

No. 13-485

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IN THE  
**Supreme Court of the United States**

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COMPTROLLER OF THE TREASURY  
OF MARYLAND,  
*Petitioner,*

v.

BRIAN WYNNE, ET UX.,  
*Respondents.*

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**On Writ of Certiorari to the  
Court of Appeals of Maryland**

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**BRIEF OF *AMICUS CURIAE* THE NATIONAL  
ASSOCIATION OF PUBLICLY TRADED  
PARTNERSHIPS IN SUPPORT OF  
RESPONDENTS**

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September 26, 2014

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## INTEREST OF THE AMICUS CURIAE<sup>1</sup>

The National Association of Publicly Traded Partnerships (NAPTP) is a trade association representing publicly traded limited partnerships, more commonly known as master limited partnerships (MLPs). NAPTP currently has 157 full and associate members and represents 100 MLPs.

MLPs have been in existence since 1981, and they were first created to allow businesses to raise capital from individual investors who could not afford the more sizeable investments often demanded by non-traded partnerships. The majority of the investors providing this capital are individual investors, many of whom are seniors. Seniors are particularly attracted to this form of investment because it generates a steady stream of reliable revenue.

The MLP structure was designed for capital-intensive businesses with a lower (but steady) general rate of return. One good example is the Nation's energy pipeline system. MLPs own approximately 300,000 miles of energy pipelines, a vast network ranging from local gathering lines that supply processing plants with products from the field to major interstate pipelines traversing thousands of miles. This system requires considerable upfront capital but once these assets are in place, they last a long time and generate a steady and reliable stream of revenue.

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief. As reflected in the letters filed with the Clerk, all parties have consented to the filing of this brief.

While steady and reliable, the income from such assets is often low in relation to the amount of capital expended, particularly in the case of rate-regulated pipelines. For this reason, corporate energy companies have increasingly preferred to divest themselves of these low-return assets and to put their capital into more profitable exploration and drilling operations; when they do, these pipelines are typically acquired by MLPs.

The taxation of MLPs differs from the standard two-level corporate form. As a general matter, partnerships are treated as “pass-through” entities for tax purposes. No tax is paid at the partnership level. A partnership’s income is considered earned by all the partners; it is allocated among all the partners in proportion to their interests in the partnership, and each partner pays tax on his or her share of the partnership income.

Historically, all MLPs were taxed in this fashion,<sup>2</sup> with all income “passing through” the partnership to the individual investors, who then paid tax on their share of the net income generated by the MLP to their State and local taxing authorities. However, Congress adopted provisions in the federal tax code in 1987 (and expanded them in 2008) that limited “pass-through” tax treatment to publicly traded partnerships engaging in certain types of activities, primarily in the natural resources sector. MLPs proved highly sensitive to these changes in the tax code and, as a result, natural resource MLPs constitute about 80 percent of MLPs by number, and about 90 percent of the MLP market capital. At the end of March 2013, the total market capital of MLPs was about \$445 billion,

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<sup>2</sup> The first MLP began trading in 1981.

of which just under \$400 billion was in the natural resource sector.

The issue presented by this case has serious ramifications for the continued viability of MLPs. Both the Petitioner and his *amici* contend that States have the power to impose unlimited double taxation on out-of-state income of their residents, including those who receive income from pass-through entities, taxing them a second time on interstate income that was already taxed by the State where it was earned. If adopted by this Court, such a rule would upset the settled expectations of partnership owners, whose interstate earnings are currently taxed a single time because state taxing authorities, other than Maryland, fairly apportion tax responsibilities according to where the income is earned. Going forward, the prospect of Nationwide double taxation of income would be a disincentive to potential investors, causing them to invest elsewhere. The fundamental change advocated by Petitioner and his *amici* thus threatens to shrink a valuable source of capital for a critical segment of our Nation's energy sector. NAPTP therefore has a strong interest in the outcome of this case.

