MICHAEL J. HOLZHEID, *et al.*,

Plaintiffs,

v.

COMPTROLLER OF THE TREASURY OF MARYLAND, *et al.*,

Defendants.

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IN THE CIRCUIT COURT FOR BALTIMORE CITY
Case No.: 24-C-15-005700

Plaintiffs' Opposition to
Defendants' Motion to Dismiss Amended Complaint

TABLE OF CONTENTS

Table of Authorities

Statutes

Other Authorities

Regulations

Defendants' error is fundamental: they seek to dismiss the Amended Complaint in the mistaken belief that it alleges a complaint about taxes and thus requires Plaintiffs to exhaust administrative remedies in the Tax Court. But this is not a case about taxes. Rather, it is a case about federal constitutional torts – the taking of property without due process of law and in violation of the dormant Commerce Clause. These constitutional claims are brought under a federal civil rights statute that the Supreme Court has held may not be impeded by state exhaustion requirements. Moreover, because this case is about property and is one that can be analyzed and decided in full with no reference to any provision of the Maryland Tax Code, it could not properly be before the Tax Court.

Defendants have it right when they state that "[t]he Court of Appeals 'has consistently treated the special statutory administrative remedies for the determination of tax questions to be exclusive or primary.'"[1] But no "tax question" is posed by the Amended Complaint and Defendants' Memorandum never identifies what it believes to be the tax question presented. At the same time, Defendants ignore (or did not uncover) precedent from the Supreme Court of the United States and the Maryland Court of Appeals establishing that federal constitutional claims brought, as here, in state court under 42 U.S.C. § 1983 may not be subjected to state administrative exhaustion requirements as Defendants propose.

STANDARD OF REVIEW

When considering a motion to dismiss for failure to state a claim under Maryland Rule 2-322(b)(2), "a trial court must assume the truth of all well-pleaded relevant and material facts in the complaint, as well as all inferences that reasonably can be drawn therefrom."[2] Further, "[a]ll

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[1] Doc. No. 9, Memorandum in Support of the Motion to Dismiss at 6 (citing *Furnitureland S., Inc., v. Comptroller*, 364 Md. 126, 133 (2001)).

[2] *Bobo v. State*, 346 Md. 706, 708 (1997) (citations omitted); *see also Allied Inv. Corp. v. Jasen*, 354 Md. 547, 555 (1999).

facts and allegations must be viewed in the light most favorable to the non-moving party."[3] "Dismissal is proper only if the alleged facts and permissible inferences, so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff."[4]

THE AMENDED COMPLAINT

I. The Amended Complaint Concerns Property, not Taxes.

The State of Maryland, on occasion, has chosen to create forms of personal property, including establishing statutory rights to interest for a person who has been deprived of the use of money due him for some period of time. For example, a property owner is entitled under certain circumstances to the payment of interest following a condemnation proceeding;[5] a creditor is entitled to post-judgment interest.[6]

Of particular significance to this case, the State has determined that interest shall run on an unpaid tax refund, starting 45 days after a taxpayer has filed a refund request, unless the refund is the result of "an error or mistake of the claimant not attributable to the State."[7] Since 2006, the interest ordinarily owed the taxpayer under these circumstances is calculated at the greater of 13% or three percentage points above the Federal Reserve Bank's average prime interest rate.[8]

In 2014, however, Maryland enacted, as part of the Budget Reconciliation and Financing Act of 2014 ("the 2014 BRFA"), a lower interest rate applicable only to those tax refund claims based on a taxpayer having paid taxes on income earned out-of-state – refund claims known as

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[3] *Hogan v. Maryland State Dental Ass'n*, 155 Md. App. 556, 561 (2004).
[4] *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006) (citing *Allied Invest. Corp.*, 354 Md. at 555; *Bobo*, 346 Md. at 709; *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995)).
[5] *See, e.g.*, Md. Code Ann., Real Prop. § 12-106(c).
[6] *See id.*, Cts. & Jud. Proc. § 11-107.
[7] *See id.*, Tax-Gen. § 13-603(a).
[8] *See id.* § 13-604(b); *see also* Acts 2006, c. 587, § 1, eff. July 1, 2006 (amending Md. Code Ann. Tax-Gen. § 13-604 to apply the same interest rate calculation to both tax refunds and moneys owed to the State).

