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IN THE SUPREME COURT OF THE UNITED STATES

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COMPTROLLER OF THE :
TREASURY OF MARYLAND, :
Petitioner :

v. : No. 13-485.

BRIAN WYNNE, ET UX. :

- - - - - x

Washington, D.C.

Wednesday, November 12, 2014

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:16 a.m.

APPEARANCES:

WILLIAM F. BROCKMAN, ESQ., Acting Solicitor General,
Baltimore, Md.; on behalf of Petitioner.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; for
United States, as amicus curiae, supporting
Petitioner.

DOMINIC F. PERELLA, ESQ., Washington, D.C.; on behalf of
Respondents.

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1 P R O C E E D I N G S

2 (11:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 in Case 13-485, Comptroller of the Treasury of Maryland
5 v. Wynne.

6 Mr. Brockman.

7 ORAL ARGUMENT OF WILLIAM F. BROCKMAN

8 ON BEHALF OF THE PETITIONER

9 MR. BROCKMAN: Mr. Chief Justice, and may it
10 please the Court:

11 A State's broad power to impose a personal
12 net income tax on its own residents is grounded in the
13 special benefits that a State affords to its own
14 residents particularly because they are residents. That
15 is, things like public schools, social services
16 programs, medical assistance services, and of course the
17 right to vote in the process that determines both the
18 level of those benefits and the level of taxes that are
19 paid in return for them.

20 There is no reason that a State should have
21 to subordinate this power, this taxing power, just
22 because another State, exercising an equally legitimate
23 taxing power, but on a very distinct ground, is taxing a
24 portion of that income merely because it was earned
25 within that State's borders.

1 JUSTICE SCALIA: Right, you're on the
2 principle that life is not fair, right?

3 MR. BROCKMAN: Life is not fair. Maryland
4 taxes are.

5 (Laughter.)

6 MR. BROCKMAN: Because all residents are
7 treated the same. They are taxed on their entire income
8 regardless of where it is earned.

9 CHIEF JUSTICE ROBERTS: Well, but as -- as
10 your friends on the other side point out in their
11 example at pages 22 to 23 of their brief, if you do the
12 internal consistency test, it ends up not being equal.
13 What it ends up is imposing a special tax -- they even
14 call it special, right, the special nonresident's tax --
15 on those who live in one State and work in the other,
16 that people who live in the State and work in the State
17 do not have to pay. That doesn't sound -- that sounds
18 unequal, whether fair or not.

19 MR. BROCKMAN: Your Honor, let me try and
20 explain why I -- why I disagree that it's unfair. The
21 special nonresident tax and the county tax both apply,
22 one to residents, one to nonresidents. One has been
23 upheld, the special nonresident tax, as a complimentary
24 tax to the other.

25 But we can abstract from all of that because

1 our position as a constitutional matter is that Maryland
2 is not required to provide a credit at all.

3 So, it would be just as accurate to do the
4 math this way. The special nonresident tax accounts for
5 6/10ths of 1 percent of total personal income tax
6 collections, both resident and nonresident, combined
7 State and local. If we've said instead there's only one
8 tax, it's a State income tax, and you may take a credit
9 up to the lesser of what you paid the other State or
10 99.4 percent of what you would have paid to Maryland,
11 whichever is lesser, we would have the same result.

12 CHIEF JUSTICE ROBERTS: But that's the case
13 now. If we uphold the situation where you charge a
14 special nonresident tax in a way that is a special tax
15 on people who live in one State and work in the other,
16 then you're free to raise that to whatever amount you
17 want. The fact that it's a smaller amount now
18 doesn't -- if we say it's okay, then you're free to
19 raise it.

20 MR. BROCKMAN: Well, I don't think we are,
21 Your Honor. It's been upheld by the Maryland courts
22 because it's complimentary and it's set at the lowest
23 rate that any county resident pays. Many county --

24 CHIEF JUSTICE ROBERTS: It is now. Do you
25 think there's -- could you increase the special

1 nonresident tax beyond the lowest rate that the county
2 tax is?

3 MR. BROCKMAN: I don't think we'd try. We
4 believe -- I think the reason it's set at the lowest is
5 because we did not want to be in a situation where we
6 were discriminating against nonresidents who are
7 entitled to --

8 JUSTICE BREYER: To be specific, you live in
9 California. You have a hot dog stand in Hawaii. All
10 right? It has a \$1,000 income. It comes back to
11 California. You pay 13-1/2 California tax. Hawaii
12 wants to charge another 12. So you're paying 25
13 percent. Can California say: That's fine; we give them
14 no credit for the 11 percent they're paying in Hawaii?
15 So the bottom check that you get is \$750, not a 1,000.
16 But if your hot dog stand were in California, the check
17 would not be 750, it would be approximately 900. Okay?

18 Now, is that constitutional or not?

19 MR. BROCKMAN: It is, Your Honor.

20 JUSTICE BREYER: Okay. That's what I
21 thought. Then your answer --

22 JUSTICE SCALIA: Move -- move to Hawaii is
23 what you're saying.

24 (Laughter.)

25 JUSTICE SCALIA: And a lot of people do

1 that, for tax reasons.

2 MR. BROCKMAN: Well, that's right, Your
3 Honor. The Wynnes are our citizens, though, and we'd
4 prefer that they express their preferences through
5 voice, not exit. But of course --

6 JUSTICE SCALIA: A lot are moving out of
7 Maryland, too.

8 JUSTICE KENNEDY: What is your best case
9 that you can rely on for your answer to Justice Breyer?
10 What's the best case you can cite. Complete Auto? I
11 don't think that works for you.

12 MR. BROCKMAN: I wouldn't cite Complete
13 Auto. I don't think it actually does much work here.

14 JUSTICE KENNEDY: No, I wouldn't if I were
15 you trying to justify the answer either.

16 What would you cite? What would your best
17 cite be.

18 MR. BROCKMAN: I might start with Jefferson
19 Lines because it demonstrates that there are situations
20 where only one claim -- State can claim to be taxing a
21 value on the specific basis it is taxing it on, but many
22 other States can be taxing it on a different basis.
23 That results in multiple taxation of the type that we're
24 talking about.

25 JUSTICE BREYER: Here in my hypothetical the

1 basis is identical. It's called an income tax, okay?
2 And they run it in both States the same, and the problem
3 that I would like you specifically -- and you are
4 addressing with Justice Kennedy -- is what California
5 says, open your hot dog stands in California. You go
6 and open them in every other State and any other State,
7 but particularly Hawaii, you will pay \$125 more in
8 income tax, not some flat other thing, not property tax,
9 not some other kind of tax, in income tax. Okay. Now,
10 that's constitutional because?

11 MR. BROCKMAN: Because California taxes the
12 income from hot dog stands without regard to where the
13 hot dog stand is located. The -- the additional tax
14 burden there is a result of the combination of two
15 States' taxes, Hawaii's and California's. It can't be
16 said --

17 JUSTICE ALITO: The question is not whether
18 California can tax the income of its residents wherever
19 they make it or whether California can tax all income
20 earned within the border of California. The question is
21 whether it can do both, whether -- and that's the
22 question with respect to you. Can you tax all income
23 earned within your border, whether by resident or by
24 nonresident, and also tax income earned by your
25 residents in -- in other States?

1 The tax economists' brief points out that
2 this -- what you've done operates exactly like a tariff,
3 because it provides an incentive to earn income in
4 Maryland and not outside of Maryland. Now, do you
5 dispute that as a factual matter? And if you don't
6 dispute it as a factual matter, why shouldn't this tax
7 system meet exactly the same fate as a tariff?

8 MR. BROCKMAN: I don't dispute the
9 mathematics. They lose me when they switch from tariffs
10 to income taxes, but I'm not an economist. The
11 difference, though, is that the -- we're talking about
12 the effect of two States's axes. Now, they've talked
13 about two States' taxes by using what they call a
14 heuristic device of hypothesizing that the other State
15 has the exact same set of taxes. Fine. We can do that,
16 too.

