No. 23-914

IN THE
Supreme Court of the United States

DIANE ZILKA,

Petitioner,

v.

CITY OF PHILADELPHIA, TAX REVIEW BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce. Accordingly, *Amicus* has an institutional interest in this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *Amicus* further certifies timely notice was provided to all parties of the intent to file this brief.

SUMMARY OF THE ARGUMENT

The court below held that if Pennsylvania delegates some of its income-taxing power to Philadelphia, the resultant tax impositions can be insulated from constitutional scrutiny that it would otherwise get if the enactments were aggregated.

This new loophole – at odds with this Court's precedents, the law of every other state except Oregon, and the general view that what should matter is how taxes practically operate and not the labels used – will have alarming effects if not corrected. While local income taxes are not a large revenue source, they do exist in 16 states, and nearly all those jurisdictions carefully ensure they are compliant with the Commerce Clause and other constitutional protections. If Pennsylvania's decision gives them an escape hatch, they will use it.

Multistate taxation of individuals used to the headache only of corporations, athletes, entertainers, and business travelers. But, spurred on by the pandemic, more Americans than ever before are living in one place while working in another. Taxpayers can seek legislative protections where they live, but are at the mercy of any one state that decides to soak out-of-state non-voters. The decision below gave an inch that can be taken a mile. It cannot be the last word, and this Court should take the opportunity to reaffirm that relabeling a tax does not magically remove it from constitutional scrutiny.

ARGUMENT

I. THE DECISION BELOW IS AT ODDS WITH EXISTING STATUTES AND CASELAW IN NEARLY EVERY STATE, AND HAS BROAD NATIONAL IMPLICATIONS.

A. Every State Except Oregon and Now Pennsylvania Agrees That Local Income Taxes are a Delegated State Power Subject to Constitutional Protections.

In 2019, state and local governments collected $4.07 trillion in revenue, including $762 billion in grants from the federal government, $644 billion in sales and excise taxes, $576 billion in property taxes, $572 billion in fees, and $446 billion in income and wage taxes. *See* U.S. Census Bureau, "State and Local Government Finances by Level of Government and by State: 2019," https://tinyurl.com/3vch66ea. Of the $446 billion in income taxes, $408 billion is characterized as collected by state governments and $38 billion by local governments.

Local income taxes are a relative latecomer to government finance: in 1932, Pennsylvania was the first state to authorize its cities to levy a local income tax. *See* Pennsylvania Economy League, "The Sterling Act: A Brief History," Mar. 1999, https://tinyurl.com/29tjfees. Philadelphia did not exercise this authority until 1939, during which time New York City adopted and then repealed its own (today's New York City income tax was enacted in 1966). Toledo, Ohio was the second city to adopt a municipal income tax, in 1946. Until 1962, "only two other states—Kentucky (1947) and Missouri (1948)—

joined Pennsylvania and Ohio in implementing local income taxes." Jared Walczak, Janelle Fritts & Maxwell James, "Local Income Taxes: A Primer," Tax Foundation, Feb. 2023, https://tinyurl.com/yc6fzx8f.

Today, just 16 states authorize local income taxes in 5,055 jurisdictions nationwide (half of which are in Pennsylvania), with rates ranging from flat monthly dollar amounts to 4% per year.[2] *See id.*; Joseph Henchman & Jason Sapia, "Local Income Taxes: City and County-Level Income and Wage Taxes Continue to Wane," Tax Foundation (2011), https://tinyurl.com/536v9mkm; Institute for Taxation & Economic Policy (ITEP), "How Local Governments Raise Revenue—and What It Means for Tax Equity," Mar. 2023, https://tinyurl.com/3jhnay7j. New York City's local income tax is perhaps the most well-known, along with Maryland's county income taxes and city and school district taxes across the Rust Belt. Of these 16 states:

- Taxpayers in 4 states (Indiana, Iowa, Maryland, New York) pay local income taxes via the state income tax form, and the local tax base conforms completely to the state tax base. *See* Walczak, et al., at 6 ("Piggyback Collection").
- Taxpayers in 8 states (Alabama, Colorado, Delaware, Kansas, Kentucky, Missouri, Pennsylvania, and West Virginia) pay local income taxes to the local government directly, and the local tax base may differ from the state tax base. *See id.* at 5 ("Direct Collection").

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[2] This does not include the District of Columbia, whose fiscal structure has state-like and local-like elements.

- Taxpayers in 4 states (Michigan, New Jersey, Ohio, and Oregon) generally pay local income taxes to the local government but using the state tax base and state definitions. *See id.* at 6 ("Hybrid Methods").

As with other local taxes, local income taxes are levied and collected only to the extent that they are authorized by state law and subject to the restrictions imposed thereby in all but one of the states. *See* ALA. CODE § 11-51-198; COLO. REV. STAT. § 31-15-501(1)(C); 22 DEL. CODE § 901; IND. CODE § 6-3.6; IOWA ADMIN. CODE 701-304.1(257,422); KAN. STAT. § 12-1101; KY. REV. STAT. § 92.281; MD. CODE, TAX-GEN. §§ 10-103; 10-106; MICH. COMP. LAWS § 141.601 *et seq.*; MO. REV. STAT. § 92.105 *et seq.*; N.J. REV. STAT. § 40:48C-1; N.Y. TAX § 1301; OHIO REV. CODE § 715.013; 53 PA. STAT. § 6924.311; W.VA. CODE § 8-13-13; *but see Bogdanski v. City of Portland*, 2014 WL 294623 (Ore. Tax Jan. 28, 2014) (holding that state tax court has no jurisdiction over a tax imposed by a local government), *citing Jarvill v. City of Eugene*, 613 P.2d 1 (1980). *See also* David Brunori, Michael E. Bell, Harold Wolman, Patricia Atkins, Joseph J. Cordes, & Bing Yuan, *State and Local Fiscal Trends and Future Threats*, George Washington (University) Institute of Public Policy Working Paper No. 25 at 6 (2005), https://tinyurl.com/3n6xppye ("The relatively small amount of revenue raised by local-option income taxes is in part attributable to the fact that few states authorize their use."); ITEP, How Local Governments Raise Revenue "("State laws in many states outline whether and in what form localities may adopt income taxes."); Erin Adele Scharff & Darien Shanske, *The Surprisingly Strong Case for Local Income Taxes in*