"*Wynne* claims." This legislation was directed only at those who had engaged in interstate commerce; moreover, it purported to apply retroactively, that is, to persons whose petitions for refund pre-dated the effective date of the legislation by more than 45 days. The legislation thus strips individuals of property interests they held at the time the legislation was enacted.

The legislature's extraordinary action was the result of litigation instituted in 2006 by Brian and Karen Wynne ("the Wynnes"), residents of Howard County, Maryland, who had reported on their Maryland tax return having earned income out-of-state.[9] Because the income had been earned and taxed elsewhere, the Wynnes claimed the income taxes paid in other states as a credit against their 2006 Maryland individual income taxes.[10] The Comptroller, however, issued a deficiency against the Wynnes, based on a State statute that permitted income paid to another jurisdiction to be credited against the "state" portion of a resident's Maryland income tax, but not against the "county" portion.[11] The Wynnes appealed the Comptroller's denial of their claim, and their case eventually landed in the Supreme Court. On May 18, 2015, the Court held that Maryland's personal income tax scheme violated the dormant Commerce Clause of the Constitution by failing to give residents full credit for taxes paid in other states on income earned in those states.[12]

During the pendency of the *Wynne* litigation, many Maryland residents who had paid taxes to other states on income earned in those states and who had not received full credit against their Maryland income taxes for those payments recognized that they might be due refunds from the State if the Wynnes were successful. Accordingly, these residents, including Plaintiffs

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[9] *See Comptroller of the Treasury of Maryland v. Wynne*, 135 S. Ct. 1787, 1793 (2015).
[10] *See id.*
[11] *See id.*
[12] *Id.* at 1792.

Michael Holzheid and Jeffrey and Arielle Grill, filed protective claims with the Comptroller, requesting a refund from the State.[13]

Faced with the potential for significant liability for interest on refunds that would be due if the Supreme Court ruled against the State in *Wynne*, on June 1, 2014, the General Assembly summarily put into effect a lower interest rate applicable only to *Wynne* claimants.[14] The 2014 BRFA interest rate is limited to the average prime rate of interest for fiscal year 2015, rounded to the nearest whole number.[15] As the average prime rate of interest for 2015 was 3.26%,[16] the interest rate for tax refunds due to *Wynne* claimants – as opposed to every other taxpayer in Maryland who is entitled to interest on a tax refund – is 3% and not 13%.

The Amended Complaint targets two constitutional defects in the 2014 BFRA: (1) its retroactive taking of the property interests of those whose right to interest accrued before the statute's effective date, and (2) its singling out of those who had engaged in interstate commerce, reducing only their interest rate for refunds.

ARGUMENT

I. The Amended Complaint asserts federal constitutional violations entirely disconnected from any issue of tax law and which the State may not subject to requirements of administrative exhaustion.

Plaintiffs allege constitutional torts, the analysis of which are entirely separate from any issue of what taxes Defendants may collect or the amount of any such taxes, much less any interpretation of Maryland's Tax Code. Accordingly, Defendants' assertion that Plaintiffs'

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[13] Plaintiff Bruce Feinerman filed a protective claim in or about June 2014 for tax year 2010, and in early 2015 for tax years 2011, 2012, and 2013. Thus, Mr. Feinerman's protective claims were all filed after the Supreme Court issued its decision in *Wynne*.

[14] *See* 2014 Md. Laws Ch. 464 § 16.