17 But the point is that it's the combined
18 effect. That means that Maryland's taxes, the validity
19 of Maryland's tax, will turn on how another State
20 exercises its taxing powers.

21 JUSTICE SCALIA: Yes.

22 MR. BROCKMAN: Every State --

23 JUSTICE SCALIA: That's my problem, is I
24 don't I understand why it is that California has to
25 yield in this California-Hawaii situation. Why is it

1 that the State that taxes all the income of its
2 residents has to yield rather than the State that taxes
3 all income earned in the State? Why can't you just as
4 well say, you know, Hawaii shouldn't be able to sock on
5 an addition?

6 MR. BROCKMAN: Well, there are good
7 reasons --

8 JUSTICE SCALIA: I mean, as far as fairness
9 is concerned. Now, maybe it doesn't work the same way
10 with respect to the imaginary negative Commerce Clause,
11 but -- but as far as fairness is concerned, I don't -- I
12 don't see the difference.

13 JUSTICE GINSBURG: Your position -- your
14 position is that the residents -- the domicile can tax
15 worldwide income, period. And I think everybody agrees
16 with that. The question is: Does the domicile have to
17 give a credit because somebody else is also taxing it?
18 Do you stop having the power to tax worldwide income
19 because other States may tax on a different basis?

20 MR. BROCKMAN: I think that is the question,
21 Your Honor: Must the State yield to another State's
22 taxation of a portion of that income, but on a very
23 distinct ground, a territorial ground? It was -- the
24 argument that State would make is: Well, we think you
25 earned it here, and if you did we have a right to tax

1 it.

2 Our argument with respect of our own
3 residents is: We think you live here, and the Wynnes
4 indisputably do, and that you benefit from the same
5 privileges -- I'm sorry, Your Honor.

6 CHIEF JUSTICE ROBERTS: Well, I was just
7 going to say it's not a question of yielding. The way
8 you test under our precedents whether one State has to
9 yield or not is to say, well, let's suppose each State
10 does exactly the same thing, neither one is yielding.
11 And as indicated earlier, the example in the
12 Respondents' brief is that if each State did what we're
13 talking about, people who work in one State and live in
14 another would pay higher taxes overall than people who
15 live within one State and work in the same State. And
16 that sounds to me like a tariff.

17 MR. BROCKMAN: Well, perhaps this is another
18 way to address the internal consistency analysis and
19 demonstrate why we think it doesn't do very much good
20 analytic here. If you take just a single sentence in
21 one of this Court's opinions in Curry, "Income may be
22 taxed both by the state where it is earned and by the
23 state of the recipient's domicile," points internal
24 consistency, that's it. If you add the feature that
25 there -- there's a credit or not, that's the issue here,

1 and if, as in Chickasaw Nation that the offering of that
2 credit is understood correctly as an independent policy
3 decision that states make and is not of constitutional
4 magnitude, is not done as a matter of constitutional
5 compulsion, then the internal consistency problem
6 remains.

7 We think the internal consistency test works
8 better, though not perfectly, when we're talking about
9 two states taxing on the same basis. Because there, it
10 may detect instances where one state is overreaching
11 jurisdictionally, exercising a power that it does not
12 lawfully have. The respondents don't argue that
13 Maryland lacks this power, they acknowledge it. They --
14 and they acknowledge it as an attribute of Maryland's
15 sovereignty. If it were *Situs v. Situs*, *Source v.*
16 *Source*, there the internal consistency test can tell
17 whether -- sometimes -- whether the multiple taxation,
18 the tax is a result of discrimination or of
19 extraterritorial application of laws. But that neither
20 of those is present here --

21 JUSTICE SCALIA: That's not the Commerce
22 Clause test, though. The cases where we've applied that
23 test, has that -- have they been decided under the
24 Commerce Clause?

25 MR. BROCKMAN: The internal consistency

1 test?

2 JUSTICE SCALIA: Yes.

3 MR. BROCKMAN: I think -- I think they
4 have --

5 JUSTICE SCALIA: I thought it -- I thought
6 it's a matter of state power.

7 MR. BROCKMAN: Well, I think this case does
8 not present any issues that are unique to the Commerce
9 Clause case, because it's undisputed that Maryland's tax
10 does not facially discriminate. It's even-handed in its
11 application. Only after the tax liability is determined
12 does it take into account the source, and there it gives
13 an advantage to the people who have earned some of it
14 out of state.

15 So what we're left with is an argument of
16 the discrimination here is in the supposed
17 malapportionment itself. And that question, the
18 question of apportionment, fair apportionment, I think
19 is common to both the due process and Commerce Clause
20 jurisprudence of this Court, and I think Maryland's tax
21 survives that scrutiny under both --

22 JUSTICE GINSBURG: What about -- we're
23 dealing with an individual because it's a Chapter S
24 corporation, but what about a corporation that is
25 domiciled in Maryland? I think Maryland, like all

1 states, uses an apportionment formula for both domestic
2 and foreign corporations.

3 MR. BROCKMAN: We don't believe this case
4 implicates any question of how corporations would be
5 taxed. The residence principle that we're relying on as
6 a basis for the broad taxing power and the benefits that
7 one receives as residents is unique to individuals, and
8 it's always been articulated in cases involving
9 individuals, so we're talking about personal income
10 taxes here. And it might very well --

11 JUSTICE KENNEDY: Well, I suppose you could
12 argue that some states are very -- have very good
13 corporation laws and that's why corporations are
14 domiciled there. They're, let's say, director friendly
15 or that they are laws that are easy to apply and well
16 understood. That -- that's a significant advantage.

17 MR. BROCKMAN: I think that's absolutely
18 correct, Your Honor. I think this Court's precedents
19 recognize some benefit that's accorded merely in the
20 fact of domiciliary status, whatever -- however that's
21 defined. And -- but being in the net income tax
22 situation for corporations, I'm not aware of any state
23 that tries to assign a value to that because
24 non-domiciliary and domiciliary corporations are treated
25 equally.

1 Now, I do know that Delaware, known to be
2 hospitable to corporations for incorporation purposes,
3 does impose a tax, a yearly franchise tax, that ranges
4 from \$180 -- from \$225 to \$180,000 annually, and that
5 it's not based on income, it's based on a very complex
6 measure of the worth of the entire enterprise.

7 JUSTICE SOTOMAYOR: Can we go back to the
8 Chief's initial question. If we applied Complete Auto,
9 would you fail the internal consistency test? And if
10 you fail it, why shouldn't we apply that test here?
11 Would you -- if we applied it, would you fail it?

12 MR. BROCKMAN: I don't believe we would
13 because I think the proper construction of that test in
14 this situation asks about the internal consistency of
15 the rationale that Maryland is advancing, that is, are
16 we being consistent in our structure -- in structuring
17 our tax so that it reaches residents on their entire
18 income regardless of whether it's earned.

19 JUSTICE SCALIA: I must say I am confused
20 about what this case involved. You argue, and I find it
21 surprising, that it involves both the Commerce Clause
22 and any other constitutional prohibition. Okay?
23 Whereas your opponents, the question they say is
24 presented is whether a state tax that exposes interstate
25 commerce to double taxation is saved from invalidation

1 under the Commerce Clause, merely because the state --
2 why do you want to take on the whole Constitution when
3 they only want to argue about the Commerce Clause?

4 MR. BROCKMAN: Your Honor --

5 JUSTICE SCALIA: And I thought it was the
6 latter that the case involves.

7 MR. BROCKMAN: We'd be willing to defend it
8 under any provision of the Constitution. But, Your
9 Honor --

10 JUSTICE SCALIA: Well, that's big of you.
11 It really is.

12 MR. BROCKMAN: And the chief concern that
13 this Court has articulated of its dormant Commerce
14 Clause protection -- jurisprudence, that is, protecting
15 against measures that are protectionist in nature and
16 benefit in-staters at the expense of out-of-staters is
17 not present here. There is no discrimination or
18 extraterritorial overreaching, and the tax is valid.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. BROCKMAN: I reserve.

