No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON, PETITIONERS

v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
GILBERT S. ROTHENBERG
BRUCE R. ELLISEN
NATHANIEL S. POLLOCK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case presents the question whether the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111, prohibits the State of West Virginia from exempting from taxation the retirement benefits of certain former state law-enforcement officers, without allowing the same exemption for the retirement benefits of former officers of the United States Marshals Service. The United States has a substantial interest in ensuring that its employees and retirees receive equitable tax treatment from the States. At the Court's invitation, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, barred the State of Maryland

from taxing the Bank of the United States while exempting from taxation banks chartered by the State. 17 U.S. (4 Wheat.) at 320, 436. Chief Justice Marshall concluded that permitting a State to apply such a tax to a federal entity would threaten "clashing sovereignty" and "interfer[ence]" with the federal government's functions. *Id.* at 430.

"For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another," on the theory that "any tax on income a party received under a contract with the government was a tax 'on' the contract and thus a tax on the government because it burdened the government's power to enter the contract." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 810-811 (1989) (citation omitted). By the late 1930s, however, "the Court began to turn away from its more expansive applications of the immunity doctrine," holding instead that "intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Id.* at 811 (citing *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), and *Graves* v. *New York*, 306 U.S. 466 (1939)). The Court explained in 1939 that, when a State's tax is "nondiscriminatory," the application of that tax to employees of the federal government will not result in the sort of intergovernmental strife or "undue interference" with federal operations that the Constitution forbids. *Graves*, 306 U.S. at 484-486; cf. *Gerhardt*, 304 U.S. at 420 (holding that the federal government may impose a nondiscriminatory income tax on employees of the States). See also *South Carolina* v. *Baker*, 485 U.S. 505, 526 n.15 (1988) ("[W]here a government imposes a nondiscriminatory tax, * * * the threat of destroying another

government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents.").

"[C]ongressional action coincided" with that shift in the Court's constitutional jurisprudence. *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 437 (1999); see *ibid.* (holding that intergovernmental tax immunity is an area "over which Congress is the principal superintendent"). When "Congress decided to extend the federal income tax to state and local government employees," it also determined "that federal employees would not remain immune from state taxation" so long as any state taxation of federal employees was nondiscriminatory. *Davis*, 489 U.S. at 811-812. To achieve that goal, Congress enacted Section 4 of the Public Salary Tax Act of 1939, ch. 59, 53 Stat. 575, the predecessor to 4 U.S.C. 111. Today (as at all times relevant to this case) that provision states:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, * * * by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

4 U.S.C. 111(a).

This Court has understood the United States' "retention of immunity" in Section 111's last clause to be "coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at

813.[1] Under that interpretation of Section 111, a State unlawfully "discriminate[s]" against a federal employee "because of" his source of income, 4 U.S.C. 111(a), when the State "'impos[es] a heavier tax burden'" on the federal employee than on comparable state workers, and when that disparate treatment is not "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 815-816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)); see *Barker* v. *Kansas*, 503 U.S. 594, 596, 598 (1992).

2. West Virginia provides a total exemption from state income taxation for benefits from four state-employee retirement plans: (1) the Municipal Police Officer and Firefighter Retirement System (MPFRS); (2) the Deputy Sheriff Retirement System (DSRS); (3) the State Police Death, Disability and Retirement Fund (Trooper Plan A); and (4) the West Virginia State Police Retirement System (Trooper Plan B). W. Va. Code Ann. § 11-21-12(c)(6) (LexisNexis 2017) (Section 12(c)(6)). Most other state retirees, and all federal non-military retirees (including retired federal law-enforcement officers), receive a less generous exemption. Those taxpayers may exempt from taxation the first $2000 in benefits received each year under the West Virginia Public Employees Retirement System (PERS), the West Virginia State Teachers Retirement System, or "any federal retirement system to which Title 4 U.S.C. § 111 applies." *Id.* § 11-21-12(c)(5) (LexisNexis 2017). See generally Pet. App. 2a-4a.[2]

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[1] This brief therefore refers to the constitutional and statutory nondiscrimination requirements interchangeably. See Pet. 8 n.2; Br. in Opp. 5 n.1.

[2] Respondent, the West Virginia State Tax Commissioner, has identified three classes of former state law-enforcement officers

West Virginia generally does not exempt from state income taxation benefits received under the State's Emergency Medical Services Retirement System or its Judges' Retirement System. W. Va. Code Ann. §§ 11-21-12(c) (LexisNexis 2017); *id.* §§ 16-5V-4, 51-9-1 (LexisNexis 2016); Pet. App. 13a-15a & nn.8 and 11. At all relevant times, West Virginia has exempted a taxpayer's "first [$20,000] of military retirement income," *i.e.*, "retirement income from the regular armed forces, reserves and National Guard." W. Va. Code Ann. § 11-21-12(c)(7)(B) (LexisNexis 2017); Pet. App. 3a.[3] And West Virginia exempts from taxation $8000 of income "received from any source" by individuals who are age 65 or older, or who are "permanently and totally disabled." W. Va. Code Ann. § 11-21-12(c)(8) (LexisNexis 2017). See generally Pet. App. 2a-4a.

