No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON, PETITIONERS

v.

DALE W. STEAGER, WEST VIRGINIA STATE TAX COMMISSIONER

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

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

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), this Court held that the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, barred the State of Maryland from imposing a discriminatory tax on the Bank of the United States. "For a time, *McCulloch* was read broadly to bar most taxation by one sovereign of the employees of another," on the theory that "'any tax on income a party received under a contract with the government was a tax on the contract and thus a tax on the government because it burdened the government's power to enter the contract.'" *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 810-811 (1989) (citation and internal

quotation marks omitted); see *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 436 (1999). In the late 1930s, however, "the Court began to turn away from its more expansive applications of the immunity doctrine," holding that "intergovernmental tax immunity barred only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt." *Davis*, 489 U.S. at 811 (citing *Helvering* v. *Gerhardt*, 304 U.S. 405 (1938), and *Graves* v. *New York*, 306 U.S. 466 (1939)); see *Jefferson Cnty.*, 527 U.S. at 436-437.

"[C]ongressional action coincided" with that shift in this Court's jurisprudence. *Jefferson Cnty.*, 527 U.S. at 437. When "Congress decided to extend the federal income tax to state and local government employees," it sought to "ensure that federal employees would not remain immune from state taxation." *Davis*, 489 U.S. at 811-812. To achieve that goal, Congress enacted Section 4 of the Public Salary Tax Act of 1939, ch. 59, 53 Stat. 575, the predecessor to 4 U.S.C. 111. Today, that provision states:

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

4 U.S.C. 111.

This Court has held that "the retention of immunity" in Section 111's last clause "is coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental

tax immunity." *Davis*, 489 U.S. at 813; see *Jefferson Cnty.*, 527 U.S. at 437.[1] To determine whether a state tax complies with Section 111, "the relevant inquiry is whether" the imposition of a heavier tax burden on federal employees "is directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960)).

2. West Virginia provides a total exemption from state income taxation for benefits from four retirement plans: (1) the Municipal Police Officer and Firefighter Retirement System (MPFRS); (2) the Deputy Sheriff Retirement System (DSRS); (3) the State Police Death, Disability and Retirement Fund (Trooper Plan A); and (4) the West Virginia State Police Retirement System (Trooper Plan B). Pet. App. 3a & n.3; see W. Va. Code Ann. § 11-21-12(c)(6) (LexisNexis 2017) (Section 12(c)(6)). West Virginia also exempts from taxation the first $2000 in benefits received each year under the West Virginia Public Employees Retirement System, the West Virginia State Teachers Retirement System, or "any federal retirement system to which Title 4 U.S.C. § 111 applies." W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017).[2] In addition, at all relevant times, West Virginia exempted from taxation "the first

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[1] For that reason, this brief refers to the constitutional and statutory nondiscrimination requirements interchangeably. See Pet. 8 n.2; Br. in Opp. 5.

[2] West Virginia does not exempt from state income taxation any benefits received under the State's Emergency Medical Services Retirement System or its Judges' Retirement System. See W. Va. Code Ann. § 11-21-12(c) (LexisNexis 2017); *id.* §§ 16-5V-4, 51-9-1 (LexisNexis 2016); Pet. App. 13a, 15a & n.11.

[$20,000] of military retirement income," *i.e.*, "retirement income from the regular armed forces, reserves and National Guard." *Id.* § 11-21-12(c)(7)(B); Pet. App. 3a.[3] And West Virginia exempts from taxation $8000 of income "received from any source" by individuals who are age 65 or older, or who are "permanently and totally disabled." W. Va. Code Ann. § 11-21-12(c)(8) (LexisNexis 2017). See generally Pet. App. 2a-4a.

3. In 2008, petitioner James Dawson retired from the United States Marshals Service. Pet. App. 4a. Mr. Dawson had served for most of his career as a Deputy U.S. Marshal before the President appointed him as the U.S. Marshal for the Southern District of West Virginia. *Ibid.* During his tenure with the Marshals Service, Mr. Dawson was enrolled exclusively in the Federal Employee Retirement System (FERS), and he currently receives benefits from FERS. *Ibid.* Under West Virginia law, Mr. Dawson may exempt at least $2000 of his FERS income from his state taxable income. W. Va. Code Ann. § 11-21-12(c)(5) (LexisNexis 2017); Pet. App. 4a.