21 CHIEF JUSTICE ROBERTS: Yes.

22 Mr. Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF UNITED STATES, AS AMICUS CURIAE,

25 SUPPORTING PETITIONER

1 MR. FEIGIN: Thank you, Mr. Chief Justice,
2 and may it please the Court:

3 I'd like to begin, if I could, by the
4 interaction of taxes imposed on the jurisdictional
5 rationale of residency, and taxes imposed on
6 nonresidents by virtue of their doing business in the
7 state.

8 I don't think there's any constitutional
9 rule that says a state can only impose one tax or the
10 other. And to the extent the internal consistency test
11 might suggest that the special nonresident tax that
12 Maryland imposes, which is a special tax imposed only on
13 nonresidents, may be taking too great a portion of
14 nonresidents' income, I think it's kind of backwards for
15 respondents to be able to raise that challenge because
16 they are residents. They pay only the residential
17 income taxes and, in fact, benefit from any overtaxing
18 of nonresidents.

19 The other thing I would --

20 JUSTICE KAGAN: You only have to look at the
21 tax scheme as a whole including the tax on nonresidents?
22 I mean --

23 MR. FEIGIN: Well, Your Honor, I think the
24 very important thing to understand here is we're talking
25 about two very different kinds of income taxes with

1 distinct jurisdictional rationales. Maryland is taxing
2 respondent's income because they are residents of
3 Maryland. Other states are taxing their income because
4 they do business there. I'm not sure you would
5 necessarily look at them and mix and match. And I'm not
6 aware of any case in which this Court has taken a
7 completely nondiscriminatory tax -- like Maryland's
8 county income tax which applies at the same rate to a
9 county resident no matter where he earns his income in
10 state or out of state, and finds that tax to be
11 unconstitutional by yoking it to some other tax like the
12 special nonresident tax that's going to look
13 discriminatory no matter what other scheme of taxes you
14 throw it into.

15 But, if you really did think there was a
16 problem --

17 JUSTICE BREYER: I thought that we held that
18 quite a lot in respect to corporate taxes. The three
19 cases we found here, *J.D. Adams*, *Gwin White & Prince*,
20 *Hennerford*, *Central Greyhound of New York*, all said that
21 corporations, when they are taxed on their income by a
22 state, that they have to apportion in a fair manner. Is
23 that right?

24 MR. FEIGIN: No, Your Honor, I don't think
25 that that's precisely what they hold. I think the most

1 salient distinction between those cases and this one is
2 that none of those cases address a tax that was
3 justified on the basis of the taxpayer's domicile as the
4 Maryland county income tax is.

5 In Gwin and Greyhound, the Court didn't even
6 address any argument that the tax was based on domicile.
7 And in J.D. Adams, although the highest court in Indiana
8 had -- believed that the tax was justified on the basis
9 of domicile, this Court looked at the structure of the
10 tax and concluded that it wasn't -- that that
11 justification didn't actually fit the tax.

12 JUSTICE SOTOMAYOR: When you say -- it seems
13 a little bit of hairsplitting. You say it's a test on
14 residency, but not income. But we have previously said
15 a tax on sleeping, measured by the number of pairs of
16 shoes you have in your closet, is a tax on shoes. So
17 you can call it residency, but if it's still using
18 income as its basis as opposed to property values or
19 whatever else these residency taxes are based on, then
20 why isn't it a tax on income?

21 MR. FEIGIN: Let me be as clear as I can,
22 Your Honor. It is a tax on income, but the
23 jurisdictional rationale for the tax is different from
24 the jurisdictional rationales employed by the states.

25 JUSTICE KENNEDY: But that's a due process

1 argument. The question here is whether or not a number
2 of States impose taxes like this it would be additional
3 burden on interstate commerce.

4 MR. FEIGIN: Well, first of all, Your Honor,
5 if every State --

6 JUSTICE KENNEDY: I mean, that is the
7 question, isn't it?

8 MR. FEIGIN: Yes, I think that is part of
9 the analysis of the question.

10 But if every State enacted an income tax
11 that looked exactly like Maryland's county income tax,
12 that applies one uniform rate no matter where income is
13 earned, every U.S. citizen would pay income tax at the
14 exact same rate no matter where they earned their
15 income.

16 CHIEF JUSTICE ROBERTS: Except if they also
17 imposed the special nonresident tax, and that changes
18 the whole scenario.

19 MR. FEIGIN: That's right, Your Honor.

20 In addition to what I said to Justice Kagan
21 about that earlier, let me add a further thought, that
22 if you really thought there was a problem with the
23 interaction of resident and nonresident taxes then I
24 think it would probably be much more logical to locate
25 the problem in the nonresident tax rather than the

1 resident tax, for three reasons.

2 First, the nonresident tax is the only one
3 that's triggered by economic activity that crosses State
4 lines. Maryland's county income tax applies whether the
5 business is done in State or out of State.

6 Second, any differential incentives that a
7 taxpayer might have to do business in one State versus
8 another aren't arising from the county income tax, which
9 applies evenly, but instead from the differential tax
10 rates that various other States which their nonresidents
11 might have. So Illinois might impose a 3 percent rate,
12 Idaho a 5 percent rate, and Iowa an 8 percent rate.

13 And the third thing is that the resident tax
14 is the only one that the taxpayers actually have some
15 political power to get in there and to influence.

16 JUSTICE KENNEDY: In your answer that you
17 gave to my -- the hypothetical of 100 percent, that
18 would be a burden on 100 percent of interstate commerce,
19 because a resident who did not go into interstate
20 commerce would pay less, so there is a burden. All
21 you're saying is, well, if there's going to be a burden,
22 it could be a great big one.

23 MR. FEIGIN: So, Your Honor, there is -- in
24 some cases, a Maryland resident will be taxed more on
25 commerce that they conduct outside of Maryland than

1 inside of Maryland, but I don't see why that's
2 discrimination attributable to Maryland. It arises from
3 the combination of the income taxes of two States.

4 And I think for the reasons I was just
5 explaining to the Chief Justice, one could file a
6 perhaps more persuasive brief challenging the
7 nonresident tax which the Maryland taxpayers exposed and
8 that's not a reason for invalidating the uniform
9 residence tax.

10 And, Justice Breyer, if I can get back to
11 your point.

12 JUSTICE BREYER: Justice Kennedy asked a
13 question I was curious about that. I wanted you to
14 address that specifically, and you're just trying to say
15 who's at fault. I don't know who's at fault.
16 Switzerland has a tax on milk from cows that are
17 pastured at less than 5,000 feet. It's Belgium's fault.
18 They don't have any mountains.

19 (Laughter.)

20 JUSTICE BREYER: I mean, I don't know who's
21 at fault, but that is a discriminatory tariff.

22 MR. FEIGIN: Well, Your Honor, I've
23 explained to explains why if someone has to be at fault,
24 I think it's the nonresident tax. But let me explain
25 why I think --

1 JUSTICE BREYER: I don't see anybody at
2 fault. Actually in the corporate area it was a tax on
3 gross income in that first case, and so I don't know why
4 human beings -- well, no, I won't go into that issue.

5 MR. FEIGIN: Well, Your Honor, it wasn't --
6 Your Honor, just quickly on J.D. Adams, in addition to
7 it not being a domicile-based tax, it was a tax on gross
8 receipts, which are taxes on transactions and the entire
9 revenue of those transactions. But let me explain why I
10 think neither tax here --

11 JUSTICE ALITO: Well, just to understand
12 what you said a minute ago, are you saying that if this
13 same claim were brought by a nonresident challenging the
14 nonresident tax in Maryland that would succeed?

15 MR. FEIGIN: No, Your Honor. I'm saying it
16 would be a stronger claim. But let me try to explain
17 now why I think both taxes can peacefully coexist.