3. In 2008, petitioner James Dawson retired from the United States Marshals Service. Pet. App. 4a. Mr. Dawson had served for most of his career as a deputy U.S. Marshal before the President appointed him as the U.S. Marshal for the Southern District of West Virginia. *Ibid.* During his tenure with the Marshals Service, Mr. Dawson was enrolled exclusively in the Federal Employees Retirement System (FERS), and he currently receives benefits from FERS. *Ibid.* Under

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who are not entitled to the unlimited exemption in Section 12(c)(6). Those include certain deputy sheriffs (those who began to work before DSRS was created in 1998 and who elected to keep their pensions with PERS), officers employed by the Department of Natural Resources, and Capitol Police officers. Pet. App. 13a-14a. The record does not disclose the total percentage of West Virginia law-enforcement officers who are entitled to the exemption.

[3] For taxable years beginning after December 31, 2017, West Virginia exempts from state income taxation all military retirement income. W. Va. Code Ann. § 11-21-12(c)(7)(C) (LexisNexis Supp. 2018).

West Virginia law, Mr. Dawson may exempt $2000 of his FERS benefits from his state taxable income. W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017); Pet. App. 4a. When he turns 65, he will be able to exempt $8000. Pet. App. 4a.

In October 2013, Mr. Dawson and his wife, petitioner Elaine Dawson, filed amended tax returns for 2010 and 2011. Pet. App. 4a; see Pet. 3. Petitioners claimed an adjustment exempting all of Mr. Dawson's FERS retirement income from state taxation pursuant to Section 12(c)(6), the provision that fully exempts state retirement benefits paid under MPFRS, DSRS, Trooper Plan A, and Trooper Plan B. *Ibid.* Respondent disallowed the exemption, Pet. App. 4a, and the West Virginia Office of Tax Appeals denied petitioners' appeal, *id.* at 4a-5a.

4. The Circuit Court of Mercer County reversed, holding that petitioners had been subjected to unlawful discrimination. Pet. App. 17a-25a. The court relied on this Court's holding in *Davis* that 4 U.S.C. 111 requires any imposition of a heavier tax burden on federal employees than on comparable state employees to be "justified by significant differences between the two classes." Pet. App. 20a-21a (quoting 489 U.S. at 815-816). The circuit court acknowledged the holding of the West Virginia Supreme Court of Appeals in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), that federal military retirees were not entitled to claim the unlimited state-tax exemption in Section 12(c)(6). Pet. App. 21a. The circuit court found *Brown* distinguishable, however, because the federal military retirees who had sought the unlimited exemption in that case "did not have a state counterpart." *Ibid.*; see *id.* at 23a.

Here, by contrast, the circuit court found it "undisputed * * * that there are no significant differences

between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full tax exemption. Pet. App. 22a. The court concluded that Section 12(c)(6) imposes "inconsistent tax treatment * * * based on the source of one's retirement income," in violation of 4 U.S.C. 111. Pet. App. 23a. The court rejected respondent's contention that Section 12(c)(6) was consistent with federal law because it was meant "to benefit [a] narrow class of *state* law enforcement officers." *Ibid.* The court found that rationale to be "precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Ibid.*

5. The West Virginia Supreme Court of Appeals reversed. Pet. App. 1a-16a. The court did not dispute the circuit court's finding "that there are no significant differences between the powers and duties of state and local law enforcement officers and those of federal marshals." *Id.* at 12a. Nevertheless, the state supreme court read its opinion in *Brown* to mean that a state tax statute complies with 4 U.S.C. 111 so long as "there is no intent in the [state] scheme to discriminate *against* federal retirees." Pet. App. 10a (quoting 443 S.E.2d at 466).

The state supreme court observed that Mr. Dawson had "received more favorable tax treatment than state civilian retirees" and certain state judges, and had received "the same tax treatment as the * * * vast majority of all state retirees," who also may exempt $2000 of retirement benefits from their taxable income. Pet. App. 14a-15a. The court further explained that "only some law enforcement officers * * * are permitted to rely upon the Section 12(c)(6) exemption," and the exemption covers only "two percent of all state-pension recipi-

ents." *Id.* at 15a-16a. Based on the "totality of the circumstances," the court concluded that Section 12(c)(6) "was not intended to discriminate against former federal marshals," but instead was "inten[ded] * * * to give a benefit to a narrow class of state retirees." *Id.* at 14a-16a.

SUMMARY OF ARGUMENT

The West Virginia Supreme Court of Appeals misapplied the doctrine of intergovernmental tax immunity that is codified in 4 U.S.C. 111.