### **SUMMARY OF ARGUMENT**

Petitioner and his *amici* attempt to frame this case as one about whether States and localities have the ability to tax the income of their residents earned through interstate commerce. Pet. Br. at 11-12, 18-24; U.S. *Amicus* Br. at 9-15. But, as in all cases involving multiple taxation, there is no dispute that Maryland has some power to tax all of its residents' income; the problem is that another jurisdiction also unquestionably has the power to

tax exactly the same income. The real question here, then, is not whether the Due Process Clause allows state and local jurisdictions to tax the income their residents generate through interstate commerce but whether that power is unfettered, notwithstanding the limits on state and local taxes that have been traditionally imposed by the Commerce Clause. This Court's precedents make clear that the answer to such a question must be a resounding "no." A taxing regime like Maryland's, which places an unfair share of the tax burden on interstate commerce, and which rejects a fair and simple method of apportionment, runs afoul of the dormant Commerce Clause. Any other result would substantially impede the continued viability of businesses like those represented by NAPTP, and would unduly burden our Nation's economy.

#### **ARGUMENT**

As this Court has long held, the Congressional power to "regulate Commerce among . . . the several States," U.S. Const. art. I, § 8, cl. 3, imposes implicit limitations on "the ability of States and localities to regulate or otherwise burden the flow of interstate commerce." *Maine v. Taylor*, 477 U.S. 131, 151 (1986); *see also Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429 (2005). This "negative" or "dormant" Commerce Clause prevents a State from "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995). In short, when it comes to evaluating state taxation schemes on interstate revenues, the "Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or

that burden it by subjecting activities to multiple or unfairly apportioned taxation.” *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 24 (2008); see also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). These two principles work in tandem to “prohibit taxes that pass an unfair share of the tax burden onto interstate commerce.” *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992).

Maryland’s taxing regime does precisely that here, passing an unfair share of the tax burden onto Maryland residents who earn their income through interstate commerce. Such residents are virtually certain to face multiple taxation of the same income, while the intrastate income of Maryland residents is taxed only a single time. Maryland’s tax regime improperly rejects a simple apportionment solution that is almost uniformly adopted by other state and local taxing jurisdictions around the country: providing a credit for tax paid to the jurisdiction in which the income was earned. Maryland’s insistence on full taxation at the county level of out-of-state income with no apportionment is constitutionally impermissible under the Commerce Clause, and the Court should affirm the decision below invalidating it.

**I. Maryland Impermissibly Taxes Interstate Income More Heavily Than Income Generated Entirely Within Maryland**

The first problem with Maryland's taxing regime is that it discriminates against interstate commerce. Under this Court's Commerce Clause jurisprudence, state laws that tax interstate income more heavily than intrastate income are disfavored. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996). As the Court has explained, it will treat a state tax law as discriminatory (and often invalid), when it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state." *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 342 (1992) (citation omitted, alteration added).

The Court applied these principles in *Fulton Corp. v. Faulkner*, 516 U.S. at 333-36, to strike down a taxation scheme analogous in many ways to the one here. The scheme challenged in *Fulton* levied a .25% tax on the value of North Carolina residents' corporate stock, but allowed for a "taxable percentage deduction" based on the fraction of the issuing corporation's income subject to tax in North Carolina. Thus, under North Carolina's regime, if a resident owned stock in a corporation that did purely intrastate business, the resident would receive a deduction for the full amount of any tax because the corporation would have paid tax to North Carolina on 100% of its income. However, if a resident owned stock in a company that generated income outside of North Carolina, that resident would owe corporate stock tax because there could be no full deduction (and,

indeed, there would be little or no deduction unless the multistate corporation earned a large percentage of income in North Carolina). *Id.* at 328-30. The Court found that the state tax scheme was impermissibly discriminatory, explaining that a “regime that taxes stock only to the degree that its issuing corporation participates in interstate commerce favors domestic corporations over their foreign competitors in raising capital among North Carolina residents and tends, at least, to discourage domestic corporations from plying their trades in interstate commerce.” *Id.* at 333.

Maryland’s taxing regime here suffers from the same flaws. Maryland imposes an up-to 3.2% county income tax on all of a resident’s income, no matter where it is earned, and provides no credit for payments made to other States on that same income. Thus a Maryland resident who earns income by participating in interstate commerce is subject to multiple taxation while a Maryland resident who earns income solely within Maryland will face only a single tax. Just as in *Fulton*, such a taxing regime favors residents who earn their income in-state, and thus “tends, at least, to discourage [residents] from plying their trades in interstate commerce.”

