IN THE
SUPREME COURT OF VIRGINIA

Record No. 171627

THE CORPORATE EXECUTIVE BOARD COMPANY,
Appellant,

v.

VIRGINIA DEPARTMENT OF TAXATION,
Appellee.

BRIEF OF APPELLEE

MARK R. HERRING
Attorney General of Virginia

STEPHEN A. COBB
Deputy Attorney General

Elizabeth Bushnell Myers
Assistant Attorney General

TOBY J. HEYTENS (VSB #90788)
Solicitor General

MATTHEW R. MCGUIRE (VSB #84194)
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7240
(804) 371-0200 (fax)
theytens@oag.state.va.us

STEPHANIE ANNE LIPINSKI GALLAND
(VSB #30688)
HAROLD JOHNSON (VSB #65591)
Williams Mullen
P.O. Box 1320
Richmond, Virginia 23218
Telephone: (804) 420-6481
slipinskigalland@williamsmullen.com
hjohnson@williamsmullen.com

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INTRODUCTION

This case involves a constitutional and administrative law challenge to Virginia's longstanding method for taxing sales of services and intangible goods. For almost 60 years, the Code of Virginia has directed the use of the "income-producing" method to determine where such sales occurred. Va. Code Ann. § 58.1-416 (1) & (2).[1] And in situations where "[t]he income-producing activity" took place in more than one State, the Code provides that a sale will be attributed to Virginia *only* if "a greater proportion of the income-producing activity is performed in the Commonwealth than in any other state, based on costs of performance." § 58.1-416(2).

The Corporate Executive Board Company (CEB) asserts that the Virginia Department of Taxation (Department) violated its rights in determining CEB's obligations for tax years 2011 through 2013. CEB does not contend that the Department misapplied the statutory framework set forth in Section 58.1-416. Instead, CEB argues that application of

[1] Section 58.1-416 was recently amended to add new subsections (B), (C), and (D), at which point the material that previously comprised Section 58.1-416 became Section 58.1-416(A). See 2018 Va. Acts ch. 807, § 58-1-416 (approved April 9, 2018). No changes were made to the relevant language. This brief cites the version of the Code in effect during the tax years in question and at the time of the circuit court's decision.

Virginia's traditional framework violated the United States Constitution and was otherwise "inequitable" within the meaning of Virginia Code § 58.1-421 because it "produced substantial double taxation of CEB's income in each of those years." CEB Br. 1.

As the circuit court correctly concluded, CEB's claims are without merit. The United States Supreme Court has squarely rejected the claim that the Federal Constitution "prohibits any overlap in the computation of taxable income by the States." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278 (1978). To the contrary, "some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income," *id.*, and "a fairly apportioned tax w[ill] not be found invalid simply because it differ[s] from the prevailing approach adopted by [other] States," *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983). To hold otherwise "would require extensive judicial lawmaking," *Moorman Mfg.*, 437 U.S. at 278, and create the "unsettling" possibility that "a longstanding tax policy of one State" could "become[] the object of constitutional attack simply because it is different from the recently adopted practice of its neighbor," *id.* at 280 n.16.

That "unsettling" prospect is precisely what CEB urges here. Virginia has not changed its method for calculating CEB's tax liability. To the contrary, the challenged features of Virginia's tax law have remained precisely the same since CEB was founded in 1983 and voluntarily relocated its headquarters to Virginia in 2008.

The circuit court acknowledged that CEB had "made a forceful argument for changing" Virginia's long-standing method for calculating a company's tax liability in situations like this one. JA 761. But as the circuit court recognized, such arguments "may be more appropriately addressed to the legislature," JA 762, which has repeatedly rejected requests to adopt the sort of market-based sourcing approach that CEB urges here, see House Bill 442 (2014), House Bill 2253 (2013), House Bill 1604 (2011), Senate Bill 1006 (2011). Under those circumstances, the Department certainly did not "abuse[its] discretion" or "act[ ] in an arbitrary, capricious, or unreasonable manner," *Commonwealth v. Lucky Stores, Inc.*, 217 Va. 121, 127, 225 S.E.2d 870, 874 (1976), by declining to approve CEB's preferred rules via administrative fiat.

The judgment of the circuit court should be affirmed.

ASSIGNMENTS OF ERROR

CEB's assignments of error are as follows:

1. The trial court erred in granting the Tax Department's motion for summary judgment, and in denying CEB's motion for summary judgment, in ruling that the general apportionment method as applied to CEB for the Tax Years did not violate the Commerce Clause or the Due Process Clause of the U.S. Constitution, and was not "inapplicable" within the meaning of Code § 58.1- 421 and 23 VAC 10-120-280.

2. The trial court erred in granting the Tax Department's motion for summary judgment, and in denying CEB's motion for summary judgment, in ruling that the general apportionment method as applied to CEB for the Tax Years was not "inequitable" under Code § 58.1-421 and 23 VAC 10-120-280.

3. The trial court erred in granting the Tax Department's motion for summary judgment, and in denying CEB's motion for summary judgment, in ruling that the Tax Department was not required, under Code § 58.1-421 and 23 VAC 10-120-280, to allow CEB to use the alternative method of apportionment proposed by CEB.

STATEMENT OF THE CASE AND FACTS

A. The Commonwealth imposes a six-percent annual tax "on the Virginia taxable income . . . of every corporation organized under the laws of the Commonwealth and every foreign corporation having income from Virginia sources." Va. Code Ann. § 58.1-400. For companies "having income from business activity which is taxable both within and without the Commonwealth," the Code provides that they "shall allocate and apportion the Virginia taxable income as provided in §§ 58.1-407 through 58.1-420." § 58.1-406.

Section 58.1-408 establishes the general rule. Subject to various exceptions not applicable here, it creates a formula for calculating the portion of a company's overall income subject to Virginia tax. The formula has three components: a "property factor"; a "payroll factor"; and a "sales factor." § 58.1-408; see §§ 58.1-409, 412, and 414 (describing each factor); § 58.1-408 (weighting of each factor).

This case involves the sales factor. The Code provides that "[t]he sales factor is a fraction, the numerator of which is the total sales of the corporation in the Commonwealth . . . , and the denominator of which is the total sales of the corporation everywhere." § 58.1-414.