A. Section 111 permits a State to tax the income of federal employees or retirees only so long as the State "does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." 4 U.S.C. 111(a). A State violates that nondiscrimination requirement when it imposes more burdensome taxation on those who deal with the federal government (including federal retirees), because of their federal status, than on similarly situated persons who deal with the State. In a variety of contexts, both before and after Section 111 was enacted in 1939, this Court has held that a State may not accord more favorable tax treatment to persons with whom it deals than to persons who have comparable relationships with the federal government.

B. West Virginia's Section 12(c)(6) exempts from state taxation the retirement benefits of participants in four retirement plans that serve state and local law-enforcement officers. That state-law exemption does not apply, however, to any federal law-enforcement officer's retirement benefits. The courts below did not identify any significant difference between Mr. Dawson and the retired state law-enforcement officers who

receive the exemption. In the absence of such a showing, West Virginia's inconsistent treatment violates Section 111 by "discriminat[ing]" against Mr. Dawson "because of" the federal source of his pay. 4 U.S.C. 111(a).

C. Rather than determine whether significant differences exist between Mr. Dawson and the state retirees who receive the total state-tax exemption, the state supreme court applied a "totality of the circumstances" analysis. The court concluded that Section 12(c)(6) is permissible because the State intends to favor its own employees but does not intend to disadvantage federal employees; because the State gives preferential treatment to only a narrow class of state retirees; and because Mr. Dawson is treated the same as or better than other classes of state and private employees in West Virginia. Because those rationales for rejecting Mr. Dawson's claim do not speak to whether Mr. Dawson has suffered "discriminat[ion] * * * because of" the federal source of his pay, 4 U.S.C. 111(a), they cannot be reconciled with the text of Section 111 or with this Court's intergovernmental-tax-immunity precedents.

ARGUMENT

WEST VIRGINIA MAY NOT TAX RETIREMENT BENEFITS OF FEDERAL LAW-ENFORCEMENT OFFICERS MORE HEAVILY THAN IT TAXES RETIREMENT BENEFITS OF COMPARABLE STATE LAW-ENFORCEMENT OFFICERS

The doctrine of intergovernmental tax immunity, now codified in 4 U.S.C. 111, permits a State to tax the income (including the retirement benefits) of federal employees so long as the State "does not discriminate against the [federal] officer or employee because of the source of the pay or compensation." 4 U.S.C. 111(a); see *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 808-809 (1989). Construing Section 111 in *Davis*, this

Court held that a State unlawfully "discriminate[s] against" a federal employee "because of" his federal source of pay, 4 U.S.C. 111(a), when the State taxes the federal employee more heavily than comparable state employees, and the inconsistent treatment is not "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)); see *Barker* v. *Kansas*, 503 U.S. 594, 596, 598 (1992).

West Virginia taxes Mr. Dawson's federal retirement benefits more heavily than it taxes benefits for certain state law-enforcement officers whom Mr. Dawson alleges are similarly situated. The West Virginia Supreme Court of Appeals did not dispute the circuit court's finding that "no significant differences" exist between the duties that Mr. Dawson performed as a U.S. Marshal and the duties performed by the state and local law-enforcement officers who receive the full tax exemption. Pet. App. 22a. The state supreme court nevertheless held that West Virginia's taxing scheme does not violate Section 111 because it treats Mr. Dawson as well as or better than most state and private retirees. *Id.* at 14a-16a. That view is contrary to the text of Section 111 and inconsistent with the reasoning of this Court's intergovernmental-tax-immunity decisions.

A. Section 111 Prohibits A State From Subjecting Federal Employees To Heavier Taxation Than Similarly Situated State Employees

1. This Court in *Davis* held that a federal employee suffers unlawful "discriminat[ion] * * * because of" the source of his compensation, in violation of 4 U.S.C. 111(a), when state law subjects him to heavier taxation than similarly situated state employees. 489 U.S. at

816; see *Phillips Chemical*, 361 U.S. at 383 (stating that, in applying principles of intergovernmental tax immunity, it is "necessary to determine how other taxpayers similarly situated are treated"). Any "'imposition of a heavier tax burden on [those who deal with the federal government] than is imposed on [those who deal with the State] must be'" "directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 815-816 (quoting *Phillips Chemical*, 361 U.S. at 383).

The determination whether a tax "discriminate[s]" in violation of Section 111 does not turn on the same "mode of analysis developed in [the Court's] equal protection cases." *Davis*, 489 U.S. at 816. When a State legislates concerning economic matters unrelated to the activities of the federal government, its "power to classify is * * * extremely broad, and [the State's] discretion is limited only by constitutional rights and by the doctrine that a classification may not be" arbitrary. *Phillips Chemical*, 361 U.S. at 385. But when a State taxes federal employees, Congress has enacted—and the Constitution demands—a much stronger mandate of equal treatment. That nondiscrimination rule "require[s] that the State treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4 (quoting *Phillips Chemical*, 361 U.S. at 385). Applying that rule in *Davis*, this Court struck down a Michigan statute that exempted from taxation the retirement benefits of all former state employees while taxing the retirement benefits paid by "all other employers, including the Federal Government." *Id.* at 805; see *id.* at 816-817.