[15] *See id.*

[16] *See* http://www.federalreserve.gov/releases/h15/data.htm (last visited February 1, 2016).

claims fall within the jurisdiction of the Tax Court must fail, and their motion is due to be denied.

A. The Amended Complaint asserts that the State's retroactive application of a lower interest rate to income tax refunds due to *Wynne* claimants is a taking, in violation of the Fifth Amendment, incorporated against the State via the Fourteenth Amendment.

The Amended Complaint's claim of an unconstitutional taking is directed at Defendants' action in taking property; to wit, interest accrued before the statute's effective date. This claim will stand or fall without any need for judicial consideration of the nature of the *res* that is earning interest. It does not matter whether this is interest on a tax claim, wrongly forfeited property, or from a condemnation proceeding. Either Defendants can change the rules and radically reduce the interest rate retroactively for accrued claims or they cannot. That the interest is on tax refunds is a fact without any legal significance to Plaintiffs' claim, a point that is quickly established by a review of the pertinent constitutional precedent.

In *Phillips v. Washington Legal Foundation*, the Supreme Court stated clearly and unequivocally that the interest income generated by funds that belong to an individual is the private property of that individual.[17] The Court based its decision on the common law rule that "interest follows principal," which "has been established under English common law since at least the mid-1700's."[18] Thus, "any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[19]

The *Phillips* Court relied in large part on an earlier Supreme Court case, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, regarding whether a county could keep the interest that

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[17] 524 U.S. 156, 172 (1998).
[18] *Id.* at 165 (citation omitted); *see also id.* at 165 n.5 (citing cases from 18 states finding that interest is private property, based on the common law rule); *cf. Rosenberg v. Rosenberg*, 64 Md. App. 487, 503 (1985) (affirming holding that foregone interest on a loan constitutes marital property).
[19] *Id.* at 168.

accrued on an interpleader fund deposited in the registry of the county court.[20] As the *Webb* Court noted, simply because Florida decreed that interest would accrue on interpleader accounts did not mean that the state could keep the interest for itself.[21] Instead, any interest that accrued was private property, just as the funds generating the interest were private property, and the state "may not transform private property into public property without compensation," even for the short time a deposit was with the court.[22]

In this case, the question of who owns the principal (money paid to county governments on income earned out-of-state) was administratively exhausted and decided by the Supreme Court in *Wynne*. The *Phillips* and *Webb* holdings teach that if the principal does not belong to the State of Maryland, it may not grant interest on that principal and then later choose to keep part of that interest by retroactively changing the interest rate. As held by the Supreme Court, such interest is private property, and hornbook Fifth Amendment jurisprudence[23] mandates that any governmental taking of private property "must be for a 'public use' and 'just compensation' must be paid to the owner."[24] Moreover, even if the government takes only a portion of a property interest, it must abide by the dictates of the Fifth Amendment.[25]

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[20] 449 U.S. 155, 155-56 (1980).
[21] *See id.* at 162 ("But the State's having mandated the accrual of interest does not mean the State or its designate is entitled to assume ownership of the interest.").
[22] *Id.* at 164.
[23] The Fifth Amendment's Eminent Domain Clause has been incorporated against the states via the Due Process Clause of the Fourteenth Amendment. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 n.7 (1984) (citing *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897)).
[24] *Brown v. Legal Found. of Washington*, 538 U.S. 216, 231–32 (2003); *see also City of Annapolis v. Waterman*, 357 Md. 484, 515 (2000) (referencing the "right of the property owner to receive just compensation for his property taken by eminent domain" (citation omitted)).
[25] *Id.* at 233 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 321–323 (2002)).