Because the sales factor is based on the ratio of a corporation's "sales . . . in the Commonwealth" to its "sales . . . everywhere," § 58.1-414, the General Assembly has provided rules for determining where a particular sale occurred. For sales involving "tangible personal property," the Code says that a sale occurs where the "property is received . . . by the purchaser." § 58.1-415. Even that seemingly simple rule has wrinkles, however, and the Code specifically addresses situations where the property is shipped via common carrier or delivered by the seller to an agent designated by the buyer. *Id.*

The Code also specifically addresses sales not involving tangible personal property—that is, sales of services and other intangible goods. Before 1960, Virginia law did not specifically explain how such sales should be assigned. That year, however, the General Assembly enacted legislation addressing that precise question. See 1960 Va. Acts ch. 442, § 58-131.16. In language that has remained materially unchanged since then,[2] the General Assembly directed that such sales will be deemed to

[2] The only differences between the original version and the law in effect for the relevant tax years involved replacing "this State" with "the Commonwealth" and changing the formatting that introduces the provision's two subparts. Compare 1960 Va. Acts ch. 442, § 58-131.16, with Va. Code Ann. § 58.1-416.

have occurred where "the income-producing activity is performed." *Id.*; accord Va. Code § 58.1-416(1). And where "the income-producing activity is performed" in multiple States, the General Assembly further instructed that a sale will be attributed to Virginia only if "a greater portion of *the income producing activity* is performed in this State than in any other State, *based on costs of performance*." 1960 Va. Acts ch. 442, § 58-131.16 (emphasis added); accord Va. Code Ann. § 58.1-416(2).

The Code of Virginia also contains a general provision (the relief provision) that permits the Department of Taxation to consider claims "that the method of allocation or apportionment hereinbefore prescribed . . . has operated or will so operate as to subject [a corporation] to taxation on a greater portion of its Virginia taxable income than is reasonably attributable to business or sources within the Commonwealth." § 58.1-421. A corporation that believes it has been subject to such treatment may file "a statement of its objections" within the Department and propose use "of such alternative method [of taxation] as it believes to be proper under the circumstances." *Id.* "If the Department concludes that the method of allocation or apportionment theretofore employed is in fact *inapplicable or inequitable*," the statute continues,

"it shall redetermine the taxable income by such other method of allocation or apportionment as seems best calculated to assign to the Commonwealth for taxation the portion of income reasonably attributed to business and sources within the Commonwealth." *Id.* (emphasis added).

Acting pursuant to "the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administrated by the Department," Va. Code Ann. § 58.1-203(A), the Tax Commissioner has issued regulations addressing both when sales of services or intangible goods shall be deemed to have occurred in Virginia, see 23 VAC 10-120-230, and when an otherwise applicable "method of allocation and apportionment . . . is . . . inapplicable or inequitable" within the meaning of Section 58.1-421, see 23 VAC 10-120-280. Under those regulations, a method will be found "inapplicable" only if it "produces an unconstitutional result under the particular facts and circumstances of the taxpayer's situation." 23 VAC 10-120-280(B)(4)(a). A method will be found "inequitable" only if "[i]t results in double taxation of the income, or a class of income" *and* "[t]he inequity is attributable to Virginia, rather than to the fact that some other state

has a unique method of allocation and apportionment." 23 VAC 10-120-280(B)(4)(b)(1) & (2).

B. CEB is a Delaware corporation that was founded in 1983,[3] and relocated its headquarters to Arlington, Virginia in 2008. JA 39 (¶ 2).

"CEB provides research and best practice advisory services for executives of corporations throughout the country and the world." JA 55. It does so mainly through a "Core Product" that is "marketed as executive memberships in [CEB's] network." JA 40 (¶ 9). That Core Product "is primarily delivered through an annual, fixed-fee subscription," which grants members "online access to best-practices research, executive education and networking events, and tools used by executives to analyze business functions and processes." JA 40 (¶ 9).[4]

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[3] Press Release, Corporate Executive Board Company, *Corporate Executive Board CEO to Ring NASDAQ Closing Bell on September 16th: Company Celebrates 25th Year in Business* (Sept. 16, 2008), https://news.cebglobal.com/press-release?item=66601.

[4] CEB provides no citation (record or otherwise) for its repeated claim that it previously "sold and delivered its products as books or other tangible personal property." CEB Br. 13; see *id.* at 9, 19, 37. From the outset of this case, CEB has labeled itself a provider of "services," JA 5 (¶ 24), 11 (¶ 53), 55, and characterized its Core Product as "memberships" rather than physical goods, JA 40 (¶ 9). CEB's public statements are in accord, describing CEB as "a membership-based advisory compa-

C. The dispute currently before this Court began in November 2014. JA 42 (¶ 20). That month, CEB filed a claim with the Department, seeking an administrative refund of $11,801,526 "plus applicable interest" for tax years 2011, 2012, and 2013. JA 54, 56; see Va. Code Ann. § 58.1-1823 (permitting taxpayers to file an amended return and seek a refund if "the tax assessed and paid upon the original return exceeds the proper amount"). In support of that claim, CEB relied in the relief provision, Section 58.1-421.[5]

The Department made no formal response to CEB's claim. JA 43 (¶ 22). Under Virginia law, that meant CEB's claim was deemed denied

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ny." Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, filed by The Corporate Executive Board Company, Nov. 12, 2013, at note 1, https://tinyurl.com/yd37dcw3. In any event, as explained below, CEB also errs in asserting that the method it proposed for use in calculating its Virginia tax liability is the same that would govern were CEB a seller of tangible books. See *infra* 41-43.

[5] In earlier proceedings, CEB also sought relief for tax years 2008, 2009, and 2010. JA 35. The Department denied that claim, the circuit court granted summary judgment to the Department, JA 764-65, and CEB filed an appeal to this Court. JA 767-68. On June 9, 2016—11 days before this suit was filed—this Court dismissed CEB's appeal on procedural grounds and later denied CEB's petition for rehearing as well. See *Corp. Exec. Bd. Co. v. Va. Dep't of Taxation,* Record No. 160376. The proceedings involving tax years 2008, 2009, and 2010 are thus final and not at issue here.

in February 2015, three months after it was filed. See Code § 58.1-1823 (final sentence).