2. The *Davis* Court's description of Section 111 accords with this Court's precedents applying constitutional principles of intergovernmental tax immunity. Congress "consciously" drafted Section 111 "against the background of," and "drew upon," the nondiscrimination requirement that the Constitution imposes on the States. *Davis*, 489 U.S. at 813. Shortly before Congress enacted the original version of Section 111 in 1939, the Court upheld against constitutional challenge two income-tax statutes—one state and one federal—on the ground that they drew no distinction between income received from state and federal employers. See *Graves* v. *New York*, 306 U.S. 466, 480 (1939) (describing New York's tax as one "applied to salaries at a specified rate"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 420 (1938) (federal tax was "laid on [state employees'] net income, in common with that of all other members of the community").

The Court has since adhered to its view that the States may not give more favorable tax treatment to persons with whom they deal than to those who have similar relationships with the federal government. In *Phillips Chemical*, for example, the Court struck down a Texas tax that "impose[d] a distinctly lesser burden on similarly situated lessees of * * * property owned by the State and its political subdivisions" than on lessees of property owned by the federal government or by private parties. 361 U.S. at 379; see *id.* at 381, 387. In *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983), the Court applied 31 U.S.C. 742 (1976) (currently 31 U.S.C. 3124)—which establishes a nondiscrimination requirement similar to Section 111—and struck down a Tennessee bank tax that applied to "income from federal obligations while excluding income from otherwise

comparable state and local obligations." 459 U.S. at 398; cf. *Werner Mach. Co.* v. *Director of Div. of Taxation*, 350 U.S. 492, 493-494 (1956) (per curiam) (rejecting a constitutional challenge to the imposition of New Jersey's franchise tax on the value of federal bonds held by a corporate taxpayer, on the ground that the tax "remain[ed] the same whatever the character of the corporate assets may be").

Since *Davis*, this Court has continued to require that state taxing schemes treat federal employees no worse than state workers. In *Barker* v. *Kansas*, the Court struck down a Kansas tax statute that exempted benefits paid to retired state and local employees but taxed federal retirees' benefits, including benefits received by military retirees. 503 U.S. at 596, 605. The Court explained that, "[f]or purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services," and "[i]n this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Id.* at 605.

In *Jefferson County* v. *Acker*, 527 U.S. 423 (1999), by contrast, the Court held that a county's occupational tax, which exempted persons who were subject to another state or county license fee, did not violate Section 111. *Id.* at 429, 442-443. Federal judges sitting in the county argued that the tax discriminated against them because they could never hold other state or local licenses. *Id.* at 443. The Court rejected that contention, explaining that there was "no discrimination * * * between similarly situated federal and state employees" because "[t]he tax is paid by all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices

in the county." *Ibid.*[4] The Court observed that, if the State or county adopted a tax regime "exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.*

3. It may sometimes be difficult to determine whether there are "significant differences" between state employees (or retirees) who receive a state tax exemption and the federal employees (or retirees) who do not. But this Court's decisions have established several guiding principles. First, the conditional structure of Section 111—through which the federal government consents to state taxation of its own employees only if the State's taxes are nondiscriminatory—requires the State to "justify" any inconsistent treatment. *Davis*, 489 U.S. at 816 (considering only the "allegedly significant differences" proffered by the State); see *Barker*, 503 U.S. at 598 (same); see also *Phillips Chemical*, 361 U.S. at 383-384 (same applying the Constitution).

Second, while the most natural comparison for purposes of Section 111 is typically between state and federal employees who perform similar work, see *Jefferson County*, 527 U.S. at 443, job duties are not the only potentially relevant difference under Section 111. See *Barker*, 503 U.S. at 598-600. The determination for purposes of Section 111 of which federal workers or retirees are similarly situated to the state employees receiving more favorable tax treatment will depend on how the State has defined the favored class. If that class is defined by reference to employees who perform specified job duties, the similarly situated federal employee

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[4] Respondent is thus incorrect (Br. in Opp. 26) in describing *Jefferson County* as "uph[o]ld[ing] a tax exemption that the county made available to *some* state and local judges, but *no* federal judges."

will be one who performs (or formerly performed) comparable duties. By contrast, if a State exempts from tax all benefits paid to state retirees age 75 or older, the comparable federal retiree would be a person of that age.