On the date the 2014 BRFA went into effect, many Maryland taxpayers – including Mr. Holzheid and the Grills – had filed protective claims with the State. Forty-five days after those claims were filed interest began to accrue on those claims at the statutory rate of 13%. Thus, existing Maryland law required the Comptroller to pay interest on their refunds at the statutory rate of 13%, and the claimants had vested property rights to interest at that rate.[26] The State, through the Comptroller, has abridged those claimants' vested property rights and taken their private property, *i.e.*, the accrued interest, by applying a lower, retroactive interest rate to their claims. These actions violate "[e]lementary considerations of fairness," which "dictate that . . . settled expectations should not be lightly disrupted."[27] As the Supreme Court has made clear, because of these "[e]lementary consideration of fairness," "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[28] Defendants have violated this presumption, and pursuant to the requirements of the Fifth Amendment and Supreme Court precedent, they have "a categorical duty" to justly compensate the claimants for the interest that has been taken.[29]

Defendants' taking of Plaintiffs' accrued interest – their private property – without valid reason or just compensation "is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."[30] Therefore, the Court should deny Defendants' motion to dismiss this claim.

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[26] *See Gen. Motors Corp. v. Pappas*, 242 Ill. 2d 163, 187 (2011) ("It has long been held that the legislature may increase, decrease or eliminate a statutory interest rate as long as it does not interfere with rights which have already accrued and vested under a previous statutory rate." (citation omitted)).

[27] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994).

[28] *Id.*

[29] Of course, Defendants must also identify the public purpose for which interest has been withheld from these claimants, a burden they have thus far failed to meet.

[30] *Webb*, 449 U.S. at 164.

B. The Amended Complaint also asserts that Defendants' application of a lower interest rate only to income tax refunds due to *Wynne* claimants burdens interstate commerce, in violation of the dormant Commerce Clause.

The Constitution gives Congress the express power to "regulate Commerce . . . among the several States."[31] The Supreme Court has consistently held that the Commerce Clause "contains 'a further, negative command, known as the dormant Commerce Clause.'"[32] The 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."[33]

To determine whether a law violates the dormant Commerce Clause, a court must first ask whether the law "discriminates on its face against interstate commerce."[34] "Discrimination" in this context "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[35] If the law is discriminatory, "it is virtually *per se* invalid."[36]

Here, the 2014 BRFA discriminates against interstate commerce by establishing a lower interest rate applicable only to the refunds due Maryland residents who earned income out-of-state and were erroneously taxed by the State of Maryland on that income. In contrast, all other Maryland taxpayers who are entitled to a refund earn interest at the higher, statutory interest rate.

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[31] Art. I, § 8, cl. 3.

[32] *Am. Trucking Assoc., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995)).

[33] *Id.* (quoting *Jefferson Lines*, 514 U.S. at 180); *see also Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) ("The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.").

[34] *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007) (citations omitted); *see also Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) ("[W]e have held that the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it 'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

[35] *United Haulers*, 550 U.S. at 338 (quoting *Oregon Waste Systems*, 511 U.S. at 99).

[36] *Oregon Waste Sys.*, 511 U.S. at 99.

Such a facially discriminatory law "invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives."[37] A state may not "discriminat[e] against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[38] Here, nothing separates Plaintiffs' refunds from those of other taxpayers except the origin of the income generating the refunds. Thus, Defendants' creation and application of a separate, lower interest rate applicable only to *Wynne* claimants violates the dormant Commerce Clause.

Because this claim, too, alleges a constitutional tort, the analysis of which is entirely separate from any issue of what taxes Defendants may collect or the amount of any such taxes, much less any interpretation of Maryland's Tax Code, Defendants' assertion that this claim falls within the jurisdiction of the Tax Court must fail and the motion to dismiss Plaintiffs' claim on this basis must be denied.

C. Federal constitutional claims brought pursuant to 42 U.S.C. § 1983 in state court may not be subjected to a requirement of administrative exhaustion.

Defendants seek dismissal solely on the ground that Plaintiffs have failed to exhaust their claims through the administrative process provided by Maryland tax law. However, federal constitutional claims brought pursuant to 42 U.S.C. § 1983 need not be exhausted through state administrative processes.