On June 20, 2016, CEB filed suit in the Circuit Court of Arlington County. JA 1-17 (complaint); see Code § 58.1-1825(A) ("[a]ny person . . . aggrieved by" a tax assessed by the Department may "apply to a circuit court for relief"). In its complaint, CEB argued that the method specifically prescribed by Code § 58.1-416(2) for determining *where* its sales occurred was both "inapplicable" and "inequitable" within the meaning of Code § 58.1-421 and that the Department violated its statutory obligations by failing to act on CEB's claim for relief. JA 12-16.

Because the issues raised by this case were materially identical to those previously resolved by the same circuit court, see note 5, *supra*, the parties filed a joint motion for summary judgment based on stipulated facts. JA 37. The three issues framed for the circuit court's decision were:

1. Is Virginia's statutory apportionment formula unconstitutional as applied to CEB?
2. Is Virginia's statutory apportionment formula inequitable as applied to CEB?
3. If the answer to either of the first two issues is 'yes,' should CEB be permitted to use an alternative appor-

> tionment formula with destination-based sourcing in the sales factor?

JA 35.

D. The circuit court granted summary judgment to the Department. JA 745-63 (opinion), 764-65 (order).

The court began with CEB's constitutional claims. JA 753-58. The court noted that it is "well settled that it is impossible for a state to specifically allocate the taxable income earned within its borders" and that a "taxpayer who attacks a state's apportionment as unconstitutional must prove by clear and cogent evidence that it results in extraterritorial values being taxed." JA 754. The court further explained that, whereas CEB's arguments "focused on *transactions*," the United States Supreme Court has instructed that the constitutional question turns on whether there is "a minimal connection between *activities* generating the income and the taxing state." JA 754 (citing *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)) (first emphasis added). And although a great many of CEB's "subscriptions are sold to out of state customers," the circuit court emphasized that "almost all of the work on the information and content which encompasses the subscription service is performed within Virginia." JA 756; see also JA 757 (noting that CEB's

products were "created, developed, and improved in Virginia" and were "accessible by CEB's customers on-line through CEB's servers located and fully maintained by a team of technicians at its headquarters in Virginia"). For that reason, the court concluded that CEB had failed to show that "the income captured under the Statutory Method was not reasonably attributable to its business or services within the Commonwealth." JA 756.

The circuit court also rejected CEB's arguments that it was "inequitable" within the meaning of Section 58.1-421 to apply the method specified in Section 58.1-416(2) for determining where its sales occurred. JA 758-63. The court emphasized that "[t]he burden of proof lies upon the taxpayer to show that the tax attributed to the taxpayer is erroneous or otherwise improper" and that "[t]here is a presumption of validity to the Tax Commissioner's denial of relief." JA 759 (citing Va. Code Ann. § 58.1-1825(D) and *Verizon Online, LLC v. Horbal*, 293 Va. 176, 182, 796 S.E.2d 409, 412 (2017)). CEB had not met its burden, the circuit court explained, because "[i]t appears on this record that the income captured under the Statutory Method is, in fact, reasonably attributable to CEB's business or sources within Virginia," JA 761, and

"[t]he record is void of evidence for the Court to find that, were an inequity to exist, it was attributable to Virginia rather than to another unique method used in some other states," JA 760. Although "CEB made a forceful argument for changing the method on policy grounds," the court emphasized "[a] social or business trend . . . does not negate the foregoing well-established legal principles when analyzing the issues in this case." JA 761-62.

Having concluded that following Section 58.1-416(2) was neither unconstitutional nor inequitable in this case, the circuit court noted that it was "unnecessary" to reach the third issue—whether CEB's proposed alternative would have been "a proper alternative method of allocation or apportionment." JA 763.

"Notwithstanding th[at] conclusion," however, the circuit court also stated that "the record is clear . . . that CEB failed to meet its burden to prove that its method was a proper alternative method of allocation or apportionment." JA 763. CEB's proposed method would treat each sale as having occurred in the State of the customer's address on file with CEB, see JA 44 (¶ 32), 678-80, 701-02, an approach the circuit court described as the "zip code factor method," JA 752. The court con-

cluded that such an approach "would lead to . . . arbitrary result[s]." JA 757. For example, although "customers pay a subscription fee for access to [CEB's] data and information, . . . a customer would not need to access that data or information for the sale by CEB to be completed." JA 757; see JA 674, 678 (counsel for CEB so acknowledging). The court also saw "no direct evidence or reasonable inference that using a customer's zip code negates the type or extent of business CEB conducted within Virginia in relation to its income, or to generate its income." JA 757-58. In contrast, "Virginia's apportionment formula captures in a reasonable sense how CEB's income is generated." JA 758.

STANDARD OF REVIEW

Because "[t]he case was decided by the circuit court on stipulated facts and the appeal presents pure questions of law applied to th[o]se undisputed facts," the circuit court's decision is subject to "a de novo standard of review." *Dykes v. Friends of C.C.C. Rd.*, 283 Va. 306, 308, 720 S.E.2d 537, 538 (2012).

In conducting that review, this Court is bound by the same principles as the circuit court. *Commonwealth v. Lucky Stores, Inc.*, 217 Va. 121, 127, 225 S.E.2d 870, 874 (1976). "Any assessment of a tax by the Department shall be deemed prima facie correct." Va. Code Ann. § 58.1-205(1). In addition, "the Department's interpretation of a tax statute is entitled to great weight," *LZM, Inc. v. Va. Dep't of Taxation*, 269 Va. 105, 109, 606 S.E.2d 797, 799 (2005), "and the burden is on the taxpayer to prove that the assessment is contrary to law or that the [Commissioner] has abused his discretion and acted in an arbitrary, capricious, or unreasonable manner." *Lucky Stores*, 217 Va. at 127, 225 S.E.2d at 874; see *LZM, Inc.*, 269 Va. at 109-10, 606 S.E.2d at 799.

The presumption in favor of the Department's assessment extends to requests for alternative apportionment under the relief provision. See

Lucky Stores, 217 Va. at 127, 225 S.E.2d at 874. A taxpayer has "no absolute right to use an alternative method of allocation and apportionment" and "use of th[e] method" now set forth in § 58.1-408[6] "is the rule" and "use of an alternative method is the exception." *Id.* Whether to grant such an exception is committed to the "sound discretion [of] the Tax Commissioner." *Id.*

[6] At the time of *Lucky Stores*, the statutory method was set out in Code § 58-151.051 rather than its current location in § 58.1-408.