Third, courts will not credit supposed differences that are not actually incorporated into the State's tax statute, or that the State does not consistently apply. In *Davis*, the Court held that Michigan's inconsistent tax treatment of federal and state retirees could not be justified on the ground that Michigan's "retirement benefits [were] significantly less munificent than those offered by the Federal Government." 489 U.S. at 816. The Court explained that "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Similarly in *Barker*, the Court held that Kansas's disparate tax treatment could not be justified on the ground that state retirees had "contributed to their retirement benefits" while federal military retirees had not, because the State applied its income tax "to other federal retirees who contributed to their benefits." 503 U.S. at 605 n.5; see *id.* at 604-605 (stating that courts must ensure that a State's "articulated rationale" for inconsistent tax treatment is not "a cloak for discrimination").

Finally, the State must identify a *significant* difference between state and federal employees in order to justify inconsistent tax treatment. The Court in *Barker* concluded, for example, that the fact that military retirees, unlike state retirees, "remain in the service and are subject to restrictions and recall" did not constitute a

"significant difference[ ]" that could justify the State's inconsistent taxation. 503 U.S. at 599-600.[5]

B. Unless Respondent Can Identify Significant Differences Between Mr. Dawson And The State Law-Enforcement Officers Who Receive A Total State-Tax Exemption, The Inconsistent Treatment Between Them Violates Section 111

1. Under this Court's precedents interpreting and applying Section 111, and the constitutional principles on which that statute is based, this case is straightforward. West Virginia Section 12(c)(6) fully exempts from income taxation the retirement benefits of multiple classes of state law-enforcement officers, while providing a lesser exemption for the retirement benefits received by federal law-enforcement officers like Mr. Dawson. The state circuit court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforce-

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[5] Some state tax exemptions will be unproblematic even though they result in particular federal retirees receiving less favorable tax treatment than particular state retirees who previously performed comparable duties. See *United States* v. *County of Fresno*, 429 U.S. 452, 464 (1977) (holding that a facially neutral state tax whose burden falls predominantly on federal employees is not discriminatory for that reason alone). West Virginia's more generous tax exemption for disabled persons (see p. 5, *supra*), for example, raises no meaningful concern under Section 111. Although a disabled state retiree would receive the exemption, and a non-disabled federal retiree who had performed the same duties would not, that disparity would not constitute discrimination "because of" the federal retiree's source of income. 4 U.S.C. 111(a). Rather, the disparity would be "because of" the employees' respective disabled and non-disabled status.

ment officers listed in [Section 12(c)(6)]" that would justify the discriminatory treatment. Pet. App. 22a. The West Virginia Supreme Court of Appeals did not dispute that view of the record, and the court did not identify any other significant differences that would justify higher state taxation of federal law-enforcement officers than of comparable West Virginia law-enforcement officers. See *id.* at 12a-16a.

Respondent contends (Br. in Opp. 28) that "*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." That is incorrect. The Court in *Davis* held that "discriminat[ion]" under 4 U.S.C. 111(a) refers simply to "inconsistent" tax treatment, and that, whenever a state tax statute subjects federal employees to heavier taxation than comparable state workers, the significant-differences test is "the relevant inquiry" to determine whether that discrimination is (impermissibly) "because of" the federal employee's source of pay or (permissibly) because of something else. 489 U.S. at 816; see *Barker*, 503 U.S. at 598.

If this Court vacates the judgment of the state supreme court, respondent will be entitled to assert on remand any preserved arguments that Mr. Dawson is sufficiently unlike those state law-enforcement officers who receive a total income-tax exemption to justify differential treatment. But in the absence of such a justification—*i.e.*, if the only salient difference between Mr. Dawson and the employees who pay lower taxes under Section 12(c)(6) is that Mr. Dawson worked for the federal government and the tax-exempt employees worked for the State—then West Virginia's denial of

Mr. Dawson's request for the same complete tax exemption constitutes prohibited "discriminat[ion] * * * because of" his federal source of pay. 4 U.S.C. 111(a).

2. In the West Virginia Supreme Court of Appeals, respondent argued that, even if Mr. Dawson's job responsibilities were substantially similar to those of former state law-enforcement officers who receive a total tax exemption, the difference in tax treatment is still "related to and justified by a significant difference between Dawson and the narrow class of state government retirees who qualify for the exemption." Resp.'s Br. to W. Va. S. Ct. of App. at 20. Respondent identified, as the asserted salient difference between Mr. Dawson and the tax-exempt state retirees, "the significantly more munificent retirement benefits Dawson receives than the state retirees who qualify for the exemption." *Ibid*; see *id.* at 20-23; Br. in Opp. 29-30. The state supreme court did not address that argument.