In *Felder v. Casey*, the State of Wisconsin argued that the plaintiff, alleging a deprivation of constitutional rights in an encounter with the Milwaukee police, could not proceed under Section 1983, since he had failed to file a Notice of Claim as required by state law.[39] The *Felder* Court concluded that since Congress had imposed no conditions in enacting § 1983 on the

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[37] *Hughes*, 441 U.S. at 337.
[38] *City of Philadelphia v. New Jersey*, 437 U.S. 617, 626-67 (1978).
[39] 487 U.S. 131, 146-47 (1988).

pursuit of federal constitutional claims, but instead allowed claimants to proceed immediately to federal or state court, states were without authority to interpose their own requirements.[40] Lest there be any doubt, the Maryland Court of Appeals gives this court clear guidance on *Felder*'s application to this case. In *Maryland Reclamation Associates, Inc. v. Harford County*, the Court of Appeals, citing *Felder*, stated as follows:

> The Supreme Court has held that a plaintiff is entitled to maintain an action under 42 U.S.C. § 1983 in a state court without having exhausted available administrative remedies. State law requirements that administrative remedies first be exhausted are generally inapplicable to 1983 actions.[41]

Because Plaintiffs here raise only federal constitutional claims under § 1983, they are not bound by the administrative exhaustion requirements contained in the Maryland Tax Code and described in detail by Defendants.[42]

Although the Supreme Court subsequently held, in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, that state courts need not award declaratory and injunctive relief to plaintiffs who seek to enjoin the assessment of state taxes through § 1983 "when an adequate legal remedy exists."[43] That decision is of no avail to Defendants. First, as discussed *supra*, this case is not about Defendants' power to assess and collect taxes. Plaintiffs here make no attempt to enjoin the Defendants' collection of any tax, nor is the legality of the tax collected from

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[40] *Id.* at 147-78.

[41] 342 Md. 476, 492-93 (1996)

[42] Even if Defendants could inhibit federal constitutional claims by requiring administrative exhaustion, which they cannot, Maryland courts would not demand such exhaustion in this instance based on the "'constitutional' exception." This exception "permits a judicial determination without administrative exhaustion when there is a direct attack upon the power or authority . . . of the legislative body to adopt the legislation from which relief is sought." *Harbor Island Marina, Inc. v. Bd. of Cty. Comm'rs. of Calvert Cty.*, 286 Md. 303, 308 (1979). In this case, Plaintiffs are directly attacking the power and authority of the General Assembly to pass legislation that (1) singles out interest on one specific type of tax refund claim where the refund is of a tax assessment that was specifically found to burden interstate commerce, and (2) takes away a property right already granted to individuals who are entitled to that sort of tax refund.

[43] 515 U.S. 582, 591 (1995).

Plaintiffs in dispute. Indeed, Plaintiffs paid all taxes that were due, even those erroneously collected. All of the parties to this suit agree that Defendants owe refunds to Plaintiffs and to the class of Maryland taxpayers they represent. Rather, the only issues in this case are the constitutional challenges to Defendants' application of a lower interest rate to refunds for Maryland residents who earned income out-of-state.

Second, Plaintiffs and all others similarly situated have no adequate remedy at law if this Court does not maintain jurisdiction over their suit. Administrative exhaustion of challenges to Maryland tax assessments requires a claim to the Comptroller, followed by an administrative hearing, and then, if the decision is adverse, an appeal to the Tax Court.[44] But Maryland law provides no administrative process for challenging the reduction in the interest rate as a class action.[45] For many members of the plaintiff class, the difference in the amount of interest they stand to receive on their refunds is much less than the cost of hiring an accountant to calculate that interest differential, paying an accountant or lawyer to exhaust administratively, and then appealing an adverse decision to the Tax Court and beyond. Mr. Holzheid's situation perfectly illustrates this quandary. Under the usual statutory interest rate of 13%, Mr. Holzheid would be due approximately $297.66 in interest earned on his refund of $1,806 between the date he filed his protective claim and June 1, 2014 (the date the 2014 BRFA went into effect); but he is due only approximately $165.74 under the revised, retroactive interest rate of 3% established by the 2014 BRFA.[46] Thus, Mr. Holzheid stands to gain approximately $131.92 if this Court holds that the application of a lower, retroactive interest rate to claims such as his is unconstitutional.[47]

