." *Davis*, 489 U.S. at 815. But there is no tension with the decisions of other courts on this score, either. The "significant difference" test is a defense that States can use to salvage a tax that would otherwise be struck down as discriminating "because of the source of the pay or compensation." 4 U.S.C. § 111(a); see also *Davis*, 489 U.S. at 815. Indeed, the Colorado Supreme Court in *Kuhn* proceeded to the "significant difference" test only *after* it determined that the tax regime discriminated "based on the source of [taxpayers'] income." 817 P.2d at 108–09. Where, as in *Brown* and the decision below, a tax regime does not impermissibly discriminate against federal employees in the first place, it is irrelevant whether significant differences could justify a different law that would.

***New Mexico.*** Petitioners' reliance on *Alarid v. Secretary of New Mexico Department of Taxation & Revenue*, 878 P.2d 341 (N.M. Ct. App. 1994), falls flat for the simple reason that it is a decision of the Court

of Appeals of New Mexico, not the New Mexico Supreme Court.

In any event, there is no conflict between this intermediate state appellate court decision and decisions from state courts of last resort. The parties in *Alarid* stipulated that the taxable income in question came from the State of California, not the federal government, which meant that Section 111—and "the cornerstone of *Davis*"—did not apply. 878 P.2d at 345; see also *ibid.* (holding that although the "cost" of the retirement benefits was ultimately passed onto the federal government by contract, this fact was "irrelevant because the 'legal incidence' of the tax does not fall upon the federal government or its instrumentalities" (quoting *United States v. Cty. of Fresno*, 429 U.S. 452, 459 (1977))). As a result, the court's holding turned largely on this Court's separate precedent regarding the legality of taxes that affect "an entity doing business with the federal government." *Id.* at 346 (citing *United States v. New Mexico*, 455 U.S. 720 (1982)).

Concluding that the alleged "discriminatory impact" of New Mexico's tax regime was "not directed toward the federal government" and thus "not prohibited," *Alarid*, 878 P.2d at 346, the court's analysis of the intergovernmental tax immunity doctrine was brief—and dicta. Even then, there is no conflict with other courts' application of *Davis*. The

New Mexico regime applied to "one limited class of state retirees" only, and plaintiffs were treated "no different than the vast majority of other New Mexico citizens whose retirement incomes are also subject to New Mexico income tax." *Id.* at 347.

***Massachusetts.*** Finally, the Massachusetts Supreme Judicial Court's decision in *Cooper v. Commissioner of Revenue*, 421 Mass. 557, 658 N.E.2d 963 (1995), conflicts with neither this Court nor any state court of highest resort.

In *Cooper*, the court rejected a challenge to a "grandfather" provision in the Massachusetts tax code that exempted certain retirement income to municipal police and firefighters who were employed before 1938. 421 Mass. at 561, 658 N.E.2d at 965. As an initial matter, the court found no discrimination on the basis of "source of the pay or compensation," as Section 111 prohibits, but rather "on the basis of occupation" and "date of first employment." *Ibid.* This holding was enough to uphold the tax against challenge under the intergovernmental tax immunity doctrine.

The court's discussion of the *size* of the exempted class of state employees was thus unnecessary to its holding. It was also consistent with governing precedent. The court emphasized that the exemption applied to only "a small and dwindling class" of state retirees, and as such did "not think it can be credibly

argued that it constitutes discrimination against federally funded benefits." *Ibid.* (citation omitted).

Finally, the court found no need to consider whether "alleged inconsistencies" between classes of employees satisfy *Davis*'s "significant differences" standard, because it had already concluded that the statute did not discriminate "because of the source of the pay or compensation." *Id.* at 966 n.5. This approach tracks the logic of *Brown*, *Kuhn*, and the decision below, which all make clear that the significant difference test is relevant only after the court finds a state tax regime discriminates based on the source of taxpayers' compensation.

### C. Review would not resolve purported confusion over application of the intergovernmental tax immunity doctrine to issues not raised below.

Perhaps recognizing the difficulty of manufacturing division among state courts over *Davis*'s application to tax codes that exempt small subsets of state retirees, Petitioners also rely on purported state-court divisions over *entirely different* aspects of the doctrine of intergovernmental tax immunity. Pet. 21–25. Specifically, Petitioners object to state tax schemes that "allow tax exemptions or deductions for only specific types of contributions made to retirement plans," *id.* at 21, as well as decisions to increase "state employee retirement

benefits" in some States after tax exemptions for state retirees have been repealed, *id.* at 23.

Whatever merit there may be to Petitioners' concern that these state laws may be "attempts to circumvent *Davis*," Pet. 24, none of those laws is at issue here. Nor, for that matter, is it likely that a decision on whether States can grant tax exemptions to subsets of state employees would provide direction on the extent (if any) to which other, more indirect state laws and policies—including some outside the context of state tax law altogether—may implicate intergovernmental tax immunity doctrine concerns. Because the Court is not in the business of issuing advisory opinions, granting review would thus have no effect on these independent issues.