If this Court vacates the decision below and respondent raises this argument on remand, it will be necessary for respondent to demonstrate that the State applies "evenhanded[ly]" this asserted rationale for its differential tax treatment. *Davis*, 489 U.S. at 817. In defending the blanket tax exemption for state retirees that was at issue in *Davis*, and the failure to provide a comparable exemption for federal retirees, the State of Michigan "argue[d] that its retirement benefits [were] significantly less munificent than those offered by the Federal Government," and that "[t]he substantial differences in the value of the retirement benefits paid the two classes should * * * justify the inconsistent treatment." *Id.* at 816. The Court rejected that proffered justification, explaining that "[a] tax exemption truly

intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits, as Michigan's statute does; rather, it would discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817. Similarly, in *Phillips Chemical*, the Court explained that Texas's discriminatory treatment of leases of state-owned versus federally owned property could not be sustained on the ground that the State does not lease property that is "exactly comparable" in "size, value, or number of employees involved," because the statutory tax rate "was not based on such factors," but rather on "the identity of the * * * lessor." 361 U.S. at 384-385.

Thus, in order for respondent to invoke an asserted benefits differential as a ground for rejecting Mr. Dawson's Section 111 claim, respondent would be required to show that West Virginia law actually "discriminate[s] on the basis of the amount of benefits received by individual retirees," *Davis*, 489 U.S. at 817, rather than simply on the basis of the retirees' source of pay. To make that showing, respondent would need to demonstrate that West Virginia treats the amount of benefits received as a determinative factor in distinguishing the *state* retirees who receive a total tax exemption from the state retirees who do not. See pp. 14-15, *supra*.

C. The West Virginia Supreme Court Of Appeals Identified No Sound Reason For Finding Section 111 To Be Inapplicable Here

The state supreme court offered several rationales for rejecting Mr. Dawson's claim of unlawful tax discrimination. None is persuasive.

1. The court below stated that "tax exemptions are strictly construed against the taxpayer." Pet. App. 14a. That principle of West Virginia law has no application

to this case, because there is no dispute about the meaning of Section 12(c)(6) that would call for "construc[tion]." Rather, the statute to be construed is 4 U.S.C. 111, whose interpretation presents "a question of federal law." *Jefferson County*, 527 U.S. at 439. And there is no sound reason to resolve any ambiguities in that provision against the taxpayer, particularly given Section 111's purpose "to protect" the federal government's operations against "undue interference" by the States. *Davis*, 489 U.S. at 814.

2. The state supreme court also observed that this Court has found a violation of Section 111 only when a State's law provided a "blanket exemption to *all* state retirees." Pet. App. 10a. The state court found Section 12(c)(6) to be permissible because it "applies to a narrow but diverse class of state retirees" that as of 2010 was "less than two percent" of all state-government retirees. *Id.* at 13a. That focus on the "narrow[ness]" of the State's exemption is inconsistent with the text of Section 111, and with this Court's reasoning in *Davis* and in other intergovernmental-tax-immunity cases.

a. Section 111 provides that a State must "not discriminate against" a federal employee "because of" his federal source of pay. 4 U.S.C. 111(a). A State therefore may not impose any form of "inconsistent tax treatment" that is not "directly related to, and justified by, 'significant differences between the two classes'" of taxpayers. *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383-385). The statute does not allow *some* discrimination based on source of pay, so long as the State confines the inconsistent treatment to a narrow class of taxpayers. Cf. *Ross* v. *Blake*, 136 S. Ct. 1850,

1857 (2016) ("Time and again, this Court has taken [mandatory] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements.").

To be sure, the breadth or narrowness of a state tax exemption will affect the *scope* of the State's resulting obligations under Section 111. If a State exempts from taxation benefits paid to all state retirees, it must likewise exempt all federal retirees' benefits in order to comply with Section 111's nondiscrimination mandate. By contrast, if the state exemption is limited to a narrow subset of state retirees, the State can comply with Section 111 by exempting only the comparable class of federal retirees. See pp. 14-15, 16 n.5, *supra*. But the narrowness of the exemption conferred by Section 12(c)(6) provides no sound basis for concluding that Section 111 does not apply *at all*.

When Congress enacted the original version of Section 111, it drew on this Court's constitutional precedents in *Gerhardt* and *Graves*. See *Davis*, 489 U.S. at 812-813. The Court in those cases had not suggested that it would permit distinctions based on the source of the taxpayer's pay if the exempted classes were relatively small. On the contrary, in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Chief Justice Marshall found it essential to draw clear lines constraining the States' authority to tax the federal government precisely in order to avoid "the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *Id.* at 430. See also *South Carolina* v. *Baker*, 485 U.S. 505, 526 n.15 (1988) ("[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion.").