ARGUMENT

To be eligible for treatment under the relief statute, CEB must prove that the Department abused its discretion in concluding that the same apportionment rules the Commonwealth has been using for nearly 60 years are either "inapplicable or inequitable" under the specific circumstances presented here. Va. Code Ann. § 58.1-421. As the circuit court correctly determined, CEB can make neither showing.

I. The Department reasonably (and correctly) concluded that neither changes in other States' laws nor CEB's own choices rendered Virginia's long-standing approach to apportionment unconstitutional in this case.

To show "[t]hat the statutory method is in fact inapplicable," CEB had to demonstrate that "it produces an unconstitutional result under the particular facts and circumstances of [CEB's] situation." 23 VAC 10-120-280(B)(4)(a).

A. Although no provision of the Federal Constitution expressly restricts a State's ability to tax activities occurring outside its borders, the United States Supreme Court has long held that the Commerce Clause of Article I limits a State's ability to do so. See, *e.g.*, *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). "By prohibiting States from discriminating against or imposing excessive burdens

on interstate commerce without congressional approval," this judge-created doctrine "strikes at one of the chief evils that led to the adoption of the Constitution, namely state tariffs and other laws that burdened interstate commerce." *Id.*[7]

The United States Supreme Court applies a four-part test to determine whether a State tax law is permissible under the Commerce Clause. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2085 (2018) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). Three of the four parts are unchallenged here—*i.e.*, that the challenged

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[7] The Due Process Clause also limits States' power to tax. But the United States Supreme Court has held that "[t]he Due Process Clause allows a State to tax *all* of the income of its residents, even income earned outside the taxing jurisdiction." *Wynne*, 135 S. Ct. at 1798 (internal quotation marks and citation omitted). Although it is incorporated in Delaware, JA 2 (¶ 6), CEB is properly treated as a Virginia resident because its "corporate headquarters" are in Virginia, where it employs more than 1,400 people. JA 39 (¶¶ 2 & 3); see 28 U.S.C. § 1332(c) (providing that, for purposes of diversity jurisdiction, "a corporation shall be deemed to be a citizen of every State . . . by which it has been incorporated and of the State . . . where it has its principal place of business"); *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) (explaining that "[d]omicil itself affords a basis for . . . taxation" because "[e]njoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government"). In any event, CEB's argument does not meaningfully distinguish between the Due Process and Commerce Clauses. See CEB Br. 23 n.10 (describing the "fair apportionment analysis [as] substantially the same" under both provisions).

tax "is applied to an activity with a substantial nexus with [Virginia]"; "does not discriminate against interstate commerce"; and "is fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. The only requirement at issue is *Complete Auto*'s second prong—whether the challenged tax "is fairly apportioned." *Complete Auto*, 430 U.S. at 279.

Courts "determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (citing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)). CEB has repeatedly conceded that the challenged tax meets the internal-consistency test, see, *e.g.*, CEB Br. 24—that is, even "if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261. Accordingly, the only way the challenged apportionment formula would be invalid is if it flunks the external-consistency test.

"External consistency" analysis "looks . . . to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Okla. Tax Comm'n v.*

Jefferson Lines, Inc., 514 U.S. 175, 185 (1995) (*Jefferson Lines*). The question is not whether it "would be possible to use" a different formula, *id.* at 195, or even whether another formula might provide a more "accurate calculation" of the underlying matters that challenged apportionment formula seeks to measure, *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 384 (1991). Rather, to prevail on an external-consistency challenge, a "taxpayer must prove by clear and cogent evidence that the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State, or has led to a grossly distorted result." *Id.* at 380 (internal quotation marks and citation omitted).

B. As the circuit court correctly held, see JA 756-57, CEB fell far short of meeting that high burden. The external-consistency analysis focuses on the taxpayer and the relationship between the taxpayer's income-producing activities and the taxing state. See *Jefferson Lines, Inc.*, 514 U.S. at 185 (framing issue as "whether a State's tax reaches beyond that portion of value that is fairly attributable to *economic activity within the taxing State*" (emphasis added)); *Container Corp.*, 463 U.S. at 169 (stating that an "apportionment formula must actually re-

flect a reasonable sense of how income *is generated*" (emphasis added)). There is no requirement that the revenue received be from customers within the taxing state. In *Jefferson Lines*, for example, the United States Supreme Court noted that "even where interstate circulation contributes to the value of magazine advertising purchased by the customer, . . . the Commerce Clause does not preclude a tax on the full value by the State of publication." 514 U.S. at 188-89. As support for that proposition, the Court cited *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), which upheld New Mexico's constitutional authority to tax revenue that an in-state publisher received from out-of-state advertisers. *Id.* at 252-54; see *Jefferson Lines*, 514 U.S. at 189. Instead, the external-consistency test requires only that the revenue be reasonably related to the taxpayer's activities within the taxing State.

The standard is easily satisfied here. During the years in question, "CEB derived greater than 90 percent of its total revenue from [its] Core Product," JA 48 (¶ 47), which is a subscription-based service that "includes online access to best practices research, executive education and networking events, and tools used by executives to analyze business functions and processes," JA 40 (¶ 9). The CEB employees who de-

veloped that content are located in Virginia.[8] The proprietary online content is stored on servers that are "managed," "controlled," and physically located at CEB's "corporate headquarters" in Arlington, Virginia, JA 39 (¶ 2), 49 (¶50), which means that subscribers' computers must make a tangible contact with Virginia *each and every time they access that content.* "CEB currently employs over 1,400 people in Arlington, Virginia," JA 39 (¶ 3), and "the reasonable inference is that most of its employees work at CEB's Arlington headquarters," JA 748.

The language of Section 58.1-416(2) is clear. The statute's whole focus is on the "costs of performance," which is defined as the place where the costs of performing the "income-producing activity" are incurred. In *The University of Phoenix, Inc. v. Indiana Department of State Revenue*, 88 N.E.3d 805 (Ind. T.C. 2017), the Indiana Tax Court interpreted a cost-of-performance statute that, like Virginia's, mirrors Section 17 of the Uniform Division of Income for Tax Purposes Act

[8] JA 49 (¶ 51) ("[M]ore than 50% . . . of CEB's employees who developed and improved the content integrated into the online components of CEB's products, and the costs of performance associated with developing and improving that content, were located in Arlington, Virginia.")