In October 2013, Mr. Dawson and his wife, petitioner Elaine Dawson, filed amended tax returns for 2010 and 2011. Pet. App. 4a. Petitioners claimed an adjustment exempting all of Mr. Dawson's FERS retirement income from state taxation pursuant to Section 12(c)(6), the provision that fully exempts state retirement benefits under MPFRS, DSRS, Trooper Plan A, and Trooper Plan B. *Ibid.*; see Pet. 2-3. The Tax Commissioner disallowed the exemption. Pet. App. 4a.

Petitioners appealed to the West Virginia Office of Tax Appeals. Petitioners contended that West Virginia's

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

differential treatment of Mr. Dawson's retirement benefits violated 4 U.S.C. 111 because no significant differences exist between Mr. Dawson's law-enforcement duties at the U.S. Marshals Service and the duties of state law-enforcement personnel whose retirement benefits are fully exempt from taxation under Section 12(c)(6). Pet. App. 4a-5a. The Office of Tax Appeals rejected petitioners' argument. *Id.* at 5a.

The Circuit Court of Mercer County reversed. Pet. App. 17a-25a. The court acknowledged that in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), the West Virginia Supreme Court of Appeals had held that military retirees were not entitled to claim the state tax exemption under Section 12(c)(6). Pet. App. 21a. The court found *Brown* distinguishable, however, because the military retirees who had brought that suit "did not have a state counterpart identified" in Section 12(c)(6). *Ibid.*; see *id.* at 23a. Here, by contrast, the Circuit Court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full tax exemption. *Id.* at 22a. Applying *Davis* to this case, the court held that Section 12(c)(6) imposes "inconsistent tax treatment * * * based on the source of one's retirement income"—"precisely the type of favoritism the doctrine of intergovernmental tax immunity prohibits." *Id.* at 23a.

4. The West Virginia Supreme Court of Appeals reversed. Pet. App. 1a-16a. Applying *Brown*'s "totality of the circumstances" approach, the court observed that Mr. Dawson had "received more favorable tax treatment than state civilian retirees" and certain state

judges, and that he had received "the same tax treatment as the vast majority of all state retirees," who also may exempt $2000 of retirement benefits from their taxable income. *Id.* at 14a-15a. The court further explained that "only some law enforcement officers * * * are permitted to rely upon the Section 12(c)(6) exemption," which covers only "two percent of all state-pension recipients." *Id.* at 15a-16a. Because "that benefit was not intended to discriminate against federal marshals," the court found it consistent with 4 U.S.C. 111. Pet. App. 16a. The court did not consider whether there are any significant differences between U.S. Marshals and the state and local law-enforcement officers who receive Section 12(c)(6)'s full exemption that could justify their differential treatment.

DISCUSSION

The West Virginia Supreme Court of Appeals misapplied the doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111. Under the test articulated in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989), the court should have asked whether the State's inconsistent tax treatment of former federal and state law-enforcement officers "is directly related to, and justified by, 'significant differences between the two classes.'" *Id.* at 816 (citation omitted). Instead, the court below engaged in a "totality of the circumstances" analysis, essentially holding that so long as Mr. Dawson was treated better than *most* state and private employees, no unlawful discrimination occurred. Pet. App. 14a-16a. That reasoning is inconsistent with *Davis* and with this Court's other intergovernmental-tax-immunity decisions.

Whether this Court's review is warranted presents a closer question. Since this Court's decision in *Davis*, intergovernmental-tax-immunity issues have not arisen

with great frequency. Between 1994 and 1996, this Court denied three petitions for certiorari seeking review of state-court decisions that, in the view of the United States, misapplied *Davis*.[4] This case appears, however, to be a better vehicle than those cases for clarifying the applicability of *Davis* to state taxation schemes that single out certain groups of state employees or retirees for favorable tax treatment. On balance, we believe that this issue has sufficient legal and practical importance to warrant the Court's review.