Analogous statutes, which would have been familiar to the 1939 Congress that enacted Section 111, likewise established categorical bans on particular types of "discrimination." Under the Interstate Commerce Act of 1887, ch. 104, Pt. I, § 2, 24 Stat. 379-380, for example, a common carrier would be "guilty of unjust discrimination" if it charged "a greater or lesser compensation * * * in the transportation of a like kind of traffic under substantially similar circumstances and conditions." See *Baldwin's Century Edition of Bouvier's Law Dictionary* 305 (1926) ("discrimination" is "generally applied in law to a breach of the statutory or common-law duty of a carrier to treat all customers alike"). This Court construed that statute as categorically barring any preferential treatment for particular shippers. See, *e.g.*, *Illinois Commerce Comm'n* v. *United States*, 292 U.S. 474, 485 (1934) ("maintaining a lower rate [for one shipper] * * * is necessarily discriminatory wherever the two classes of traffic * * * are carried on * * * under substantially the same conditions"); *The Tap Line Cases*, 234 U.S. 1, 28-29 (1914) (holding that the Act prohibits "practices resulting in rebating or preferences, whatever form they take and in whatsoever guise they may appear").

b. The West Virginia Supreme Court of Appeals' attempt to confine *Davis* to its facts ignores the reasoning of this Court's opinions. The Court in *Davis* did not strike down the Michigan statute because of the number of state employees who were exempt, but rather because the Court saw no "significant differences" between the exempt state and non-exempt federal employees that "justified" the differential treatment. 489 U.S. at 816. The Court took the same approach in *Barker*, finding "no significant differences between military retirees

and state and local government retirees that justify disparate tax treatment by the State." 503 U.S. at 600.

Jefferson County involved a tax exemption that benefitted a relatively small class of persons—those holding a state or county professional license—that was estimated to be eight percent of the county's workforce. 527 U.S. at 428-429, 442 n.12. But while the Court rejected the plaintiffs' Section 111 challenge to the exemption, it did not base that holding on the number of persons affected. Instead, the Court held that the county law was nondiscriminatory because it produced the same results "between similarly situated federal and state employees." *Id.* at 443. All judges who worked in the county paid the tax, whether they were employed by the State or by the federal government, *ibid.*; and federal employees in licensed professions (*e.g.*, attorneys) received the same exemption as their state-employed counterparts, *id.* at 442 n.12. In other intergovernmental-tax-immunity cases, the Court has concluded that the challenged state tax statutes were discriminatory because they treated taxpayers differently based on the sources of their income, not because of the breadth or narrowness of the state exemptions. See, *e.g.*, *Phillips Chemical*, 361 U.S. at 387 ("The differences between the two classes * * * seem too impalpable to warrant such a gross differentiation."); *Memphis Bank*, 459 U.S. at 398 n.8 (rejecting the State's defense that "the impact of" its discriminatory tax "[w]as *de minimis*," and noting the adverse consequences to the United States "if all 50 States enacted [similar] provisions").

3. The state supreme court also emphasized that the "'intent of the scheme'" for Section 12(c)(6) was not "to discriminate against employees or former employees of

the federal government," but instead "to give a benefit to" certain state retirees. Pet. App. 14a-15a (citation omitted). That reasoning closely tracks the analysis of the *dissent* in *Davis*. In the dissent's view, "[t]he fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense that is relevant to the doctrine of intergovernmental tax immunity." *Davis*, 489 U.S. at 821 (Stevens, J., dissenting). The Court rejected that position as inconsistent with "the underlying rationale for the doctrine of intergovernmental tax immunity." *Id.* at 815 n.4 (majority op.).

The *Davis* Court found it "wholly beside the point" that Michigan wished to "hir[e] and retain[ ] qualified civil servants through the inducement of a tax exemption for retirement benefits," since that fact did nothing to negate the existence of discrimination, but "merely demonstrate[d] that the State ha[d] a rational reason for discriminating between two similar groups of retirees." 489 U.S. at 816. The Court explained that the "State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant" to the dispositive "inquiry into the nature of the two classes receiving inconsistent treatment." *Ibid.* Indeed, the *Davis* Court concluded that "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Id.* at 815 n.4.

When Section 111 was enacted in 1939, dictionaries referred to "discrimination" as unequal treatment of persons similarly situated whether that treatment was motivated by favoritism or by malice. See *Webster's New Int'l Dictionary of the English Language* 745 (reprint

1942) (2d ed. 1934) (to "discriminate" is "[t]o make a difference in treatment or favor * * * ; as, to *discriminate* in favor of one's friends; to *discriminate* against a special class"); *Black's Law Dictionary* 588 (3d ed. 1933) ("discrimination" is a "failure to treat all alike under substantially similar conditions," such as by "confer[ring] particular privileges on a class arbitrarily selected from a large number of persons" when "no reasonable distinction can be found"). In the context of common carriers who were subject to an analogous nondiscrimination mandate, it was settled by 1939 that "preferences may inflict undue prejudice, though the carrier's motives in granting them are honest," and that "[s]elf-interest of the carrier may not override the requirement of equality in rates." *United States* v. *Illinois Cent. R.R.*, 263 U.S. 515, 524 (1924).