(UDITPA).[9] The court explained that "the statute deems the location of the greater proportion of income-producing activities to be where the greater proportion of the *costs of performing* the income-producing activities are located," and that, as a result, "the statute requires a cost-based analysis, *not a market-based or customer-based analysis* to determine where to source receipts for service income." *Id.* at 811 (emphasis added). And by CEB's own admission, see JA 49 (¶ 51), the most significant costs associated with the underlying income-producing activity are here in Virginia.

In sum, CEB cannot "demonstrate[] the lack of a rational relationship between the income attributed to the State and the intrastate values of the enterprise" or "that the income attributed to [Virginia] is out of all appropriate proportion to the business transacted by [CEB] in [Virginia]." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 312 (1994) (internal quotation marks and citation omitted); see

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[9] See Virginia Department of Legislative Services, *Apportionment of Income from Sales of Services and Intangibles*, at 1 (stating that Virginia's approach "is derived from" UDITPA), available at http://dls.virginia.gov/GROUPS/ssf/meetings/093008/Performance.pdf. Compare Va. Code § 58.1-416 (before amendment by 2018 Va. Acts, ch. 807), with *Univ. of Phoenix*, 88 N.E.3d at 808 (quoting Indiana Code § 6-3-2-2(f)).

City of Winchester v. Am. Woodmark Corp., 252 Va. 98, 102-03, 471 S.E.2d 495, 498 (1996).

C. CEB's contrary arguments are without merit.

1. Citing treatises, a legislative report, and the opinion of its own expert, CEB claims that "[t]here is an overarching logic underlying [Virginia's] apportionment formulation" and that, under that logic, "[t]he sales factor should reflect the value of the market for a taxpayer's products because the purpose of the sales factor is to balance the property and payroll factors by giving weight to elements of the business not reflected in the property and payroll factors." CEB Br. 26-27; see also *id.* at 28-29 (repeating similar arguments).

None of that has anything to do with the constitutional question before this Court. "[T]he Constitution imposes no single [apportionment] formula on the States," *Goldberg*, 488 U.S. at 261 (internal quotation marks and citation omitted), and "States have wide latitude in [] select[ing]" which formula to use and how to calculate it. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978). As the circuit court correctly noted, CEB's arguments about the logic of the apportionment formula are

simply "a policy statement that, in Virginia, may be more appropriately addressed to the legislature," JA 762.[10]

2. CEB also repeatedly asserts that Virginia's long-standing approach to calculating the sales factor violated the Federal Constitu-

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[10] CEB's policy objections are also misleading and overstated. CEB is right that Virginia apportions sales of tangible property based upon the location where the item is physically delivered to the consumer (*i.e.*, "market sourcing"), see Va. Code Ann. § 58.1-415, and that this approach is (broadly speaking) intended to reflect the demand side of a corporation's business.

But many States (including Virginia) have taken "a different approach when it came to assigning the receipts from the sale of services or intangibles." JA 259; accord JA 505 ("In Virginia, as well as most states, sales of intangible goods or services are sourced to the state differently than tangible goods"). The reason is largely practical: Unlike tangible goods, which can be readily traced to a particular location, it is often impossible to reliably determine where services or other intangible products are delivered, received, or put to use. JA 505 (noting that it can be "extremely difficult for corporations to track where their intangible goods and services [are] consumed").

Accordingly, many States (including Virginia) use "a cost of performance" method for assessing sales of services and intangible goods. JA 505; accord Code § 58.1-416(2). As CEB's expert acknowledged, the cost-of-performance method is "origin-based," JA 259, and turns on "where [the] income-producing activity occurs." JA 505. Rather than focusing on the receipt or use of the services by the non-taxpaying purchaser, the cost-of-performance method instead focuses on "the acts which taxpayers directly engage in with the purpose of producing a sale." JA 505; accord 23 VAC 10-120-230(B) & (C)(3). Accordingly—and contrary to CEB's whole argument on this point—the method specifically prescribed by the General Assembly for allocating sales of service or intangible goods *is not designed* to capture market demand.

tion here because it transgressed "the *prohibition* against multiple or double taxation." CEB Br. 24 (emphasis added).

No such "prohibition" exists. To the contrary, the United States Supreme Court has squarely held that the Federal Constitution *does not* forbid "duplicative" or "overlap[ping]" taxation by the States. *Moorman Mfg.*, 437 U.S. at 279; accord *Container Corp.*, 463 U.S. at 171 (same).

The reasons are straightforward and directly applicable here. "[S]ome risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income." *Moorman Mfg.*, 437 U.S. at 278. Eliminating any such overlap thus "would require extensive judicial lawmaking" by requiring courts to create "national uniform rules for the division of income." *Id.* at 278-79. Such a "rule would at best be an amalgam of independent state decisions, based on considerations unique to each State" and create situations (CEB's claims here come to mind) where "a longstanding tax policy of one State . . . becomes the object of constitutional attack

simply because it is different from the recently adopted practice of its neighbor." *Id.* at 279-80 & n.16.[11]

Regardless of how other States' tax laws may or may not impact CEB's tax liability to those States, the constitutional question is simply whether Virginia's apportionment rules (including, but not limited, to the sales factor) combined to generate a result that violated *Complete Auto*'s four-part test. See *Container Corp.*, 463 U.S. at 171 (reiterating that "a fairly apportioned tax [will] not be found invalid simply because

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[11] Any non-uniform approach would create the opposite problem: "nowhere income," a phenomenon where certain income "is taxed in no State." *Acme Royalty Co. v. Dir. of Revenue*, 96 S.W.3d 72, 78 (Mo. 2002).

This case illustrates the point. CEB's brief contains a chart listing 23 other States that included some portion of CEB's sales in their apportionment process for the years in question. CEB Br. 11-12. In 2013, CEB had $694 million in total sales revenue. JA 42 (¶ 19). Yet CEB's own chart and the parties' stipulations demonstrate that, under its proposed method, CEB would have been taxed on only *38%* of its total nationwide sales for 2013. CEB Br. 11-12 (sum of figures from other States show that those States taxed CEB on $225,329,031 in combined sales in 2013); JA 44 (¶ 33) (stating that under CEB's proposed method, Virginia would have included only 5.236% of the company's 2013 sales, which comes to less than $36.5 million). The remaining 62% of CEB's sales—more than *$430 million*—would have gone unaccounted for by any State. The same is true for the other years being challenged, where the same calculations reveal that that CEB's proposed method would result in 73% in uncounted sales (more than $355 million) for 2011 and 72% in uncounted sales (more than $405 million) for 2012.

it differ[s] from the prevailing approach adopted by the States"). For the reasons explained above, the answer is no.