the Era of Increased Remote Work, 74 HASTINGS L.J. 823, 830 (2023) ("The remaining Subparts illustrate the variety of ways in which state laws authorize (and fail to authorize) local income tax."). Additionally, numerous states explicitly pre-empt local income taxes. *See, e.g.*, Scharff & Shanske, 74 HASTINGS L.J. at 838-39, *citing* ARIZ. REV. STAT. § 43-201 & GA. CODE § 36-35-6(a)(3); *see also* WASH. REV. CODE § 36.65.030.

More people today are living in one place and working in another, and the proper functioning of the credit for taxes imposed and paid to other states is vital. Over the course of the COVID-19 pandemic, full-time on-site office work fell from 60 percent in 2019 to 12 percent in 2020, and has since risen to only 20 percent in 2023. *See, e.g.*, Andrew Wilford, "2024 ROAM Index: How State Tax Codes Affect Remote and Mobile Workers," National Taxpayers Union Foundation, Jan. 2024, http://www.ntu.org/ROAM. Fully-remote work rose from 8 percent in 2019 to 30 percent in 2023. The majority is now a "hybrid" of sometimes on-site, sometimes at home: in 2022, one survey of 25,000 participants identified 58 percent as working in a "hybrid" setting and that 87 percent would opt to switch to a hybrid setting if offered the chance. *See* McKinsey & Co., "Americans are embracing flexible work – and they want more of it," Jun. 2022, https://tinyurl.com/y3p7933y. A growing number of remote and hybrid workers means more and more people subjected to interstate taxation conflicts.

Unless corrected, the decision of the court below would upset these long-settled precedents underpinning these taxes. Aside from Philadelphia, and especially since this Court's *Wynne* decision, most

of these taxes generally adopt administrative conformity practices designed to comply with the Commerce Clause and avoid unconstitutional and unfair multiple taxation. Business and individual taxpayers can use state procedures and protections in any disputes over these "local" taxes, minimizing compliance costs.

B. The Decision Below, If Uncorrected, Would Create a Problematic Loophole Around Essential Taxpayer Protections.

A distinction between a "locally administered" and "state" tax has no constitutional significance, is at odds with *Wynne*, and in practice would create a problematic loophole. This Court has plainly said that a city is not a separate, sovereign entity separate from the state, but rather a "creature of the state." *City of Worcester v. Worcester Consol St. Ry. Co.*, 196 U.S. 539, 549 (1905) (citing *East Hartford* v. *Hartford Bridge Co*, 51 U.S. 511, 533 (1850)). Following this logic, it is axiomatic then a city's tax may not violate the U.S. Constitution anymore than a State's tax may. *See id.* The inverse is also true, a State's tax, which necessarily encompasses a city's tax, may not violate the U.S. Constitution. *See Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 546 (2015) ("Despite the names that [the state] has assigned to these taxes, both are State taxes…."); *Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 654 (1994) ("[A state] may not grant its political subdivisions a power to discriminate against interstate commerce that the State lacked in the first instance. The State remains free to authorize political subdivisions to impose sales or use taxes, as long as

discriminatory treatment of interstate commerce does not result.").

The court's decision below did not follow this framework, holding that Philadelphia's tax and Pennsylvania's tax should undergo constitutional scrutiny separately. The ruling hinges on the formalism that local and state taxes are different. This distinction misses the overarching principle that Philadelphia is a creation of Pennsylvania, and thus its tax and Pennsylvania's tax are one in the same. Because of such, Pennsylvania's taxation scheme, including Philadelphia's tax, is subject to the requirements of the U.S. Constitution. Philadelphia itself has recognized this principle. The preamble of the Philadelphia Home Rule Charter acknowledges the Charter was "prepared by the Philadelphia Charter Commission under authority of the Act of the General Assembly of the Commonwealth of Pennsylvania. . . ." Philadelphia Home Rule Charter, Preamble (1949), https://tinyurl.com/mhh37vaz.

Unless corrected, the decision of the court below would upset these long-settled precedents underpinning these taxes. Aside from Philadelphia, and especially since this Court's *Wynne* decision, most of these taxes generally adopt administrative conformity practices designed to comply with the Commerce Clause and avoid unconstitutional and unfair multiple taxation. Business and individual taxpayers can use state procedures and protections in any disputes over these "local" taxes, minimizing compliance costs. But if states and their local subdivisions are able to evade these protections by recharacterizing state-authorized taxes as purely local, or by delegating the collection of state taxes to

local entities, these protections and the reliance on them will unravel. Taxpayers would be unable to have their day in court when facing tariff-like impositions that harm the national economy. Pennsylvania's decision cannot be the last word.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court grant a writ of certiorari.

Respectfully submitted,

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