1. a. Section 111 permits state taxation of federal officers' or employees' compensation—including retirement benefits, see *Davis*, 489 U.S. at 808-809—only "if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. 111. In *Davis*, this Court explained that "'[t]he imposition of a heavier tax burden'" on those who deal with the federal government "'than is imposed on'" those who deal with the State "'must be'" "directly related to, and justified by, 'significant differences between the two classes.'" 489 U.S. at 815-816 (quoting *Phillips Chem. Co.* v. *Dumas Indep. Sch. Dist.*, 361 U.S. 376, 383 (1960) (brackets in original)); see *Barker* v. *Kansas*, 503 U.S. 594, 598 (1992). "In determining whether this standard of justification has been met, it is inappropriate to rely solely on the mode of analysis developed in [this Court's] equal protection cases." *Davis*, 489 U.S. at 816. When a State legislates concerning economic matters unrelated to the activities of the federal government, the "power to classify is * * * extremely

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[4] See *Cooper* v. *Massachusetts Comm'r of Revenue*, 517 U.S. 1221 (1996) (No. 95-1542); *Alarid* v. *Secretary*, 513 U.S. 1081 (1995) (No. 94-840); *Brown* v. *Paige*, 513 U.S. 877 (1994) (No. 94-246).

broad, and [the State's] discretion is limited only by constitutional rights and by the doctrine that a classification may not be" arbitrary. *Phillips Chem. Co.*, 361 U.S. at 385. But when a State taxes "those who deal with the [federal] Government," it must treat those taxpayers "as well as it treats those with whom it deals itself." *Ibid.*

The Court applied that principle in *Davis* and in *Jefferson County* v. *Acker*, 527 U.S. 423 (1999). In *Davis*, the Court held that Michigan had violated Section 111 by exempting from state taxation all retirement benefits paid by the State or its political subdivisions, while failing to extend the same exemption to retirement benefits paid to federal retirees. 489 U.S. at 805-806, 815-817. In *Jefferson County*, by contrast, the Court held that a county's occupational tax on the gross receipts of persons working within the county who were not otherwise subject to a license fee under state law did not violate Section 111. 527 U.S. at 429, 442-443. Federal judges sitting in the county argued that the tax discriminated against them because they could never hold other state or local licenses. *Id.* at 443. In rejecting that challenge, the Court explained that, because "[t]he tax is paid by all State District and Circuit judges in Jefferson County and the three State Supreme Court justices who have satellite offices in that county," there was "no discrimination * * * between similarly situated federal and state employees." *Ibid.* The Court observed, however, that if the State or county adopted a tax regime "exempting state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.*[5]

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[5] This Court also applied Section 111 in *Barker*, *supra*. That case concerned whether military retirement benefits could be considered

The decision below is inconsistent with the most natural understanding of *Davis* and *Jefferson County*. West Virginia fully exempts from its income tax the retirement benefits of certain state law-enforcement officers, while providing a lesser exemption for the retirement benefits received by federal law-enforcement officers like Mr. Dawson. The Circuit Court of Mercer County found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers listed in [Section 12(c)(6)]." Pet. App. 22a. The West Virginia Supreme Court of Appeals did not cast doubt on that view of the record. See *id.* at 12a-16a; p. 19, *infra*. If that understanding of the facts is correct (but see Br. in Opp. 29-30), West Virginia's differential taxing scheme impermissibly discriminates between "similarly situated federal and state employees" based on the "source of their pay or compensation." *Jefferson Cnty.*, 527 U.S. at 443 (emphasis omitted).

b. The West Virginia Supreme Court of Appeals reached a contrary conclusion because it misconstrued this Court's precedents. As it had done in *Brown* v. *Mierke*, 443 S.E.2d 462, cert. denied, 513 U.S. 877 (1994), the court interpreted *Davis* to permit a totality-of-the-circumstances inquiry designed to "ascertain whether the intent of the scheme is to discriminate against employees

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"current compensation for reduced current services," thus rendering them "significantly different" from the exempted benefits of state retirees. 503 U.S. at 605. The Court concluded that, "[f]or purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services," and that "[i]n this respect they are not significantly different from the benefits paid to Kansas state and local government retirees." *Ibid.*

or former employees of the federal government" by comparing the treatment of federal retirees to the treatment of various classes of state, local, and private retirees. Pet. App. 14a-15a. Because Section 12(c)(6) grants preferential tax treatment to a relatively small subset of state retirees—and because Mr. Dawson received equal or better treatment than many other state, local, and private retirees—the court below concluded that the statute was enacted to benefit a narrow class of former state employees, rather than to discriminate against federal retirees. *Id.* at 14a-16a.