3. CEB's last constitutional argument is that following the method prescribed by the General Assembly produces a "gross disparity" simply because doing so results in CEB having to pay far more tax than it would have to pay had the General Assembly instead directed use of CEB's preferred approach. See CEB Br. 26, 31-32.

That argument cannot possibly be right. Virtually all taxpayers would prefer to pay far less tax, and an otherwise constitutional tax cannot become unconstitutional simply because a taxpayer can identify some other method that would permit it to pay less.

It is thus unsurprising that the only authority CEB cites for that startling proposition—this Court's decision in *Commonwealth v. Lucky Stores, Inc.*, 217 Va. 121, 225 S.E.2d 870 (1976)—says no such thing. To be sure, *Lucky Stores* states that in determining whether a given tax crosses the constitutional line, a court "must compare the percentage of total taxable income produced by the formula in question with the percentage of total taxable income produced by the taxpayer's proposed method." 217 Va. at 129, 225 S.E.2d at 876. But as the very next sen-

tence makes clear, that requirement imposes an obligation on the challenging taxpayer, not the government: "*Unless* a gross disparity in percentages results, the statutory formula *must be upheld*." *Id.* (emphasis added). It makes perfect sense to say that a challenger who attacks a State's method for calculating its tax liability must, among other things, prove that there is actually something tangible at stake. CEB's argument thus confuses the necessary with the sufficient.

In fact, *Lucky Stores* actually undermines CEB's position. In *Lucky Stores*, the Court recognized that the fundamental question is whether the income apportioned under the statutory method reasonably reflects the taxpayer's business activity in the Commonwealth. See 217 Va. at 129, 225 S.E.2d at 875 (framing the issue as whether the statutory method "produce[s] a tax on income not reasonably attributable to business in Virginia"). In making that determination, the Court looked at the actual integrity of the numbers that were used in the alternative formula proffered by Lucky and concluded that allocating general and accounting expenses by gross sales without any attempt to determine the actual costs attributable to Virginia was not reflective of the income attributable to Lucky's business in Virginia. See *id.* In this respect,

CEB's proposed method is as fundamentally flawed as the proposed separate accounting method in *Lucky Stores,* which renders meaningless any comparison of the results under CEB's "alternative formula method" results to those under the statutory method. A simple comparison of raw percentages—without any inquiry into whether those percentages actually reflect amounts that are "reasonably attributable to business in Virginia," *id.*—simply is not a true comparison for purposes of determining whether there has been an "unconstitutional application of the statutory formula." *Id.*

II. It was not an abuse of discretion for the Department to conclude that neither changes in other States' laws nor CEB's own decisions rendered Virginia's long-standing approach to apportionment inequitable as applied to CEB.

CEB's second assignment of error asserts that the Commissioner abused his discretion in determining that it was not "inequitable" to apply the method prescribed in Code § 58.1-416 for calculating CEB's tax liability for the years in question.

A. In making such a claim, CEB takes up a heavy burden. The Department has been "[c]harged with the responsibility of administering and enforcing the tax laws of the Commonwealth," and its "interpretation of a tax statute is entitled to great weight." *LZM, Inc.*, 269 Va. at

109, 606 S.E.2d at 799 (2005). Absent constitutional problems, the Department's regulations provide that "it will not grant permission to use an alternative method of allocation or apportionment *unless* it determines" that "the statutory method is in fact inequitable *because*

> (1) It results in double taxation of the income, or a class of income, of the taxpayer; *and*
>
> (2) The inequality is attributable to Virginia, rather than to the fact that some other state has a unique method of allocation and apportionment."

23 VAC 10-120-280(B)(4)(b)(1)&(2) (emphasis added). The regulations are framed in terms of what is necessary rather than what is sufficient and they do not say that the Department will permit use of an alternative method any time a taxpayer can make a colorable argument that the two-part regulatory definition of "inequitable" is satisfied. See *Lucky Stores*, 217 Va. at 127, 225 S.E.2d at 874 (emphasizing that whether to grant an exception to the statutorily prescribed method is committed to the "sound discretion [of] the Tax Commissioner"). Instead, the burden is on CEB "to prove that the assessment is contrary to law or that the administrator abused his discretion and acted in an arbitrary, capricious or unreasonable manner." *Id.*

B. CEB can make no such showing. Most fundamentally, the undisputed evidence provides more than ample support for the Department's view that any overlapping taxation is not fairly attributable to Virginia's decision to adhere to its nearly 60-year-old method for taxing sales of services and intangible goods.

1. It bears repeating that any overlapping taxation that has arisen with respect to CEB's sales has not been caused by any change in Virginia's approach. To the contrary, Virginia has used cost-of-performance sourcing for sales of services and intangible goods since 1960, when it enacted an apportionment scheme modeled after UDITPA. See 1960 Va. Acts ch. 442, § 58-131.16; note 9, *supra*.

In fact, the Virginia Advisory Council that recommended the 1960 change in the apportionment formula did so, in part, *because* a majority of other States were using that very same method. As the Council explained: "We further feel that this change is desirable because it will make our law more nearly uniform with those of a majority of the other states and would thus tend to simplify the accounting problems of many large corporations which do business in more than one state." *Effect Of Business Taxes On Industrial Development In Virginia And Appor-*

tionment Of Income For Tax Purposes, Senate Document No. 3 (1960), available at https://rga.lis.virginia.gov/Published/1960/SD3/PDF. In fact, as Virginia's Joint Legislative Audit and Review Commission has explained, a majority of States were "us[ing] the cost of performance method to source sales of intangible goods and services" *as recently as 2010.* JA 505 (stating that "Virginia and most states use" such a method).

2. In recent years, a number of States have moved to some form of market-based sourcing for taxing sales of services and intangible property. Based on the stipulated chart that is reproduced at pages 11-12 of CEB's opening brief, it appears that at least 23 States now treat these matters differently than the Commonwealth. See also I Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 9.18[3][c] (3d ed. 2001 & Supp. 2018-1) (listing 24 States plus the District of Columbia as using some form of market-based sourcing). These market-based sourcing methods are far from uniform.[12] But the more important point here

[12] There is no "standard" market sourcing methodology. CEB's own tax consultants prepared an analysis of each State's sourcing rules for tax years 2011 to 2013. JA 49-50 (¶¶ 54-56). Even a brief review of those documents reveals that the States that apply market-based sourc-

is that the Department acted well within the bounds of its discretion in concluding that any overlapping taxation is not "attributable to Virginia," 23 VAC 10-120-280(B)(4)(b)(2), simply because other States have departed from Virginia's consistent and longstanding approach to these issues. It strains logic to suggest that Virginia is the cause of any overlap when other States are the ones tinkering with their apportionment methodologies.