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[44] *See* Md. Code Ann., Tax-Gen. § 13-510(a)(6).
[45] *See Hooks v. Comptroller of Treasury*, 265 Md. 380, 383 (1972).
[46] *See* Doc. No. 6, Am. Compl. ¶¶ 27, 45.
[47] Of course, should the Court find that the institution of a lower interest rate only for *Wynne* claimants also violates the dormant Commerce Clause, then the additional interest due Mr. Holzheid will be greater, but still fairly modest.

That amount pales in comparison to the cost of paying an experienced lawyer in this jurisdiction for one hour of work, much less the overall cost of filing a claim with the Comptroller and seeing it through multiple levels of appeal. Without the option of pursuing their constitutional claims via a class action in this Court, many, if not most, Maryland taxpayers who have been adversely affected by the lower interest rate established by the 2014 BRFA will be deterred from pursuing their claims. The plaintiff class has no adequate remedy if they are forced to exhaust their claims administratively.

The cases cited by Defendants do not change this analysis. Some involved state-law challenges to the state tax scheme.[48] One case did not involve the state tax laws at all, but rather a state constitutional challenge to a zoning ordinance.[49] *Felder* did not say, and Plaintiffs here do not assert, that a state may not require exhaustion of **state** law and **state** constitutional claims, only that it could not overrule Congress with respect to federal constitutional claims.

Comptroller of the Treasury v. Zorzit and *Comptroller of the Treasury v. Science Applications International Corp.* are also inapposite to Plaintiffs' case. In *Zorzit*, the plaintiffs brought state and federal constitutional challenges to the Comptroller's ability to institute a tax lien.[50] The court held that the Circuit Court, which had vacated the Comptroller's tax lien, lacked the authority to do so because the tax code "expressly prohibits courts from issuing an injunction

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[48] *See, e.g., Furnitureland S., Inc. v. Comptroller of Treasury of State*, 364 Md. 126, 130 (2001) (Comptroller sought declaratory judgment that companies were "vendors" within the meaning of the tax code and required to collect sales and use tax from their Maryland customers, as well as an injunction to prevent them from failing to collect such taxes); *White v. Prince George's Cnty.*, 282 Md. 641 (1978) (case pre-dating *Felder* and *Nat'l Private Truck Council*, where plaintiffs brought state and federal constitutional challenge to County's failure to refund tax erroneously paid); *Rapley v. Montgomery Cnty.*, 261 Md. 98 (1971) (state constitutional claims barred by common law rule that a tax voluntarily paid under a mistake of law cannot be recovered).

[49] *See Prince George's Cnty. v. Ray's Used Cars*, 398 Md. 632 (2007).

[50] 221 Md. App. 274, 280 (2015).

or any other process enjoining or preventing the Comptroller's collection of a tax."[51] *Zorzit* is in accord with the Supreme Court decision in *National Truck Council*, but unlike the case at bar, in which Plaintiffs are not seeking to enjoin or prevent the collection of a tax. Similarly, *Comptroller of Treasury v. Science Applications International Corp.*,[52] involving a dispute over whether the tax code required the Comptroller to pay interest on a tax refund at all, is inapposite to the case at hand, where all parties agree that interest is due on Plaintiffs' tax refunds. The only dispute here is at what rate that interest should be paid.