18 JUSTICE ALITO: All right. So that was
19 irrelevant, then., the fact that it would be -- it would
20 be a stronger claim, but also a bad one at the end?

21 MR. FEIGIN: No, Your Honor, I don't think
22 it's irrelevant. I think it's quite relevant because
23 the only tax that Respondents have paid and the only one
24 they are challenging is the even-handed residential
25 income tax, and the existence of this other tax that

1 could be perceived to have an undesirable affect
2 shouldn't affect the validity of the tax they've
3 actually challenged. But let me explain --

4 CHIEF JUSTICE ROBERTS: But they are
5 linked -- they are linked together. I mean, the special
6 nonresident tax is set at a particular level in relation
7 to the county tax. It is obviously intended to reach
8 nonresidents in a way that the county tax reaches
9 residents. I'm not sure you can artificially separate
10 them.

11 MR. FEIGIN: Well, Maryland has upheld the
12 special nonresident tax, not on the ground that it's not
13 discriminatory. The Maryland courts recognize the
14 special nonresident tax as discriminatory, which the
15 county income tax clearly is not, and they've upheld it
16 under this Court's compensatory tax doctrine. Whether
17 the Maryland courts were right on that or whether they
18 wrong on that, I don't think it should affect the
19 validity of the county income tax, which is the question
20 presented in this case.

21 But the reason I think that nonresident
22 taxes can peacefully coexist with resident taxes is that
23 although they are both income taxes, they are on
24 distinct jurisdictional rationales, and when two taxes
25 are imposed on the same value based on distinct

1 jurisdictional rationales, it's not impermissible double
2 taxation under the Commerce Clause, and let me give an
3 example.

4 If an operation manufactures all of its
5 widgets in State A and sells them all in State B, it's
6 clear under this Court's decisions in *McGoldrick v.*
7 *Berwind-White Coal Mining Company and Armco v. Hardesty*
8 that State A can impose a manufacturing tax that is
9 measured by the value of the revenue of the sales even
10 though the sales occur in State B. And State B can
11 impose a gross receipts tax on the sales that occur in
12 State B which is paid by the seller, the mining company
13 or the widget manufacturer in my example, which is also
14 taxed on that same value, the taxes that occur in State
15 B.

16 The reason that's permissible is because
17 they're distinct jurisdictional rationales, which is
18 what we have here. One is a tax based on the residency
19 and the other is tax based on doing business in the
20 State.

21 Previous apportionment cases this Court has
22 considered have all involved the second rationale, doing
23 business in the State. And in that circumstance, it
24 makes sense to try to divide up the pie because you
25 don't want California asserting, well, we're responsible

1 for 90 percent of your income, and Oregon says, we're
2 also responsible for 90 percent of your income. But
3 there's no real way to compare apples and oranges and to
4 say that a residency-based tax is better or worse than a
5 tax based on doing business there. And so you don't
6 have the same conflict between the taxes and have to
7 divide up the pie in the same way that this Court's
8 previous cases have suggested.

9 JUSTICE KAGAN: Mr. Feigin, if we were to
10 rule against Maryland, how many States are in the same
11 position as Maryland, either because they do a county
12 tax themselves or because they allow local jurisdictions
13 to impose their own taxes?

14 MR. FEIGIN: I'd look at pages 17 to 18 of
15 the Municipal Lawyers Association brief, Your Honor, but
16 if I could add just one quick sentence beyond that.
17 Even States that do offer credits of the kind Respondent
18 is seeking would be affected by a decision in this case
19 because it would constitutionalize that requirement and
20 create constitutional questions about whether a credit
21 -- when a credit is required.

22 Thank you.

23 JUSTICE SCALIA: I have one more question.

24 Do we -- does the Federal Government allow
25 credits for all foreign income tax paid and do you think

1 it must do so?

2 MR. FEIGIN: There are limits. It does
3 offer a foreign income tax credit. There are some
4 treaties about this, I believe, but I don't think
5 there's any overarching principle of international
6 law --

7 JUSTICE SCALIA: In and of itself, it
8 wouldn't violate the negative foreign commerce clause,
9 right?

10 (Laughter.)

11 MR. FEIGIN: I think if it did, Your Honor,
12 Congress could legislate that out of existence.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.
15 Mr. Perella.

16 ORAL ARGUMENT OF DOMINIC F. PERELLA

17 ON BEHALF OF THE RESPONDENTS

18 MR. PERELLA: Thank you, Mr. Chief Justice,
19 and may it please the Court:

20 Justice Alito, you asked my friend on the
21 other side whether it's correct to say that if you
22 perform -- you know, if you look at the real economic
23 analysis of this tax and see what it does to interstate
24 commerce, whether it amounts to a tariff, and my
25 opponent conceded that it does.

1 A tariff is the quintessential unlawful tax
2 under the dormant commerce clause and I'd like to
3 illustrate why by pointing to Justice Breyer's hot dog
4 stand. Again, as my opponent on the other side
5 conceded, a small business like a hot dog stand could
6 operate in two different States. It might not be
7 California and Hawaii, but wherever it might be, and it
8 would be exposed to 100 percent double taxation. The
9 only limitation would be the rate that the State chooses
10 to set on that. And that would apply -- and I would
11 point the Court to page 5 of the Council on State
12 Taxation brief -- that would apply to 90 percent of the
13 businesses in this country.

14 JUSTICE BREYER: When you do business in
15 California and you live somewhere else, your hot dog
16 stand is going to be subject to pretty high property
17 taxes. It's going to be subject to special use taxes.
18 It's going to be subject to taxes that they have for one
19 time to finance the schools. It's going to be subject
20 to da, da, da, da, da. Okay? And so what they are
21 really saying is, well, nobody claims that California
22 can't do that and Maryland can ignore it for purposes of
23 their income tax. It's tough to do business in
24 California, according to some. Not to Californians.

25 But nonetheless, this is just one more

1 burden that you have to suffer and that's because
2 they're on -- you heard the argument. So what's your
3 response to that.

4 MR. PERELLA: My response is that in cases
5 like Container Corp., Jefferson Lines, and others, this
6 Court has said: Look, we can't and don't want to
7 constitutionalize everything about State taxation.
8 Different States impose different taxes, impose
9 different burdens, and we're not going to try to stop
10 them from doing so. We can't stop them. They have that
11 power. But the line we're going to draw, and it's the
12 line the internal consistency test draws, is that we're
13 not going to allow States to structure their taxes so
14 that they are taxing more than one -- they're exposing
15 income to more than 100 percent of the tax base.

16 JUSTICE GINSBURG: Mr. Perella, suppose we
17 had a Maryland resident and all that resident's income
18 is earned out of State. And each of the States where
19 the income is earned tax at or above the Maryland rate.
20 That would mean, I suppose, that the Maryland resident
21 owes nothing to Maryland because he could take a credit
22 for all what he's -- leaving the residents without
23 anything, without a penny from this resident who may
24 have five children that he sends to school in Maryland.

25 MR. PERELLA: Justice Ginsburg, a couple of

1 responses to that. Firstly, I agree that it can happen.
2 I think it happens rarely. And just as a practical
3 matter, let me point out Maryland has reciprocal
4 agreements with its surrounding jurisdictions --
5 Washington, Virginia, Pennsylvania, et cetera -- where
6 they say we're going to ignore commuting of that sort
7 and we're going to tax people at their residence.

8 But even if that weren't so, I think the key
9 point here is that that resident is paying substantial
10 taxes to State B, and residents of State B who happen to
11 do work in the State in Maryland are paying substantial
12 taxes to Maryland. So this comes out in the wash.

13 JUSTICE KENNEDY: Maybe -- no, maybe so, and
14 maybe -- maybe not so. Why can't -- suppose not many
15 other people in -- in -- in Maryland are in -- in this
16 position, or the reverse? This -- this man is getting a
17 free ride.