Indeed, if Petitioners are correct that "state courts are having difficulty applying *Davis* and its progeny" because of new laws that may indirectly increase federal employees' tax burdens as compared to state employees', Pet. 25, that would be an additional reason to deny the Petition. Review in *this* case—which involves none of the laws Petitioners describe, and where the legal implications of such regimes were neither pressed nor passed on below—would do nothing to clarify *Davis*'s "parameter and scope" in those separate contexts. Pet. 25. If anything, the

Court should reserve its powder for an appropriate case where these issues are squarely presented.

## II. The Decision Below Correctly Applied The Intergovernmental Tax Immunity Doctrine And This Court's Precedent.

This Court should deny review not only because there is no division among the lower courts that have resolved intergovernmental tax immunity challenges to state tax exemptions for government retirees, but also because the decision below is correct.

*First*, the West Virginia Supreme Court of Appeals correctly held that the doctrine of intergovernmental tax immunity is not offended where a State's tax laws treat federal employees just as favorably as—or better than—the vast majority of the State's own employees.

Petitioners argue that the court below "chose to disregard" *Davis*'s "broad[]" holding "that taxes favoring retired state and local governmental employees over similarly situated retired federal employees violate the doctrine of intergovernmental tax immunity." Pet. 25, 27. But *Davis*'s holding was "broad" only in the sense that it invalidated Michigan's exemption for *all* state employees at the expense of *all* federal employees. 489 U.S. at 806, 815. It did not hold that *every* exemption for state employees—no matter how narrow—is impermissible discrimination on the basis of pay unless the State

extends a corresponding exemption to federal employees with similar job descriptions.

Nevertheless, Petitioners claim that there is no "supporting authority" for a rule that narrow exemptions do not necessarily violate the intergovernmental tax immunity doctrine. Pet. 27. But this Court held precisely that in *Jefferson County*, which upheld a tax exemption that the county made available to *some* state and local judges, but *no* federal judges. 527 U.S. at 443. Petitioners elide this holding and seize instead on dicta, Pet. 27, in which the Court cautioned that it would "present a starkly different case" if the State were to "take to exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax." *Jefferson Cty.*, 527 U.S. at 443. This language, however, simply means that States cannot evade the logic of *Davis* by adopting a blanket exemption for all state retirees, and bringing a select few federal employees along for the ride. Neither *Davis* nor *Jefferson County* suggests that treating federal employees the same as the vast majority of state employees is discrimination based on source of pay. See *Cooper*, 421 Mass. at 562, 658 N.E.2d at 966 (rejecting argument that "amounts to a request that Federal employees be treated better than State and local employees").

This conclusion is underscored by another aspect of *Jefferson County* that Petitioners ignore: the

Court's repeated refusal to "extend the doctrine [of intergovernmental tax immunity] beyond the tight limits this Court has set." 527 U.S. at 436; see also *id.* at 437 (emphasizing the Court's "narrow approach to intergovernmental tax immunity" (citation omitted)). Far from violating *Davis*, the court below (like the Massachusetts Supreme Judicial Court and New Mexico Court of Appeals) followed *all* of this Court's teachings about the scope of the intergovernmental tax immunity doctrine—including the admonition not to stretch it "beyond the tight limits this Court has set."

Finally, although there may be some difficult cases at the margins, this is not that case. Twenty-three years ago, this Court denied certiorari review in *Brown*, see *Brown v. Paige*, 513 U.S. 877 (1994)—which was a decision out of the same court, analyzing the same tax provisions, and reaching the same result as the decision below.[3] Then, the tax regime applied to 4% of the West Virginia's state government retirees. *Brown*, 191 W. Va. at 123, 443 S.E.2d at 465. Now, the same laws reach less than 2%. Pet. App. 16a. *Brown* was correctly decided in 1994, and now

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[3] Tellingly, Petitioners identify no state courts of last resort to part ways with *Brown*'s analysis since this Court denied review. The Arkansas, Colorado, and Missouri cases discussed above that Petitioners argue conflict with *Brown* were all decided before *Brown*. Petitioners have identified no cases critiquing its analysis—much less reaching the opposite result—since.

that the number of state retirees receiving "preferential" treatment has *decreased*, the rationale for upholding West Virginia's limited tax exemption regime is stronger still.

*Second*, the court below did not err in "avoiding the question whether significant differences could justify" the challenged tax provisions. Pet. 28. *Davis*'s significant difference standard is a means by which a state tax law may withstand scrutiny *even if* it discriminates based on source of pay; it is not itself necessary in determining whether such discrimination has occurred. Indeed, in *Davis*, it was "undisputed that Michigan's tax scheme discriminates in favor of retired state employees and against federal employees." 489 U.S. at 814. Only *after* finding discrimination existed did the Court consider whether it could nonetheless be "justified by significant differences between the two classes." *Id.* at 815–16.