## **II. Maryland Improperly Rejects a Simple, Widely-Used System of Fair Apportionment**

The Maryland regime also implicates a second fundamental strand of this Court’s dormant Commerce Clause jurisprudence: the requirement that a taxing regime allow for fair apportionment as a means of preventing multiple taxation. *Mobil Oil Corp. v. Comm’r of Taxes*, 445 U.S. 425, 445-46

(1980); *Cent. Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948). As this Court has explained, “the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction.” *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

There is no one-size-fits-all measure of what constitutes fair apportionment, nor is mathematical precision required. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-80 (1978). Instead, courts must ask whether a state tax is internally and externally consistent. *Am. Trucking Ass’ns, Inc. v. Scheiner*, 483 U.S. 266, 285 (1987). To be internally consistent, “the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the . . . income being taxed.” *Container Corp.*, 463 U.S. at 169. To be externally consistent, “the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated.” *Id.* at 170.

Maryland’s taxation apportionment “formula” cannot withstand scrutiny under either of these tests. Maryland imposes an up-to 3.2% county income tax on resident income, regardless of whether that income was earned in, and taxed by, a jurisdiction outside of Maryland. And Maryland does so while at the same time taxing all income earned in Maryland by non-residents. Md. Code Ann., Tax-Gen. §§ 10-102, 10-106.1, 10-210(b)(3), 10-219, & 10-401. This latter feature of Maryland’s formula is ignored by Petitioner and his *amici*, who assert that “[i]f every State taxed all the income of its own residents, *and only of its own residents*, there would be no plausible argument that

interstate commerce was disadvantaged.” U.S. *Amicus Br.* at 24 (emphasis added).

But that is plainly *not* what Maryland’s taxing regime does. Maryland’s regime taxes the entire income not only of its own residents, but also of non-residents who generate income in Maryland. And as this Court’s cases make clear, it is this entire taxing “regime” or “formula” that must be assessed under the Commerce Clause. *Fulton Corp.*, 516 U.S. at 333-36 (examining state taxing “regime” by looking not only to .25% tax but also to the manner in which State allowed taxpayers to reduce the tax through a deduction); *Container Corp.*, 463 U.S. at 169 (looking to state taxation “formula”). Properly assessed, such a taxing regime fails the internal consistency test because if all jurisdictions were to adopt Maryland’s “formula” – taxation on 100% of resident income, plus taxation of all in-state income generated by non-residents, plus no credit for taxes based on income earned in other States – multiple taxation would inevitably result throughout the United States. That would unconstitutionally discourage and interfere with interstate commerce.

Likewise, such a regime fails the external consistency test because the factors used in the apportionment formula – 100% of the income is attributed to Maryland based on residency alone – do not reflect the reality of how income is generated. As the Respondents’ case itself shows, in the modern economy Maryland residents can and do generate income from business conducted throughout the country. And, like Maryland, each state where that business is conducted understandably wants and collects its share of tax on that income. But income earned and taxed in

California is “generated” in California. By treating it as though it were generated in Maryland, Maryland’s system is both fundamentally unfair and does not reflect reality.

This is not to say that the imposition of credits is constitutionally required in order to meet the fair apportionment requirement. All States, including Maryland, could meet the fair apportionment requirement by imposing taxes on their residents the same way they tax their non-residents – taxing only income generated in the State, and allowing other States to impose their own taxes on income generated elsewhere. Alternatively, States could choose to tax all of their residents’ income regardless of where earned, but to provide credits for income taxes paid elsewhere. Virtually all States (including Maryland with respect to some portions of its income tax) have chosen the latter system of apportionment, presumably because it allows the State of residence to collect and keep tax revenues from out-of-state income generated in lower (or non) taxing States, and because it puts the burden of claiming credits on the resident taxpayer in the first instance. But whichever system is chosen, it must be fair, and it must attempt to allocate the tax based on where the income is generated. Maryland’s system makes no such attempt, and thus it violates the Commerce Clause.

### **III. The Arguments Raised by Petitioner and His *Amici* In Support of Maryland's Discriminatory and Unfairly Apportioned Income Tax Scheme Cannot Withstand Scrutiny**

Likely because Maryland's scheme is impossible to justify under the established standards for assessing whether a State tax violates the Commerce Clause, both Petitioner and his *amici* expend great effort in seeking to avoid those standards or to limit their application. These efforts cannot withstand scrutiny.