Indeed, *CEB itself* has previously elected to use cost-of-performance-based sourcing in other States when it worked to CEB's advantage to do so. Until 2013, California allowed corporate taxpayers to choose between cost-of-performance sourcing (the method prescribed by Virginia law) or the particular version of market-based sourcing provided by California law. See former Cal. Revenue & Taxation Code § 38006 (repealed by Stats. 2012, c. 37 (S.B. 1015), § 3); Cal. Revenue & Taxation Code § 25128.7. Because CEB's income-producing activity—the relevant unit of measurement under a cost-of-performance standard—occurs in Virginia, that choice resulted in *none* of CEB's sales be-

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ing do so in a variety of ways. See JA 444-49; accord JA 367-71 (document prepared by Multistate Tax Commission); Hellerstein ¶ 9.18[3][c].

ing counted by California for tax years 2011 and 2012. JA 46 (¶ 38), 125, 128; accord CEB Br. 11.[13]

3. There is another reason why the Department did not abuse its discretion in declining to conclude that application of the statutory method would be "inequitable" here. In recent years, the General Assembly has repeatedly considered—and repeatedly rejected—bills that would have adopted market-based sourcing rules for services and other intangible goods. See House Bill 442 (2014); House Bill 2253; House Bill 1604 (2011); Senate Bill 1006 (2011).[14] The Department's refusal to allow CEB to use the very approach that the legislature has so far declined to enact thus showed proper respect for "the General Assembly's plenary power to set public policy" on behalf of the Commonwealth. *Old Dominion Comm. For Fair Utility Rates v. State Corp. Comm'n*, 294 Va. 168, 181, 803 S.E.2d 758, 765 (2017); see *Allstate Ins. Co. v. Eaton*, 248 Va. 426, 430, 448 S.E.2d 652, 655 (1994) (noting that "[t]his Court is not

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[13] CEB's election in California contributed to its substantial "nowhere income" for the tax years in question. See note 11, *supra*.

[14] In April 2018—long after both the tax years in question and the Department's denial of CEB's claim—the General Assembly enacted legislation requiring a narrowly defined class of debt buys to use market-based sourcing. See 2018 Acts, ch. 807, §§ 58.1-416(B) & (C) and 58.1-422.3.

empowered to supply by judicial construction a requirement that the legislature has not chosen to enact"); accord *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (emphasizing that "Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.").

Nor is there any reason to believe that the argument urged here could or would be limited to CEB. Although CEB claims that it is simply seeking an alternative apportionment under the relief statute, see CEB Br. 20-21, the basis for the alleged "inequit[y]" under Code § 58.1-421 involves the fundamental way that Code § 58.1-416 treats sales of intangible goods and services. See, *e.g.*, CEB Br. 2 (asserting that "[t]his unfair consequence is the result of the cost of performance sourcing provision in the Virginia apportionment statute (Code § 58.1-416"); *id.* at 16, 17, 29, 31, 34 (similar). If CEB prevails on that argument, there is no reason to doubt that a variety of Virginia taxpayers will be able to make it too, a fact that belies CEB's claim that it is simply seeking an

alternative apportionment under the relief statute rather than arguing for a change in the Commonwealth's overall tax policy.

III. In no event did the Department abuse its discretion in declining to permit CEB to use its own cherry-picked alternative method.

There is no need to reach CEB's third assignment of error. For the reasons explained above, the Department: (a) correctly determined that applying Virginia's longstanding apportionment rules to CEB did not violate the Constitution; and (b) acted well within the bounds of its discretion in concluding that doing so was not "inequitable" within the meaning of Code § 58.1-421. As the circuit court correctly recognized, JA 763, there is thus no warrant to consider the merits of the alternative method of apportionment proposed by CEB.

Were the Court to reach the issue, however, CEB's third assignment of error should be rejected. For one thing, even when a taxpayer is entitled to relief under Code § 58.1-421, the statute provides that the Department—not the taxpayer—gets to choose the alternative method of allocation or apportionment. The Department also did not abuse its discretion in concluding that CEB failed to carry its burden of showing that its proposed alternative method was "proper under the circumstances." § 58.1-421; see *Lucky Stores*, 217 Va. at 127, 225 S.E.2d at 874

(stating that whether to permit use of an alternative method is committed to the "sound discretion [of] the Tax Commissioner").

A. CEB insists that its proposed alternative "is a reasonable and sensible apportionment method . . . that cures the deficiencies of the Statutory Method as applied to CEB's business by eliminating the unfairness and double taxation to which CEB is subjected under the Statutory Method." CEB Br. 44. Even if every word of that sentence were true (and, as explained below, it is not), it still would not follow that that the Department was "required . . . to allow CEB to use the alternative method." *Id.* at 5.

The Code of Virginia provides that a taxpayer who believes that the normal rules will "subject it to taxation on a greater portion of its Virginia taxable income than is reasonably attributable to business or sources in the Commonwealth" may "file with the Department a statement of its objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances." Va. Code Ann. § 58.1-421. But even when "the Department concludes that the method of allocation or apportionment theretofore employed is in fact inapplicable or inequitable," *id.*, the Code contains no requirement

that the Department simply adopt the taxpayer's proposed alternative. Instead, the Code specifically provides that it remains *the Department*'s responsibility to select "*such other method* of allocation or apportionment *as seems best calculated* to assign to the Commonwealth for taxation the portion of the income reasonably attributable to business and sources within the Commonwealth." *Id.* (emphasis added).[15] Because CEB's third assignment of error itself errs in asserting that the Department is simply required to permit the taxpayer to use the taxpayer's own proposed alternative method, see CEB Br. 5, it should be rejected for that reason alone.