18 MR. PERELLA: Well, I disagree respectfully,
19 Justice Kennedy, that he's getting a free ride. I mean,
20 he's paying, first of all, again, substantial income
21 taxes to the other States where the income is earned.
22 He's paying substantial property taxes.

23 JUSTICE KENNEDY: But he's getting a free
24 ride off Maryland school. Now he rents the property.

25 MR. PERELLA: Two answers. First of all, I

1 think important to point out that 42 other States don't
2 seem to have found this problematic. Maryland is an
3 outlier here, and the other States are not here to
4 defend its rule.

5 But I also think it's worth mentioning that,
6 yes, there will be occasional cases where a State
7 resident does not pay any tax to the --

8 JUSTICE KENNEDY: Can there be some minimum
9 tax imposed on a resident?

10 MR. PERELLA: Minimum --

11 JUSTICE KENNEDY: In Justice Ginsburg's
12 hypothetical, 100 percent of the income is earned from
13 out of State, and has five kids go to school, and they
14 use all of the local facilities. Can Maryland impose
15 any tax based on residence?

16 MR. PERELLA: I think the short answer to
17 that is if it's an income tax, no, under your
18 hypothetical, which is that he earns no income inside
19 the State.

20 But this Court has, you know --

21 JUSTICE BREYER: What about a school support
22 tax?

23 MR. PERELLA: You know, I think that it's
24 possible that you could impose a school support tax, but
25 then what --

1 JUSTICE BREYER: Can you give me the right
2 numbers in what you said? We've heard different ones.
3 You just said how many States provide a credit such that
4 a resident has to pay the higher of the foreign State's
5 tax on its business there, or the State's tax on income.
6 You said 40 States impose some kind of credit like that,
7 roughly?

8 MR. PERELLA: No, Justice Breyer --

9 JUSTICE BREYER: What?

10 MR. PERELLA: -- to be clear, every other
11 State has a credit, a full credit unlike the one --

12 JUSTICE BREYER: So every other State. How
13 many are the every other State?

14 MR. PERELLA: It's 42 States.

15 JUSTICE BREYER: 42 States. How many States
16 are in the position of Maryland where they don't impose
17 a credit -- or they do not grant a credit for some or
18 all of the income?

19 MR. PERELLA: Zero.

20 JUSTICE BREYER: Zero?

21 MR. PERELLA: Wisconsin has a limitation on
22 its credit as one of the topside briefs points out. The
23 limitation has to do with whether they credit taxes paid
24 to localities in other States, but Maryland is the only
25 State that limits its credit in this way.

1 JUSTICE GINSBURG: Well, Maryland does --

2 JUSTICE KAGAN: Well, don't some States
3 allow localities to impose taxes that do not give a
4 credit? So, for example, the New York City income tax
5 would be the classic example of that.

6 MR. PERELLA: Yes. Justice Kagan, as -- as
7 my opponent on the other side said, the IMLA brief
8 catalogs some foreign localities that impose local
9 income taxes. Some of them don't appear to have a
10 credit.

11 But I think it's important to point out, and
12 we did in our responsive brief, that the IMLA's math is
13 substantially exaggerated. I mean, for example, they've
14 pointed to -- a lot of the local taxes they point to are
15 in Pennsylvania. Thousands of them in fact. And
16 they're simply wrong about Pennsylvania. Pennsylvania
17 imposes a credit. It just happens to be codified in the
18 State statutes. And the same thing is true with Kansas.
19 They say Kansas is an example. Kansas only imposes an
20 intangibles tax which operates --

21 JUSTICE GINSBURG: But you recognize that
22 there are jurisdictions, local jurisdictions, that
23 impose a tax and don't give a credit?

24 MR. PERELLA: I think it's fair --

25 JUSTICE GINSBURG: Just like this one.

1 MR. PERELLA: I think it's fair to say that
2 there are some. I think it's also fair to say that the
3 number is substantially lower.

4 JUSTICE GINSBURG: But before you said there
5 were zero.

6 MR. PERELLA: No, sorry, Justice Ginsburg.
7 I said that there are no States that don't impose --
8 that don't allow the full credit on other States' income
9 taxes.

10 JUSTICE GINSBURG: Well, Maryland does allow
11 the credit against the State income tax. It's just the
12 county tax.

13 MR. PERELLA: Well, I mean, not to split
14 hairs, but as this case comes to the Court, you know,
15 the State courts have held, and Maryland hasn't
16 disputed, that this is, in fact, a State income tax.
17 The court held that in Frey case in the Maryland Court
18 of Appeals.

19 JUSTICE GINSBURG: Yes. But they -- the
20 lion's share of it would be this State part, not the
21 county part. And on that, Maryland does give a credit.

22 MR. PERELLA: I think the key point here is
23 that if you conceive of this all as a State tax, which
24 is how, again, how the Maryland law stands and how the
25 case comes to the Court, what Maryland has done here is

1 say we're going to arbitrarily cut our credit
2 essentially in half. We're going to give you half the
3 credit.

4 Now, some of the topside briefs, the IMLA
5 brief, for example, make an issue of that. They say,
6 hey, this is just a rational compromise; we're going
7 part way. But the rule Maryland suggests is not a
8 compromise. The rule they suggest is you can impose
9 complete double taxation. And it's a rule --

10 JUSTICE KAGAN: Mr. Perella, you're not
11 saying that we have to or that we should establish a
12 priority rule as to different taxing schemes, do -- are
13 you? You're not saying it has to be source-based over
14 residence-based, or -- or vice versa?

15 MR. PERELLA: I think that the holdings of
16 this Court in Standard Oil, Mobil Oil, Central Railroad,
17 are that in a situation where one State is taxing on the
18 basis of residency and the other on the basis of source,
19 it is the State of residency that yields.

20 JUSTICE KAGAN: So you are saying that
21 that's the priority rule.

22 MR. PERELLA: Well, I'm saying that in the
23 case where there is the risk of overlap, yes.

24 Now, the other side has construed our brief
25 saying that we're requiring apportionment, right? The

1 whole point of their reply brief is how can it be that
2 the due process cases say you tax everything wherever
3 earned, and the Commerce Clause requires you to tax
4 nothing outside the State. I want to just be clear that
5 that's not the rule we're suggesting.

6 JUSTICE KAGAN: Well, let me ask you: I
7 mean, suppose we were to say what Maryland is doing is
8 not okay, but then States could choose. Some would do a
9 source-based tax, some would do a residency-based tax.
10 And if you had a situation like that, it seems it could
11 lead to double taxation in exactly this kind of way. If
12 you were living in the wrong State and all of a sudden
13 the combination of one State having a pure source-based
14 and one State having a pure residency-based tax was
15 going to lead to double taxation. Why is that any
16 different?

17 MR. PERELLA: So I think that if you had
18 that situation, and of course you don't because all the
19 States do this the same way, but if you had it, I think
20 there would be an argument to be made that that tax
21 would be unconstitutional because it would produce
22 massive double taxation. And, you know, the Court has
23 said residency yields in that situation.

24 But I want to be clear that this is a much
25 easier case. Here we have a situation where the tax is

1 simply not internally consistently. And, Justice
2 Sotomayor, to answer your question earlier, there's --
3 there's no way to argue that it is. And Maryland to
4 this -- to this day refuses to actually apply the test.

5 CHIEF JUSTICE ROBERTS: But it's only
6 internally inconsistent because of the special
7 nonresident tax. And your -- your clients don't pay the
8 special nonresidents tax, so why should we worry about
9 it in this case?

10 MR. PERELLA: The reason you have to worry
11 about it in this case -- and let me say, Mr. Chief
12 Justice, there are other ways to -- to rule in our favor
13 without doing internal consistency. But if that's the
14 approach that you take, the only way the internal
15 consistency test makes any sense is if you look at both
16 the residence tax -- you know, the inbound tax and the
17 outbound tax. Because the whole point of the test, as
18 the economists' brief points out, is to look at what
19 happens when two States have the power to tax, one on
20 the basis of residence and one on the basis of source.