That approach is inconsistent with *Davis*. The court in *Brown* read *Davis* as limited to its facts, *i.e.*, a state provision that "fully taxed all federal pensions while exempting *all* state pensions." *Brown*, 443 S.E. 2d at 466; see Pet. App. 9a (emphasizing that *Davis* concerned a "blanket state tax exemption"); Br. in Opp. 11-12, 14, 25 (same). The result in *Davis*, however, turned not on the number of retirees who received the tax exemption, but on whether "significant differences between" the groups that did and did not receive it "justified" the differential treatment. 489 U.S. at 816; see *Barker*, 503 U.S. at 600. In *Jefferson County* as well, the Court focused not on the overall number of workers who might be exempt from the tax at issue, but on whether the scheme treated "similarly situated federal and state employees" differently. 527 U.S. at 443.

To be sure, the Court in *Davis* described the challenged Michigan law as providing a "blanket exemption" for state retirement benefits. 489 U.S. at 817. The Court made that observation, however, only to explain its rejection of the State's argument that "substantial differences in the value" of state and federal benefits justified the differential tax treatment. *Id.* at 816. The

Court observed that, "[w]hile the average retired federal civil servant receives a larger pension than his state counterpart, there are undoubtedly many individual instances in which the opposite holds true." *Id.* at 817. The Court explained that, if Michigan "truly intended to account for differences in retirement benefits," it would not provide a "blanket exemption" for state benefits, but would instead distinguish "on the basis of the amount of benefits received by individual retirees." *Ibid.* Although the Michigan taxing scheme at issue in *Davis* provided a "blanket exemption" for state retirees, the rationale for the Court's decision was not limited to such laws.

By focusing on the total number of state retirees who do not receive Section 12(c)(6)'s exemption, the court below engaged in an analysis similar to that of the dissent in *Davis*. See Pet. Reply Br. 5-6. There, Justice Stevens would have held that the Michigan taxing scheme did not violate Section 111 because it "applie[d] equally to the vast majority of Michigan residents, including federal employees," and exempted "only the 130,000 retired state employees." *Davis*, 489 U.S. at 818, 821 (Stevens, J., dissenting). In Justice Stevens's view, "[t]he fact that a State may elect to grant a preference, or an exemption, to a small percentage of its residents does not make the tax discriminatory in any sense that is relevant to the doctrine of intergovernmental tax immunity." *Id.* at 821; see *Barker*, 503 U.S. at 605-606 (Stevens, J., concurring) (similar). The Court rejected that approach, however, explaining that "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in

privity with it," even if it treats federal employees no worse than private workers. 489 U.S. at 815 n.4.[6]

It also is not dispositive that, with respect to the taxation of retirement benefits, West Virginia law treats Mr. Dawson better than some state and local retirees. To be sure, that aspect of the West Virginia scheme highlights the importance of determining *which* state retirees are most similarly situated to Mr. Dawson. If state law treats Mr. Dawson as well as or better than it treats the most similarly situated state retirees, West Virginia's refusal to provide him an exemption that *other* state retirees receive would not be based on "the source of [Mr. Dawson's] pay or compensation." 4 U.S.C. 111. In this case, however, the Circuit Court found it "undisputed * * * that there are no significant differences between" Mr. Dawson and the state law-enforcement officers who receive a full exemption under Section 12(c)(6). Pet. App. 22a. This Court's decisions applying Section 111 do not suggest that a State may treat federal employees worse than a segment of

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[6] Indeed, the argument that providing a benefit to state employees does not constitute discrimination against federal employees had greater force in *Davis* than it has here. Because the Michigan scheme exempted all state retirees, including those who performed jobs with both federal- and private-sector analogues, the law did not single out federal retirees for inferior treatment. For example, while a retired federal paralegal could not claim the Michigan tax exemption, a retired law-firm paralegal could not do so either. The tax benefit that West Virginia provides, by contrast, goes to state law-enforcement personnel who generally lack private-sector counterparts. The exclusion of similarly situated federal law-enforcement personnel thus may be viewed as a more targeted form of discrimination against federal retirees.