Likewise, *Jefferson County* did not apply the significant difference test, because it determined that "[t]he record shows no discrimination . . . between similarly situated federal and state employees." 527 U.S. at 443 (citation omitted). The court below did not

"violate" *Davis* by following this Court's example in *Jefferson County*.

### III. Review Would Cause Unnecessary Litigation And Increased Uncertainty For State And Federal Retirees.

Petitioners argue that this case is an ideal vehicle to resolve a recurring and important question facing courts nationwide. Pet. 29–33. In reality, revisiting this Court's intergovernmental tax immunity precedent would needlessly unsettle decisions of courts across the country that have already resolved these issues consistent with Section 111 and the Constitution.

*First*, this is the wrong case to resolve any hypothetical uncertainty on the edges of the intergovernmental tax immunity doctrine. For one thing, it is not "undisputed that there are no significant differences" between Mr. Dawson and the state retirees to whom the tax exemptions at issue apply. Pet. 32. The state trial court (but not the Supreme Court of Appeals) found substantial similarities between Mr. Dawson's job description and some of the state and local law enforcement officers who qualify for the West Virginia exemption, Pet. App. 22a, but the Tax Commissioner argued below that there are also other relevant differences that would justify the tax treatment accorded. See Pet'rs Br. of the W. Va. State Tax Comm'r, *Matkovich v.*

*Dawson*, No. 16-0441, at 20–23 (W. Va. Aug. 2, 2016). Thus, even if this Court were to grant review and hold that the West Virginia regime discriminates on the basis of pay, the case may still ultimately be resolved against the Dawsons when the court below addresses the significant different issue in the first instance.

Similarly, the fact that one state court of last resort and an intermediate state appellate court have relied on *Brown* (Pet. 32–33) only supports Petitioners' case for review if that decision is wrong—and it is not, *supra* Part II.

Further, even assuming (contrary to the cases Petitioners have set forth) that some courts are divided about how to apply *Davis* and *Jefferson County*, granting review here would be unlikely to resolve that confusion. At best, there may be a gray zone somewhere between the clear cases of *Davis*-like blanket exemptions for state employees (*e.g.*, *Pledger* and *Kuhn*) on the one hand, and cases like *Brown* and the decision below on the other, where an exemption applies to vanishingly small numbers of state retirees, and federal employees are treated the same as or better than 96% or more of state employees. Unless and until that case arises, however, there is no need for this Court to intervene.

*Second*, Petitioners' plea that review would provide greater certainty for "the growing population

of both federal and state retirees who budget based on a fixed income" (Pet. 29–32) is also unavailing.

If anything, review would likely *increase* uncertainty for retirees, not resolve it. Petitioners point to a "rush to change state tax and benefit schemes in response to *Davis*," and a corresponding "nationwide outpouring of litigation" when "federal retirees challenged the various revised . . . schemes." Pet. 29–30. The risk of repeating these results are a reason not to wade into this area of the law again without strong reason. After all, a new pronouncement from the Court may prompt States to enact new or revised tax regimes, which may in turn encourage taxpayers unhappy with the new laws to head back to court. In the meantime, state and federal retirees alike will be left with uncertainty from a quickly changing and unsettled legal environment. Without evidence that courts are facing significant division over the proper application of *Davis* and *Jefferson County*, there is no reason to start this cycle anew.

*Third*, there is no merit to Petitioners' anxiety (at 31) that allowing the decision below to stand might encourage other States to allow "small groups of state retirees" limited tax benefits while "taxing similarly situated federal retirees to cover state costs."

Importantly, Petitioners themselves admit that the national state-law restructuring that occurred

after *Davis* was meant "to achieve *equal treatment* between state and federal retirees," Pet. 29 (emphasis added), not to benefit state retirees at federal workers' expense. There is nothing surprising about this result: State taxpayers retired from the federal government are state residents no less than state-government retirees—and their votes count the same when selecting (or removing) the legislators responsible for state tax laws. This political check becomes stronger still when the interests of a State's federal retirees are combined with those of *non-government* retirees. After all, when States choose to grant a tax exemption to small enclaves of state employees, the "expense" of those benefits is borne by *all other* taxpayers, not just federal workers and retirees. Here, for example, the "cost" of exempting income from the four West Virginia retirement plans falls on the remaining ninety-eight percent of *state* retirees, as well as on all other *private* retirees and the countless number of *non-retired* taxpayers statewide.

There is also no reason to suspect that state courts lack fortitude to correct the small number of discriminatory tax provisions that a state legislature might enact. Indeed, as Petitioners' own examples of *Pledger*, *Kuhn*, and *Hackman* show, federal taxpayers often win intergovernmental tax immunity challenges. In the few cases Petitioners identify where they did not, the exemptions at issue applied to an incredibly small percentage of state employees,

such that it could not "credibly be argued," *Cooper*, 421 Mass. at 561, 658 N.E.2d at 965, that there was an "intent to discriminate" on the basis of a taxpayer's source of income, *Brown*, 191 W. Va. at 121, 443 S.E.2d at 463.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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