With respect to taxes imposed on other types of income as well, the Court has invalidated state laws that were intended to benefit narrow classes of persons dealing with the State, rather than to disadvantage the federal government or those with whom it interacted. See *Phillips Chemical*, 361 U.S. at 383-384 (holding that Texas's preferential tax treatment for leases of state-owned property could not be justified on the ground that the State sought to "foster its own interests by adopting measures which facilitate the leasing of its property"); see also *Memphis Bank*, 459 U.S. at 398 (holding that a Tennessee tax impermissibly favored "securities issued by Tennessee and its political subdivisions").

By the same token, when the Court upheld the statutes challenged in *Gerhardt*, *Graves*, and *Jefferson County*, it did not suggest that those laws were nondiscriminatory because they were based on a benevolent motive. Instead, in each case, the Court considered

whether the state law produced disparate tax treatment of "similarly situated federal and state employees." *Jefferson County*, 527 U.S. at 443; cf. *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958) (holding that a State's tax on leased property was nondiscriminatory because it applied equally to "persons who use property owned by the Federal Government, the State, its political subdivisions, * * * and a great host of other entities").

West Virginia's intent is not relevant to this case because Section 12(c)(6) discriminates on its face: it provides a complete tax exemption to certain state law-enforcement retirees, without providing a comparable exemption to any class of retired federal law-enforcement officers. A statute like this one violates Section 111 because, regardless of motive, a State must "treat those who deal with the [Federal] Government as well as it treats those with whom it deals itself." *Davis*, 489 U.S. at 815 n.4 (quoting *Phillips Chemical*, 361 U.S. at 385).

4. The state supreme court also concluded that Section 12(c)(6) is not discriminatory because the statute affords Mr. Dawson "more favorable tax treatment than" certain state judges, and treats him the same "as the vast majority of all state retirees." Pet. App. 15a. But Section 111 prohibits any discrimination between federal and state employees "because of" their different source of income. If Mr. Dawson has received less favorable tax treatment than West Virginia accords to the most comparable state retirees, the fact that state law treats him better than some *other* state workers cannot defeat Mr. Dawson's claim of unlawful discrimination. See *Jefferson County*, 527 U.S. at 442-443 & n.12 (applying Section 111 by comparing the treatment of state and federal employees who perform similar job duties).

It is likewise irrelevant that West Virginia treats federal retirees like Mr. Dawson no worse than private retirees. Pet. App. 15a. That was true of the state laws that the Court struck down in both *Davis* and *Barker*. See *Davis*, 489 U.S. at 815 n.4 (rejecting the dissent's position that the tax was constitutional because it drew no distinction between the federal retirees and the vast majority of voters in the State). The state law declared invalid in *Memphis Bank* under the analogous nondiscrimination rule established by 31 U.S.C. 742 (1976) (currently 31 U.S.C. 3124) also treated persons dealing with the federal government the same as those dealing with private entities. See 459 U.S. at 394 (Tennessee tax exempted only "interest on obligations of Tennessee and its political subdivisions"). And while the Texas law at issue in *Phillips Chemical* likewise made "no discrimination between the [Federal] Government's lessees and lessees of private property," 361 U.S. at 381, the Court struck down the statute under the Constitution because it discriminated in favor of state property. *Id.* at 383.[6]

5. Finally, the state supreme court relied on the fact that "only some [West Virginia] law enforcement officers * * * are permitted to" claim the Section 12(c)(6) exemption. Pet. App. 15a-16a. Mr. Dawson's claim could

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[6] The West Virginia Supreme Court of Appeals' analysis is also inconsistent with the typical understanding of what it means to "discriminate * * * because of" a prohibited criterion. 4 U.S.C. 111(a). An employer that paid its female executives less than its male executives, for example, could not escape liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, simply by showing that executives formed a small percentage of the company's overall workforce, or that female executives were paid as well as or better than male rank-and-file employees.

properly be rejected on that ground if he were demonstrably more comparable to the West Virginia officers who do not receive the state tax exemption than to those who do. But the state supreme court identified only three classes of state law-enforcement officers who fall outside the exemption: deputy sheriffs who started working before 1998 and who chose not to convert their pension to DSRS, Department of Natural Resources officers, and Capitol Police officers. See *id.* at 13a-14a. The court did not suggest, or identify any reason to believe, that Mr. Dawson is more similarly situated to any of those officers than to the several other categories of West Virginia officers who receive more favorable tax treatment.

CONCLUSION

The judgment of the West Virginia Supreme Court of Appeals should be vacated, and the case should be remanded for further proceedings consistent with this Court's decision.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General[*]
RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
MICHAEL R. HUSTON
Assistant to the Solicitor General
GILBERT S. ROTHENBERG
BRUCE R. ELLISEN
NATHANIEL S. POLLOCK
Attorneys

SEPTEMBER 2018

[*] The Solicitor General is recused in this case.