1. Petitioner's main contention (joined by *amici*, including the United States), is that this Court's decision in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995), resolved the question presented here by holding that "a jurisdiction, such as Oklahoma, may tax *all* the income of its residents, even income earned outside the taxing jurisdiction." Pet. Br. at 2, 11, 18-20 (emphasis in original). But whether a jurisdiction has the power, as a matter of due process, to tax all of the income of its residents – the only question addressed in *Chickasaw Nation* – is largely beside the point. Just as in many of this Court's Commerce Clause decisions, there is no dispute here that the taxing State has the *power* to impose the tax at issue. Questions of multiple taxation arise, by definition, where multiple jurisdictions have the *power* to impose a tax on the same thing. At that point, the question under the Commerce Clause is whether each State's exercise of its undisputed power, in combination, impermissibly burdens interstate commerce. Such

a question was neither presented nor resolved by *Chickasaw Nation*.

Another case, however, did address the line between the Due Process Clause power to tax, and the potential for a state tax to unduly burden interstate commerce in violation of the Commerce Clause. In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court had before it a tax dispute between North Dakota and an out-of-state mail-order retailer who had no physical presence in the State. The Court upheld North Dakota's power, under the Due Process Clause, to impose such a tax, but then held that the collection of such a tax violated the Commerce Clause by placing an undue burden on interstate commerce. In so holding, the Court clearly differentiated the two analyses, explaining "while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." *Id.* at 305 & 313 n.7.

The line *Quill Corp.* drew between State's power to tax, on the one hand, and whether a state's tax unduly burdened interstate commerce on the other, was not a new one. In *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 443-46, the Court addressed this same line in response to a taxpayer argument that was essentially the flip-side of the one Petitioner raises here. According to the taxpayer in *Mobil Oil*, its status as a domiciliary of New York meant that New York, and no other state, had the power to tax all of its dividend income. Thus, the argument went, Vermont's tax on the taxpayer's dividend income raised the threat of multiple taxation on the same dividend income, in violation of the Commerce

Clause. The Court rejected the argument, holding that even though New York theoretically had the power to tax all the dividends of its domestic corporations, there was “no reason” that “power should be exclusive[, especially] when the dividends reflect income from a unitary business, part of which is conducted in other States.” *Id.* at 445-46. In these circumstances, the Court explained, “apportionment is ordinarily the accepted method.” *Id.* at 446. Thus, the Court held that Vermont’s interest “in taxing a proportionate share of appellant’s dividend income is not overridden by any interest of the State of commercial domicile.” *Id.*; see also *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-85 (1952) (“The rule which permits taxation . . . on an apportionment basis precludes taxation of all of the property by the state of the domicile. Otherwise there would be multiple taxation of interstate operations . . . .”) (internal citation omitted).

Thus, it is clear that the State’s power to tax its resident’s income consistent with the Due Process Clause does not trump any obligation to apportion under the Commerce Clause. The analysis under the constitutional provisions is separate, and to the extent this Court’s precedents dictate a particular result, *Mobil Oil* strongly supports the decision below. Just as in *Mobil Oil*, there is no reason here why Maryland’s power to tax its residents’ income should be “exclusive,” especially when those residents are conducting business in other States, and those other States also have the power to tax that same income. Under those circumstances, “apportionment is ordinarily the accepted method” of resolving competing claims among jurisdictions

that each possesses the undisputed power to tax the income.

2. In an attempt to distinguish the cases discussed above, the United States suggests that this case is different because it involves taxation of individuals, not corporations. According to the United States, the unique relationship between individuals and their state of residence makes other Commerce Clause cases irrelevant. U.S. *Amicus* Br. at 29-32. But nothing from this Court's Commerce Clause jurisprudence supports such a distinction – and the United States points to no case to support it. Indeed, the leading academic authority on state taxation has rejected it. 1 Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 20.10[2][b](3d ed., Supp. 2014) (“In our view, a state has no more power . . . to tax individuals on 100 percent of their income earned from commercial activities . . . in other states than it has to tax corporations on 100 percent of their income earned from commercial activities that are taxable in other states. In both instances . . . a state's insistence on the right to tax 100 percent of the taxpayer's income would expose the taxpayer to an unconstitutional risk of multiple taxation.”)