similarly situated state employees, so long as it treats them better than some *other* state workers.[7]

The court below also suggested that Section 111 is satisfied whenever the State identifies a salutary motive for its differential tax scheme. See Pet. App. 16a (finding it significant that the West Virginia scheme was intended to "give[] a benefit to a very narrow class of former state and local employees"); *id.* at 10a (similar). Under *Davis*, however, the "State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant" to the dispositive "inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816. Thus, just as it was "wholly beside the point" in *Davis* that Michigan wished to "hir[e] and retain[] qualified civil servants through the inducement of a tax exemption for retirement benefits," *ibid.*, it is irrelevant here that West Virginia wishes to "give a benefit to a narrow class of state retirees," Pet. App. 15a. For the same reason, the absence of a discriminatory motive or animus against federal employees does not demonstrate that the tax complies with Section 111. But see *id.* at 10a, 16a (suggesting that lack of discriminatory intent is material).

Respondent is also incorrect in describing (Br. in Opp. 26) *Jefferson County* as "uph[o]ld[ing] a tax exemption that the county made available to *some* state

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

and local judges, but *no* federal judges." To the contrary, the Court in that case explained that "all State District and Circuit Court judges in Jefferson County and the three State Supreme Court justices who have satellite offices in the county" paid the tax. 527 U.S. at 443; see Resp. Br. at 36, *Jefferson Cnty.*, *supra* (No. 98-10) (arguing that the tax violated 4 U.S.C. 111 despite the "parity of treatment between federal and state judges"). Indeed, the Court upheld the provision for just that reason, observing that "[t]he record show[ed] no discrimination * * * between similarly situated federal and state employees." 527 U.S. at 443. The Court further explained that, if the "Alabama or Jefferson County authorities" decided to "exempt[] state officials while leaving federal officials (or a subcategory of them) subject to the tax, that would indeed present a starkly different case." *Ibid.* Respondent construes (Br. in Opp. 26) this statement to mean only that "States cannot evade the logic of *Davis* by adopting a blanket exemption for all state retirees, and bringing a select few federal employees along for the ride." Particularly when read in context, however, the Court's statement is best understood as reiterating the rule that States must treat similarly situated state and federal employees alike. See 527 U.S. at 443.[8]

2. Although the question presented here has not arisen with great frequency, it has sufficient legal and practical importance to warrant this Court's review.

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[8] Even if some state judges, but no federal judges, had benefitted from the tax exemption in *Jefferson County*, that would not necessarily demonstrate a violation of Section 111. The provision would still stand if the differential treatment were based on a neutral, nonpretextual characteristic, rather than the federal source of compensation.

a. i. Petitioner identifies (Pet. 11-15) three state appellate courts that have correctly applied *Davis* to invalidate discriminatory taxing schemes. In *Hackman* v. *Director of Revenue*, 771 S.W.2d 77 (1989) (en banc), cert. denied, 493 U.S. 1019 (1990), the Supreme Court of Missouri held that the State's system of taxation violated Section 111 because it exempted the receipt of "certain retirement benefits paid" to state retirees while providing no corresponding exemption for federal retirees. *Id.* at 78; see *id.* at 80. In *Pledger* v. *Bosnick*, 811 S.W.2d 286 (1991), cert. denied, 509 U.S. 921 (1993), the Supreme Court of Arkansas held that Arkansas's taxing scheme, which provided a full exemption for retirement income from "the Arkansas Public Employees, Teachers, State Highway Police, and State Highway Employees Retirement Systems, while allowing an exemption for only the first $6,000 of" federal retirement and other retirement benefits, impermissibly discriminated against federal retirees. *Id.* at 288; see *id.* at 291-292. And in *Kuhn* v. *State Department of Revenue*, 817 P.2d 101 (1991) (en banc), cert. denied, 504 U.S. 901 (1992), the Supreme Court of Colorado held that the State's differential treatment of federal military retirees, as compared to state, private, and other federal retirees, could not be squared with the doctrine of intergovernmental tax immunity. *Id.* at 107-109.

ii. Three other state appellate courts have applied an erroneous totality-of-the-circumstances approach to determine whether a tax is discriminatory in violation of Section 111. See Pet. 15-21.