Finally, Defendants very briefly address exhaustion requirements for § 1983 actions. While not discussing or even recognizing *Felder* and its progeny, Defendants rely on two lower federal court cases – *Strescon Industries, Inc. v. Cohen*,[53] and *Mayor & City Council of Baltimore v. Vonage America Inc.*,[54] – that turned on the application of the Tax Injunction Act, which dictates that federal district courts "shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[55] The third case cited by Defendants, *Bancroft Information Group, Inc. v. Comptroller of Treasury*, challenged the Comptroller's power to collect certain taxes at all.[56] It appears from Defendants' persistent resort to cases involving the collection of taxes that they hope that by repetition alone, the court will be led to wrongly conclude that Plaintiffs seek to interfere with Defendants' collection of taxes. Thus, it bears repeating from Plaintiffs: none of Plaintiffs' claims are directed at the Maryland Tax Code at all. Rather,

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[51] *Id.* at 281.
[52] 405 Md. 185 (2008).
[53] 664 F.2d 929, 931 (4th Cir. 1981).
[54] 544 F. Supp. 2d 458, 464 (D. Md. 2008).
[55] 28 U.S.C. § 1341.
[56] 91 Md. App. 100, 104 (1992).

Plaintiffs are objecting to a statute that singles out their claims, even discriminating against those claims after the claims and interest thereon had accrued.

II. The Court should deny Defendants' motion because Plaintiffs do not challenge a tax assessment made by Defendants.

The Maryland Tax Court is the appropriate venue only if this case is about taxes. It is not. None of the Plaintiffs seek an interpretation of the Maryland Tax Code, to enjoin the assessment or collection of a tax by the State, or to interfere in any way with the withholding of income tax. Far from there being a tax issue, the State concedes that Plaintiffs, and the class of all others similarly situated, are due tax refunds. Rather, Plaintiffs allege that their federal constitutional rights have been violated, not by any decision regarding taxation, but by Defendants' decisions (1) to apply a differential interest rate only to those persons whose refunds are based on having engaged in interstate commerce, and (2) to apply this lower interest rate to accrued interest. The Court is not presented with any dispute regarding taxes.

Plaintiffs here are excluded from the category of persons who may seek relief from the Comptroller and proceed, if unsatisfied, to the Maryland Tax Court. The gateway for the Maryland Tax Court, insofar as state income taxes are concerned, is the Comptroller. Thus, the first resort is to see whether the claims in this case fall within those that may be made to the Comptroller. They do not, for the simple reason that Plaintiffs do not in this lawsuit seek refunds. That is, Plaintiffs do not seek to recover monies that they paid to the State. Section 13-901(a) of the Maryland Tax Code provides that one who erroneously **pays** too much to the State (whether in the form of tax, fee, charge, interest, or penalty) may seek a refund from the Comptroller. Defendants concede that Plaintiffs are due a refund. Thus, there is no dispute concerning the form of tax, fee, charge, interest, or penalty paid by the taxpayer to present to the

Comptroller. Indeed, several Plaintiffs have received refunds.[57] It follows that if there is nothing Plaintiffs may take to the Comptroller, there is nothing they may take to the Tax Court.

Conclusion

For the foregoing reasons, Plaintiffs respectfully request that Defendants' Motion to Dismiss should be denied.

DATED: February 1, 2016

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[57] When a claim for refund is properly before the Comptroller or the Tax Court for resolution, undoubtedly there is ancillary jurisdiction to also resolve the amount, if any, of interest to be paid. That is not the situation here.

CERTIFICATE OF SERVICE

I HEREBY certify that on February 1, 2016, a true and accurate copy of the foregoing was hand delivered and electronically mailed to:

Julia D. Bernhardt, Esq.
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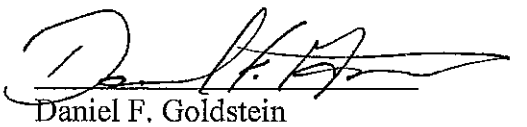
Attorney for Defendants



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