Nor is such a distinction tenable. This case involves the taxation of individuals operating an interstate corporation, which “passed through” its income to them. *Amicus* consists of MLP enterprises whose partners receive similar “pass through” income that is generated through interstate commerce. Like the corporations and their shareholders discussed in this Court's Commerce Clause decisions, the shareholders of S Corporations and the partners in MLPs have a keen interest in paying their fair share of taxes on

interstate income – but only their fair share. There is no reason to protect traditional corporate shareholders from the tax effects of multiple taxation imposed on corporations and not similarly protect the shareholders of S Corporations or MLP partners who do not operate in the traditional corporate form. Discriminatory and unfairly apportioned State taxes imposed on individuals who earn income from interstate commerce will have every bit as damaging an effect on the Nation's economy when applied to investors in MLPs as would similar taxes imposed on corporations.

*Amicus* can attest to the serious manner in which such a rule could interfere with interstate commerce. MLPs were designed to raise capital from smaller investors who desire a steady, reliable income stream. Since 1987, investments in MLPs have totaled in the hundreds of billions of dollars, and these investments are critical to the operation of capital-intensive businesses such as pipelines. Under our current interstate tax system, investors in MLPs generate income from a variety of States but pay only a single tax on this income because most States provide credits to their residents for tax paid on income earned in other States. But if Petitioner prevails, investors in MLPs will be subject to tax on the income where it is earned, and then can constitutionally be made subject to the same income tax on the same income (with no corresponding credit) in their place of residence. Such double taxation of MLP investors would make these investments less viable. And if these investments are threatened, the important businesses they fund may be endangered as well.

Nor is there a sound basis for sharply differentiating between an individual's residence and a corporation's place of domicile. As this Court's recent cases make clear, a corporation has a connection with its home state like that of an individual resident. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). While the United States argues that corporations can theoretically be "at home" in more than one place, U.S. *Amicus* Br. at 31 n.7, the States are more than capable of creating overlapping definitions of "residence" for individuals as well. *See generally* Seth Goldstein, "Resident" Taxpayers: Internal Consistency, Due Process, and State Income Taxation, 91 Colum. L. Rev. 119, 124 (Jan. 1991) ("Due to the various definitions of resident, more than one state may claim the same taxpayer as a resident.") In short, there is no legally tenable reason why the principles this Court has applied to multiple taxation of corporations should not also apply to multiple taxation of individuals.

Nor is it any answer for the Petitioner to hypothesize situations in which Maryland could get zero income tax from a Maryland resident who earns all income in other States and receives a credit for the entire amount of his or her Maryland income tax. Pet. Br. at 23. In the first place, the theoretical situation postulated by Petitioner is apparently so rare that no one cites a single example of this occurring. It is also notable that Respondents' case clearly does not present such a situation. Resp. Supp. Br. at 12 (stating Respondents paid over \$50,000 in Howard County income taxes even with credits due to Maxim's in-state business and Brian Wynne's Maryland salary). But even if that scenario were to occur,

Maryland, like other States, levels a host of other sales and property taxes on residents, thus still generating tax revenues from those rare residents who earn all of their income elsewhere.

Petitioner's scenario also ignores the manner in which such anomalous situations would counter-balance each other. It is undisputed that Maryland taxes non-residents on income generated in Maryland. In the Petitioner's hypothetical, then, Maryland could get 100% of the tax on a California non-resident who generates all of his or her income in Maryland. This evens out any shortfalls, and in fact the balance from a credit system is likely tilted in Maryland's favor. A credit system allows Maryland to tax its residents who generate income from interstate commerce conducted in States that have no tax on income based on the entirety of this commerce even though a value-based system might provide Maryland with less tax revenue.

In short, none of the arguments raised by Petitioner and his *amici* can justify what is unquestionably a discriminatory and unfairly apportioned taxing regime.

**CONCLUSION**

For the foregoing reasons, the Court should affirm the judgment of the Maryland Court of Appeals.

Respectfully submitted,

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September 26, 2014