21 So to suggest that you would only look at
22 the inbound piece makes nonsense of the test. That's
23 not how it's ever been applied. I'd like to --

24 JUSTICE GINSBURG: A resident -- you're not
25 disputing the proposition that the State of residence

1 can tax worldwide income, can impose an income tax on
2 its residents worldwide, wherever they earn it. You're
3 not questioning that proposition.

4 MR. PERELLA: I'm not questioning that as a
5 matter of due process.

6 JUSTICE GINSBURG: Well, as a matter of
7 what? Would you question it as a matter of a dormant
8 Commerce Clause, that the State of residence can tax
9 worldwide income?

10 MR. PERELLA: Would I question it as a
11 matter of the Commerce Clause? I think the gravamen of
12 our position, Justice Ginsburg, is that States have the
13 raw power, right, putting aside all other factors and
14 all other States' taxes, to reach their residents'
15 income wherever earned. But the Commerce Clause
16 operates to force them to structure their taxes in a way
17 that avoids double taxation.

18 Now, there will be --

19 JUSTICE GINSBURG: Well, then what you're
20 saying is they don't have the power to tax worldwide
21 income --

22 MR. PERELLA: No, that --

23 JUSTICE GINSBURG: -- if another State has a
24 tax based on source. So, going in proposition, they can
25 tax worldwide income, is subject to what other States

1 do, and if other States have a tax, then the resident's
2 State has to recede.

3 MR. PERELLA: Two answers to that, Justice
4 Ginsburg. First, under our position, which is not
5 something we've invented for purposes of this case, but
6 is the steady holding of this Court for 80 years, the
7 question is not what other States are actually doing.
8 The question is whether Maryland's tax is structured in
9 such a way that eliminates the pervasive risk of double
10 taxation.

11 Because, of course, as the Chief -- as -- as
12 the Chief Justice pointed out in the opening argument,
13 other States can exercise their right to tax on the
14 basis of source to any degree. And so what this Court
15 has said is we're not going to make the
16 constitutionality of the tax turn on the shifting
17 incidents of the other 49 States. We're going to
18 require that you structure your tax so you're not going
19 to open the door to all this double taxation.

20 JUSTICE GINSBURG: You talked about what
21 this Court has been doing for I don't know how many
22 years. Have we ever had a case under the Dormant
23 Commerce Clause where a resident is complaining, an
24 insider is complaining. The Dormant Commerce Clause
25 cases involved outsiders who are saying, this State

1 where I don't vote is imposing something arbitrary on
2 me. Here we have an in-state person complaining under
3 the Dormant Commerce Clause that its State is
4 discriminating against it.

5 Is there any other State where -- case where
6 it's an insider complaining --

7 MR. PERELLA: Yes.

8 JUSTICE GINSBURG: -- rather than an
9 outsider?

10 MR. PERELLA: There are -- there are a
11 number of cases, and let me give them to you. Boston
12 Stock Exchange, for starters, is a resident complaining
13 about their own tax. The complete audit -- or the
14 Commerce Clause was imposed. Goldberg is the same,
15 although you ruled against the taxpayer in that case;
16 the test was applied. And most importantly, I think,
17 J.D. Adams, Gwin and Central Greyhound are all
18 domiciliaries. Now, they are, of course, corporations.

19 But my opponent, I don't think, has offered
20 any rationale to distinguish between the two. The
21 question this Court has always identified is: Is this
22 tax double taxing --

23 JUSTICE GINSBURG: Well, one thing, one
24 obvious distinction is the corporation doesn't have five
25 children to send to school.

1 MR. PERELLA: Well, you know, I think that
2 that rationale maybe proves a little bit too much.
3 Because, of course, corporations do receive an awful lot
4 of benefits from their domiciliary States, and
5 especially the States where they have their principal
6 place of business. And I would argue, although there's
7 no, you know, empirical evidence in the record, that
8 they probably use more in the way of services -- fire,
9 water, structure, legal, you know, legal mechanisms,
10 et cetera -- and yet this Court has said, you absolutely
11 cannot double tax and it's forbidden.

12 And, you know, again, Maryland is -- the
13 only distinguishing factor they have for those cases --
14 and actually this is an important point I would like to
15 address -- the only point either Maryland or the United
16 States has used to distinguish J.D. Adams and the like
17 is the idea that the tax in those cases was on gross
18 receipts.

19 That argument has been long since
20 foreclosed. This Court held in *Moorman*, both the
21 majority and the concurring opinion, that there is no
22 analytical difference between net and gross income in
23 this area.

24 And furthermore, in *Westinghouse v. Tully*,
25 the Court said, look, there's no difference for our

1 analysis between the tax and -- a burdensome tax imposed
2 on interstate transactions and a burdensome tax --
3 excuse me -- a burdensome tax imposed on interstate
4 income. They said it cannot be, quote/unquote, that you
5 can impose that unlawful burden by doing it in the
6 aggregate.

7 And so I think the idea that that
8 distinguishes our cases is not available to them.

9 JUSTICE KAGAN: Mr. Perella, we said in this
10 American Trucking case, we said we were going to allow
11 States to impose a neutral, local tax even though it
12 violated internal consistency.

13 Why shouldn't we see this as pretty
14 equivalent to American Trucking? In other words, a
15 State saying, we're going to impose a small tax to
16 ensure that you are paying for some of the very basic
17 services that we provide.

18 MR. PERELLA: Well, I guess several
19 responses, Justice Kagan. First of all, there's nothing
20 small about this tax. Maryland is imposing, by their
21 own lights, \$50 million in double taxation on its local
22 businesses annually when they operate across State
23 lines.

24 JUSTICE KAGAN: I'm sure that if you
25 aggregate the American Trucking tax, it was a lot of

1 money, too.

2 MR. PERELLA: Maybe. The distinction
3 that -- that Justice Breyer drew for the Court in that
4 case was that in American Trucking it was a fee. It was
5 a flat fee and it was imposed only on intrastate
6 transactions. He said no interstate transactions, no
7 interstate commerce appears to be at issue in this case.

8 In this case, by striking contrast, Maxim,
9 the S corporation that earned this income, operates
10 essentially in every State in the country. And, of
11 course, under S corporation principles, the income that
12 the Wynnes earned through that is passthrough income
13 just like a partnership.

14 And furthermore, you know, if you look at
15 the -- how the tax affects other State residents, again,
16 90 percent of businesses in this country are organized
17 as passthrough entities or sole proprietorships. And so
18 you have all of that income crossing State lines, and
19 every time it does, there's a tariff, there's a barrier
20 at the State lines that says you're going to pay twice.
21 And this Court has never, I don't think, approved a tax
22 like that. American Trucking certainly did not.

23 I'd like to -- to mention a couple of other
24 things. The IMLA brief and Maryland's reply brief
25 suggest that if you accept our position, Maryland has no

1 choice but to make its tax code more aggressive. I'd
2 just like to point out that that's not so. Maryland, to
3 take just one example, could raise the top marginal
4 income tax rate to close the gap. That would impose the
5 difference only on, you know, higher income citizens and
6 it would not double tax anyone. The thing that
7 Maryland --

8 JUSTICE SCALIA: Why should that give me
9 comfort?

10 (Laughter.)

11 JUSTICE SCALIA: What difference does that
12 make?

13 MR. PERELLA: Well, I don't think it
14 makes --

15 JUSTICE SCALIA: Where the only way out is
16 to -- is to -- I don't understand the argument.

17 MR. PERELLA: Justice Scalia, Maryland can
18 close the gap however it likes. It can raise the
19 property tax --

20 JUSTICE SCALIA: That's what I think.

21 MR. PERELLA: It can raise the income tax
22 generally. The point that I wanted to make is that if
23 the suggestion is that this tax is somehow unfair
24 because, as a -- as a necessary result you're going to
25 soak people with lower incomes, that's simply not so.