B. In any event, before a taxpayer's proposed alternative method may even be entertained, that method must be "proper under the circumstances." Va. Code Ann. § 58.1-421. CEB does not appear to take is-

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[15] The relevant sentence reads, in pertinent part, as follows:

> If *the Department* concludes that the method of allocation or apportionment theretobefore employed is in fact inapplicable or inequitable, *it* shall redetermine the taxable income by such other method of allocation or apportionment as seems best calculated to assign to the Commonwealth for taxation the portion of the income reasonably attributable to business and sources within the Commonwealth . . . .

Va. Code Ann. § 58.1-421 (emphasis added).

sue with—and certainly did not assign error to—the circuit court's conclusion that it was CEB's burden to prove "that its proposed apportionment formula was better calculated to assign CEB's income to the Commonwealth of Virginia for taxation." JA 747. It is thus not enough simply to demonstrate that CEB's proposed alternative "is both sensible and workable." CEB Br. 40. Instead, CEB's obligation is to show that the Department abused its discretion in declining to find that CEB's proposed alternative was *better*.

1. As the circuit court correctly concluded, CEB made no such showing. JA 752-53, 757. Most fundamentally—and no matter how many times CEB says it—it simply is not true that the method CEB proposed "is the same apportionment method that Virginia uses for sourcing income from the sale of tangible personal property." CEB Br. 40. Indeed, the inherent difficulties with translating concepts originally developed to govern sales of tangible goods to the realm of services or other intangible goods is why States adopted cost-of-performance sourcing rules in the first place. See note 10, *supra.*

For example, take the matter of determining where "receipt" occurs. For tangible goods, it is relatively easy to determine the physical

place where the seller made delivery or the address it gave to its shipper. See Va. Code Ann. § 58.1-415. In contrast, it can be much harder to determine (much less record and track) where a given customer uses materials made available over the internet. JA 505 (noting that it can be "extremely difficult for corporations to track where their intangible goods and services [are] consumed"). And matters grow even more complicated when it is remembered that CEB is a subscription-based service, meaning that some of CEB's customers may not access its services at all during a given billing period, JA 678 (circuit court noting this point)—which is a bit like paying for tangible goods that are never shipped in the first place.

A simple example illustrates both: (a) why CEB's proposal to allocate sales of services and intangible goods based on a customer's zip code is not the same method that Virginia uses for sales of tangible goods; and (b) why the circuit court was correct in perceiving the problems with CEB's proposed approach. Imagine a website like Amazon.com, which sells physical products to customers over the internet. It is easy to picture situations (holiday gifts come to mind) where the customer's billing address may be in one State (say, Wisconsin) but the

customer directs that delivery be made to another State (say, Virginia). Under Code § 58.1-415's rules governing sales of tangible personal property, that sale would be treated as having been made in Virginia (the place of delivery). Under CEB's proposed approach—which, to reiterate, looks to the location of the customer's "billing address," JA 44 (¶ 32), 678-80, 701-02—that same sale would be treated as having occurred in Wisconsin. Nor need the example involve gifts to other people: It is far from unheard of for people who maintain their primary residence in one State to purchase items for their own use in (and thus direct delivery to) another State.

But the problems with a customer-billing-zip-code approach only multiply from there. Imagine a CEB client who lives in Washington, D.C., but accesses CEB's resources exclusively from her office in Arlington, Virginia. Under CEB's proposed approach, the allocation question thus would turn on whether that client gave CEB the address for her home or her office. JA 50 (¶ 59) ("During the Tax Years, the default billing address was the contact person's address for most Members. The contact person is the individual who uses the product."). Imagine another client who travels more than 200 days per year for work and almost

never accesses CEB resources from the State in which his billing address is located. Or situations where the end-user client is located in one State but the bills are actually paid by that person's employer, which is located in another State. JA 680 (oral argument before the circuit court addressing this scenario). And, of course, information gleaned by a client in one place can be implemented in another State, another relevant consideration that is not captured by a billing zip code method. JA 686. In short, the customer's billing zip code is not even a particularly good proxy for where CEB's product was put to use, much less for where the activity that generated the income occurred.

For all those reasons, CEB's proposed billing-zip-code method does not realistically reflect how or where CEB earns its income. Notably, although CEB emphasizes that a variety of States have adopted some form of market-based sourcing, it does not identify *any* State as having adopted a billing-zip-code method.

The reason is straightforward: It appears that no such State exists. Indeed, documents prepared by CEB's own accountants show that even States that employ some form of market-based sourcing do not simply use a customer's billing zip code as a proxy for where services or

intangible goods were received or used. See JA 50 (¶ 56) (explaining that the attached Exhibit 7 is "[a] summary of CEB's membership sales by state for 2013, which was prepared by CEB's tax return preparer, Ernst and Young"); JA 138-60 (describing the sourcing rules used by various other States). Instead, the majority of such States have complicated mechanisms to determine where the benefits of services or intangible products were received or put to use. JA 138-60. Even as compared to market-sourcing methodologies adopted by other States, therefore, CEB's zip-code method does not pass muster as a reasonable reflection of how or where CEB's income is earned.

CONCLUSION

The judgment of the circuit court should be affirmed.

Respectfully submitted,

VIRGINIA DEPARTMENT OF TAXATION,

By: *s/ Toby J. Heytens*
Toby J. Heytens (VSB #90788)
Solicitor General

Mark R. Herring
Attorney General of Virginia

Matthew R. McGuire (VSB #84194)
Deputy Solicitor General

Stephen A. Cobb
Deputy Attorney General

Elizabeth B. Myers
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200
theytens@oag.state.va.us

Stephanie Anne Lipinski Galland (VSB #30688)
Harold Johnson (VSB #65591)
WILLIAMS MULLEN
Post Office Box 1320
Richmond, Virginia 23218-1320
Telephone: (804) 420-6481
slipinskigalland@williamsmullen.com
hjohnson@williamsmullen.com

CERTIFICATE OF SERVICE AND FILING

I certify that, on July 13, 2018, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

Richard L. Beizer, Esquire
Robert L. Willmore, Esquire
Jeremy Abrams, Esquire
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 624-2500 (Phone)
(202) 628-5116 (Fax)
rbeizer@crowell.com
rwillmore@crowell.com
jabrams@crowell.com

E. Duncan Getchell, Jr., Esquire
Robert W. Loftin, Esquire
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219-3916
(804) 775-4715 (Phone)
(804) 698-2177 (Fax)
egetchell@mcguirewoods.com
rloftin@mcguirewoods.com

Counsel for Petitioner

s/ Toby J. Heytens
Toby J. Heytens