In *Brown*, *supra*, the West Virginia Supreme Court of Appeals rejected a challenge by retired military personnel to a prior version of West Virginia's income-tax statute, which provided a $2000 exemption for military

pensions while fully exempting "certain firefighters' and police officers' retirement benefits." 443 S.E.2d at 465. Because the full exemption was "surpassingly narrow"—"less than four percent of all *State* government retirees in West Virginia" received it—the court determined that "there is no intent * * * to discriminate *against* federal retirees; rather, the intent is to give a benefit to a very narrow class of former state and local employees." *Id.* at 465-466. In light of these "specialized circumstances," the court concluded that *Davis* and *Barker* were not "controlling," and that the State's taxing scheme complied with Section 111. *Id.* at 465. In the decision below, the West Virginia Supreme Court of Appeals relied heavily on its analysis in *Brown*. Pet. App. 9a-16a.

The Court of Appeals of New Mexico applied a similar totality-of-the-circumstances approach in *Alarid* v. *Secretary of New Mexico Department of Taxation & Revenue*, 878 P.2d 341, cert. denied, 879 P.2d 91 (N.M. 1994) (Tbl.), and 513 U.S. 1081 (1995). The court first held that, because the retiree plaintiffs were paid by the State of California rather than by the federal government, "the 'legal incidence' of the tax" did not fall on the federal government, and Section 111 did "not apply." *Id.* at 345. The court went on to note, however, that "[t]he fact that the State has chosen to exempt from state tax one limited class of state retirees does not mean Plaintiffs are being illegally discriminated against." *Id.* at 347. As support for that approach, the court cited *Brown* and a concurring opinion in *Barker*, in which Justice Stevens reiterated his view that "[a] state tax burden that is shared equally by federal retirees and the vast majority of the State's citizens does not discriminate against those retirees." *Ibid.* (citation

omitted; brackets in original). The court in *Alarid* failed to acknowledge that Justice Stevens's position had not carried the day in *Davis*. See *ibid.*; *Barker*, 503 U.S. at 606 (Stevens, J., concurring).

The Supreme Judicial Court of Massachusetts engaged in a similar analysis in *Cooper* v. *Commissioner of Revenue*, 658 N.E.2d 963 (1995), cert. denied, 517 U.S. 1221 (1996). The state law at issue there exempted from taxation income from any federal, state, or local "contributory annuity, pension, endowment or retirement fund." *Id.* at 964 (citation omitted). The law required employees (like the military-retiree plaintiffs) who did not contribute a portion of their salary to the retirement system to pay state taxes on their benefits. *Ibid.* The court concluded that the statute distinguished not between federal and state employees, but instead between "contributory and noncontributory retirement plans." *Ibid.* In addition, relying on *Brown* and *Alarid*, the court held that the statute's grandfather provision exempting income from certain noncontributory state plans did not violate Section 111. *Id.* at 965-966. The court explained that, because the grandfather provision "protect[ed] a small and dwindling class" of state retirees, it did not "constitute[] 'discrimination against federally funded benefits.'" *Id.* at 965 (quoting *Barker*, 503 U.S. at 604-605).

iii. Respondent suggests (Br. in Opp. 18) that these decisions merely "appl[ied] the same legal principles" to "different facts." In respondent's view, *Hackman*, *Pledger*, and *Kuhn* involved "blanket" exemptions like the one at issue in *Davis*, while *Brown*, *Alarid*, and *Cooper* (like this case) concerned state taxation schemes that singled out a relatively small subset of state employees to receive a tax benefit. But as respondent

acknowledges (*id.* at 30), that distinction makes a difference only if *Davis*'s application is limited to "blanket" exemptions for state benefits. See, *e.g.*, *id.* at 11. Because that understanding of *Davis* is incorrect (see pp. 7-14, *supra*), the state-court decisions applying the totality-of-the-circumstances approach are inconsistent with this Court's precedents.

b. This Court's review is warranted to clarify the appropriate inquiry under Section 111. To be sure, since *Davis*, intergovernmental-tax-immunity issues have not arisen with great frequency, see Br. in Opp. 27 & n.3, and this Court denied certiorari in *Brown*, *Cooper*, and *Alarid*. See *Brown* v. *Paige*, 513 U.S. 877 (1994) (No. 94-246); *Cooper* v. *Massachusetts Comm'r of Revenue*, 517 U.S. 1221 (1996) (No. 95-1542); *Alarid* v. *Secretary*, 513 U.S. 1081 (1995) (No. 94-840). But this case presents a better vehicle for the Court's review than did any of those cases.