1 That's not what Maryland has to do to the fix the
2 problem here.

3 And, again, this is a problem that only
4 Maryland has. Every other State with an income tax
5 allows the credit in full.

6 Let me also mention another argument
7 Maryland makes in its reply. It suggests that
8 S corporation owners or S corporations should not be
9 heard to complain about double taxation because
10 C corporations are double taxed. That misunderstands
11 the concept of double taxation in Commerce Clause cases.
12 In a C corporation, you have the first tax imposed on
13 the, you know, the corporation itself, and then down the
14 line you have a tax imposed either by the same State or
15 another on the -- on the person who's getting a
16 dividend.

17 That's not the same person being taxed
18 twice, nor is it anyone being taxed twice for crossing
19 State lines. And so both the dividends recipient and
20 corporation are indifferent to where they live and where
21 they work. There's no double taxation there in the
22 sense of the hydraulic pull, pulling the commerce into
23 single State. And in fact, in that respect, it's just
24 like Jefferson Lines. In that opinion, this Court said,
25 "The reason this is different from Central Greyhound and

1 the only reason we're not striking this tax down is
2 because the first incidence falls on the bus ticket
3 buyer, and the second incidence falls on the bus
4 company. And so no one discouraged from crossing state
5 lines." That's not how the Maryland tax operates.

6 JUSTICE SOTOMAYOR: What if they didn't do
7 it on gross income, but just said every resident has to
8 pay X amount?

9 MR. PERELLA: As an income tax?

10 JUSTICE SOTOMAYOR: As an income tax.

11 MR. PERELLA: I think the result would be
12 the same.

13 JUSTICE SOTOMAYOR: It's not being based on
14 gross income. Just says every resident has to pay
15 \$1,000.

16 MR. PERELLA: Justice Sotomayor, I think the
17 result would be the same because -- and as I stand here,
18 I'm thinking about this -- I believe it would be the
19 same because the question would be, as the Chief Justice
20 points out, is the tax internally consistent. And, you
21 know, that sounds obscure but all it's really saying is,
22 is that tax creating a risk of pervasive double taxation
23 for anyone who does interstate commerce.

24 JUSTICE KAGAN: But why doesn't Justice
25 Sotomayor's hypothetical, isn't it exactly the same as

1 the American Trucking hypothetical? You just
2 distinguished the flat tax versus the percentage income
3 tax. I thought that that was your principal distinction
4 of American Trucking.

5 MR. PERELLA: I think -- I think that the
6 thing about American Trucking that made it unique,
7 Justice Kagan, and I confess I don't completely
8 understand the rationale of American Trucking, but I
9 think the thing that makes it unique is it's a flat fee
10 for use of the State services. That's what Justice
11 Breyer said to the Court in that case.

12 JUSTICE KAGAN: I thought that that was what
13 Justice Sotomayor was positing, a flat fee for use of
14 the State schools and everything else that comes along
15 with being a State resident.

16 MR. PERELLA: All right. Well, perhaps,
17 then, you know, maybe that tax could survive under the
18 rationale in American Trucking too. But, again, I think
19 it's important to point out this is not that case. I
20 mean, this is a case where it's clearly an income tax.
21 It's clearly pegged to, you know, adjusted gross income
22 and it clearly does not offer the credit that every
23 other State offers.

24 And, you know, I think just to illustrate
25 how this -- how this functions in reality, the other

1 side suggests, well, this is just some sort of -- we're
2 asking for a special benefit for -- for, you know,
3 people who own these big interstate companies. If you
4 own, for example, an independent taxi and you happen to
5 take rides, give people rides across the line into
6 Delaware and Pennsylvania, you're going to be double
7 taxed, under their theory, on any piece of that commerce
8 that can be taxed by Pennsylvania or Delaware. Whereas,
9 the exact same operation that happens to be an
10 incorporated bus company could not be constitutionally
11 double taxed.

12 JUSTICE SCALIA: But, you know, there --
13 there's an inequity either way. The inequity on the
14 other side is you have two neighbors side by side.
15 Their kids both use the school. One of the neighbors
16 makes most of his income out of the State and you want
17 to say that would not be taxable, whereas the other
18 neighbor makes all of the income in the State and pays a
19 very high, very high tax. You know, that's not fair
20 either, is it?

21 MR. PERELLA: Three responses, if I could,
22 Justice Scalia. First response, as I mentioned earlier,
23 it's going to work the other way as well. If you look
24 at this across 50 States without State lines, as you're
25 supposed to for Commerce Clause purposes, people who are

1 nonresidents are going to be paying taxes into the
2 State.

3 Secondly, even if there is some inequity
4 there, the lodestar of this Court's Commerce Clause
5 cases has always been that whatever else you do, you
6 can't create the substantial nationwide risk of double
7 taxation. So that has to be the first principle.

8 JUSTICE SOTOMAYOR: That's quite
9 interesting, because New York City's normal population,
10 I think now we have gone down to 7 million, but
11 out-of-state residents that come in are 25 million a
12 day, who work in the city. So, New York's 7 million
13 pays for those 25 million.

14 MR. PERELLA: I'm not sure totally sure how
15 the New York City income tax regime works, Justice
16 Sotomayor, but I think the point I was driving at is,
17 you know, States have different policy preferences. You
18 know, they want to have a tax on this and a tax on that,
19 that's almost always --

20 JUSTICE BREYER: What's your third?

21 MR. PERELLA: Yes, that's what I was getting
22 the line is drawn at the idea that you can't double tax.

23 And the third point I was going to make is,
24 you know, Maryland is complaining about a very small cab
25 of limitation that this Court always enforced on their

1 taxing power. And as this Court has said in a number of
2 decisions dating all the way back to Chief Justice
3 Marshall, States have some limitations on what they can
4 do with taxation under the Commerce Clause, but what
5 they bought in exchange for, you know, agreeing to those
6 limitations in the Constitution is a nationwide network
7 of commerce. They don't have barriers at State lines,
8 there are no tariffs as Maryland admitted this functions
9 as. They can -- you know, they can take advantage of
10 that nationwide network and they can market their goods
11 and they can market their employees in any State in the
12 country and vice versa. And so I think the idea that
13 this is a one-way ratchet and that Maryland is only
14 losing in this proposition is not correct.

15 And just as a final matter, let me just say,
16 with respect to the idea that residency is a
17 get-out-of-jail-free card, I'd like to quote Chief
18 Justice Marshall from *Brown v. Maryland*. "The
19 distinction between the tax on the thing imported and on
20 the person of the importer can have no influence on this
21 part of the subject. It is too obvious for controversy
22 that they interfere equally with the power to regulate
23 commerce."

24 I think that's the bottom line here. And if
25 the Court has no further questions, I'll submit.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Brockman, you have three minutes remaining.

3 REBUTTAL ARGUMENT OF WILLIAM F. BROCKMAN
4 ON BEHALF OF THE PETITIONER

5 MR. BROCKMAN: Thank you. The bottom line
6 is not that a tax on the thing is the same as a tax on
7 the person. That is true in the trilogy of cases that
8 the winds mostly rely on, the J.D. Adams cases where the
9 gross receipts tax is understood, at least at that time,
10 to be very different from a net income tax going all the
11 way back to 1918 in U.S. Glue. And the reason was
12 because it was viewed as taxing the transaction itself.
13 The net income from the transaction is different. It's
14 the thing that the person receives and enjoys in their
15 home State. And people choose to live in States for
16 reasons different from the ones that they consider when
17 they choose to do business elsewhere. They may choose
18 because there are lower property taxes relative to sales
19 taxes, as in Maryland.

20 Maryland is not unique. The Chief Justice
21 can probably correct me if I'm wrong about the number,
22 but there are 92 counties in Indiana and they all impose
23 a local income tax. None offers a credit. So -- and --
24 and the fact that other States aren't here is just a
25 harbinger because if this becomes a constitutional rule,

1 they will be.

2 The reason we have offered a compromise and
3 why it is a compromise, is because -- because this tax
4 falls on the State's own residents, they have the
5 capacity to change it. That's always been an important
6 consideration from McCullough all the way through United
7 Haulers. And the norm that -- that supposedly prefers
8 source to -- to residents as a basis is nowhere to be
9 found. It's -- it's a norm only. And in *Bernard v.*
10 *Brooks*, in answer to Your Honor's question, this Court
11 said that the United States has never believed that when
12 it decides to limit its own sovereign taxing power over
13 its own residents that it's doing it because it has to.
14 It's never been thought that. And the States could not
15 have thought that when they were joining the union, that
16 the unique relationship between a State and its own
17 residents would be -- could not be accounted for in the
18 State's tax system, that the Constitution would
19 determine how, as Mr. Perella says, the States can
20 structure their own taxes.

21 Maryland made some choices and they ought to
22 be able to make the choices they did. They said that
23 the taxes one pays to the county should not be different
24 based on factors that the county services are
25 indifferent to. You don't get 18 percent of -- of a

1 fire truck or a day of school because you earned 70 --
2 82 percent elsewhere. You get 100 percent just like
3 your neighbor does.

4 And in that respect, the reason the rates do
5 matter and the reason you should nevertheless be very
6 uncomfortable about it is because under the rule that
7 they're proposing, Maryland's tax system is at the mercy
8 of the other State's taxes. In the foldout section of
9 the Joint Appendix at page 77, you see there are 39
10 jurisdictions, there's a 40th not shown there that taxed
11 a portion of the income. 27 of them taxed it at a
12 higher rate than the Maryland and Howard County tax
13 combined in 2006. So -- thank you, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you. Thank
15 you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:11 p.m., the case in the
18 above-entitled matter was submitted.)

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<p>A</p> <p>\$1,000 6:10 46:15</p> <p>\$125 8:7</p> <p>\$180 15:4</p> <p>\$180,000 15:4</p> <p>\$225 15:4</p> <p>\$50 42:21</p> <p>\$750 6:15</p> <p>a.m 1:14 3:2</p> <p>able 10:4 17:15 52:22</p> <p>above-entitled 1:12 53:18</p> <p>absolutely 14:17 41:10</p> <p>abstract 4:25</p> <p>accept 43:25</p> <p>accorded 14:19</p> <p>account 13:12</p> <p>accounted 52:17</p> <p>accounts 5:4</p> <p>accurate 5:3</p> <p>acknowledge 12:13,14</p> <p>Acting 1:16</p> <p>activity 21:3</p> <p>Adams 18:19 19:7 23:6 40:17 41:16 51:8</p> <p>add 11:24 20:21 26:16</p> <p>addition 10:5 20:20 23:6</p> <p>additional 8:13 20:2</p> <p>address 11:18 19:2,6 22:14 41:15</p> <p>addressing 8:4</p> <p>adjusted 47:21</p> <p>admitted 50:8</p> <p>advancing 15:15</p> <p>advantage 13:13 14:16 50:9</p>	<p>affect 24:1,2,18</p> <p>affords 3:13</p> <p>aggregate 42:6 42:25</p> <p>aggressive 44:1</p> <p>ago 23:12</p> <p>agree 30:1</p> <p>agreeing 50:5</p> <p>agreements 30:4</p> <p>agrees 10:15</p> <p>Alito 8:17 23:11 23:18 27:20</p> <p>allow 26:12,24 29:13 33:3 34:8,10 42:10</p> <p>allows 45:5</p> <p>American 42:10 42:14,25 43:4 43:22 47:1,4,6 47:8,18</p> <p>amicus 1:20 2:7 16:24</p> <p>amount 5:16,17 46:8</p> <p>amounts 27:24</p> <p>analysis 11:18 20:9 27:23 42:1</p> <p>analytic 11:20</p> <p>analytical 41:22</p> <p>annually 15:4 42:22</p> <p>answer 6:21 7:9 7:15 21:16 31:16 37:2 52:10</p> <p>answers 30:25 39:3</p> <p>anybody 23:1</p> <p>Appeals 34:18</p> <p>appear 33:9</p> <p>APPEARAN... 1:15</p> <p>appears 43:7</p> <p>Appendix 53:9</p> <p>apples 26:3</p> <p>application 12:19 13:11</p>	<p>applied 12:22 15:8,11 37:23 40:16</p> <p>applies 18:8 20:12 21:4,9</p> <p>apply 4:21 14:15 15:10 28:10,12 37:4</p> <p>apportion 18:22</p> <p>apportionment 13:18,18 14:1 25:21 35:25</p> <p>approach 37:14</p> <p>approved 43:21</p> <p>approximately 6:17</p> <p>arbitrarily 35:1</p> <p>arbitrary 40:1</p> <p>area 23:2 41:23</p> <p>argue 12:12 14:12 15:20 16:3 37:3 41:6</p> <p>argument 1:13 2:2,5,9,12 3:3 3:7 10:24 11:2 13:15 16:23 19:6 20:1 27:16 29:2 36:20 39:12 41:19 44:16 45:6 51:3</p> <p>arises 22:2</p> <p>arising 21:8</p> <p>Armco 25:7</p> <p>articulated 14:8 16:13</p> <p>artificially 24:9</p> <p>aside 38:13</p> <p>asked 22:12 27:20</p> <p>asking 48:2</p> <p>asks 15:14</p> <p>asserting 25:25</p> <p>assign 14:23</p> <p>assistance 3:16</p> <p>Assistant 1:18</p>	<p>Association 26:15</p> <p>attributable 22:2</p> <p>attribute 12:14</p> <p>audit 40:13</p> <p>Auto 7:10,13 15:8</p> <p>available 42:8</p> <p>avoids 38:17</p> <p>aware 14:22 18:6</p> <p>awful 41:3</p> <p>axes 9:12</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>B 25:5,10,10,12 25:15 30:10,10</p> <p>back 6:10 15:7 22:10 50:2 51:11</p> <p>backwards 17:14</p> <p>bad 23:20</p> <p>Baltimore 1:17</p> <p>barrier 43:19</p> <p>barriers 50:7</p> <p>base 29:15</p> <p>based 15:5,5 19:6,19 24:25 25:18,19 26:5 31:15 38:24 46:13 52:24</p> <p>basic 42:16</p> <p>basis 7:21,22 8:1 10:19 12:9 14:6 19:3,8,18 35:18,18 37:20 37:20 39:14 52:8</p> <p>behalf 1:17,22 2:4,7,11,14 3:8 16:24 27:17 51:4</p> <p>beings 23:4</p> <p>Belgium's 22:17</p> <p>believe 6:4 14:3 15:12 27:4 46:18</p> <p>believed 19:8 52:11</p> <p>benefit 11:4 14:19 16:16 17:17 48:2</p> <p>benefits 3:13,18 14:6 41:4</p> <p>Bernard 52:9</p> <p>Berwind-White 25:7</p> <p>best 7:8,10,16</p> <p>better 12:8 26:4</p> <p>beyond 6:1 26:16</p> <p>big 16:10 21:22 48:3</p> <p>bit 19:13 41:2</p> <p>border 8:20,23</p> <p>borders 3:25</p> <p>Boston 40:11</p> <p>bottom 6:15 50:24 51:5</p> <p>bought 50:5</p> <p>Breyer 6:8,20 7:9,25 18:17 22:10,12,20 23:1 28:14 31:21 32:1,8,9 32:12,15,20 43:3 47:11 49:20</p> <p>Breyer's 28:3</p> <p>BRIAN 1:7</p> <p>brief 4:11 9:1 11:12 22:6 26:15 28:12 33:7,12 35:5 35:24 36:1 37:18 43:24,24</p> <p>briefs 32:22 35:4</p> <p>broad 3:11 14:6</p> <p>Brockman 1:16 2:3,13 3:6,7,9 4:3,6,19 5:20</p>
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