As discussed above, the West Virginia Supreme Court of Appeals in *Brown* announced the totality-of-the-circumstances test and relied on it to reject a challenge to West Virginia's taxing scheme. See 443 S.E.2d at 465-468. But *Brown*'s result was supported by an independent rationale: the military-retiree plaintiffs there had "failed to demonstrate that their job descriptions during any substantial part of their active service corresponded to the job descriptions of municipal firefighters, municipal police officers or state police officers." *Id.* at 465; see *id.* at 467 n.2. It therefore was unclear whether those plaintiffs were similarly situated to any state retirees who received more favorable tax treatment. If this Court had granted certiorari in *Brown*, it might have affirmed the state

court's judgment without deciding whether the totality-of-the-circumstances approach is consistent with *Davis*.

By contrast, this case squarely presents that question. The Circuit Court found it "undisputed * * * that there are no significant differences between Mr. Dawson's powers and duties as a US Marshal and the powers and duties of the state and local law enforcement officers" who receive the full exemption. Pet. App. 22a. The West Virginia Supreme Court of Appeals did not analyze that question. If this Court grants certiorari and vacates the judgment below, the West Virginia Supreme Court of Appeals can consider on remand any preserved arguments respondent may have that Mr. Dawson is not in fact similarly situated to state retirees who receive more favorable tax treatment. Cf. Br. in Opp. 29-30.

The retirees in *Alarid* had worked in the State of New Mexico for the University of California, but were paid under a contract between that university and the United States Department of Energy. 878 P.2d at 343; Pet. at 2, *Alarid*, *supra* (No. 94-840). The case therefore presented questions regarding whether the doctrine of intergovernmental tax immunity applies between the States, and whether the incidence of the tax fell on the federal government; it did not squarely present the question whether the totality-of-the-circumstances approach is consistent with Section 111 or with this Court's analysis in *Davis*. See Pet. at i, *Alarid*, *supra* (No. 94-840). And because *Cooper* concerned in part a grandfather provision that applied only to police and firefighters who were first employed before 1938—a group that was "small and dwindling" by the mid-1990s when the case was decided—the application of *Davis* to

that scheme at least arguably presented an issue of diminishing importance. 658 N.E.2d at 965; see Br. in Opp. at 19-20, *Cooper*, *supra* (No. 95-1542).[9]

Unlike *Brown*, *Alarid*, and *Cooper*, this case cleanly presents the question whether a State may provide a tax benefit to a subgroup of state employees (or retirees) but not to similarly situated federal employees (or retirees). Because state appellate courts have disagreed as to the proper mode of analysis in these circumstances, this Court's review is warranted.

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[9] In *Cooper*, the United States urged this Court to grant certiorari on the broader question whether Massachusetts's distinction between contributory and noncontributory retirement plans contravened *Davis*. Gov't Amicus Br. at 5-6, *Cooper*, *supra* (No. 95-1542). In *Davis*, this Court explained that "[a] tax exemption truly intended to account for differences in retirement benefits * * * would discriminate on the basis of the amount of benefits received by individual retirees." 489 U.S. at 817. Under analogous reasoning, the United States urged, an exemption intended to account for an employee's prior contributions would apportion the tax exemption to match the level of previously taxed contributions. Gov't Amicus Br. at 6-7, *Cooper*, *supra* (No. 95-1542). The United States further argued that the grandfather provision—which wholly exempted benefits paid under some older, state noncontributory retirement plans—demonstrated that "the State's 'nondiscriminatory' rationale [was] inconsistent with the State's facially discriminatory legislation." *Id.* at 6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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