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No. 154, Original

In The
Supreme Court of the United States

NEW HAMPSHIRE,

Plaintiff,

v.

MASSACHUSETTS,

Defendant.

On Motion For Leave To File A Bill Of Complaint

BRIEF OF PROFESSOR EDWARD A. ZELINSKY AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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INTEREST OF THE *AMICUS CURIAE*

Edward A. Zelinsky is the Morris and Annie Trachman Professor of Law of the Benjamin N. Cardozo School of Law of Yeshiva University.[1] He teaches and writes about state and local taxation. As a teacher and a scholar, he has an interest in the sound development of the tax law, including the constitutional rules governing taxation. In addition, Professor Zelinsky is a Connecticut resident who works from home on a majority of his work days, doing legal research and writing. Professor Zelinsky challenged New York's taxation of his Cardozo salary paid to him for his remote work days in Connecticut. *See Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied 541 U.S. 1009 (2004).

[1] The views expressed in this brief are Professor Zelinsky's personal views as *amicus curiae*. Neither Cardozo Law School nor Yeshiva University expresses any opinion on the issues addressed in this brief. The *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person contributed any money to fund this brief's preparation or submission. Professor Zelinsky used funds from his legal research account to defray printing costs. New Hampshire and Massachusetts have both consented to the filing of this *amicus curiae* brief. Timely notice was provided to both parties.

SUMMARY OF ARGUMENT

This case concerns a bedrock question at the heart of our federal system: Can a state leap over its border to tax a nonresident remote worker who never sets foot in the taxing state? The emphatic answer is "no."

Massachusetts' recent attempts to tax New Hampshire residents working remotely at their homes for Massachusetts employers is part of an older and broader problem: Well before Covid-19, other states, starting with New York but now including Pennsylvania, Nebraska and Delaware, have taxed nonresidents on the incomes they earn remotely beyond the borders of the taxing state.

This extraterritorial taxation violates both the Due Process and Commerce Clauses: According to this Court's longstanding precedent, a state may tax nonresidents only on income that is properly apportioned to the taxpayer's activity within the taxing state's borders. When, for example, a customer service representative works over the internet from her home in Montana for a California call center, only Montana can constitutionally tax her salary. California cannot double tax that income earned in Montana.

The constitutional requirement that a state tax only nonresidents' properly apportioned incomes earned within the taxing state's borders comports with basic federalism values as well as common sense: Otherwise, a cash-strapped legislature will always seek a free lunch served by a sister state's residents. These

constitutional principles also ensure basic fairness by curbing double state taxation of the same income.

As a result of Covid-19, millions of Americans have begun to work remotely from their homes. Consequently, the pre-existing problem of double and over-taxation by some states has become more pressing. Massachusetts is now the most recent state to tax nonresidents working remotely at their out-of-state homes for Massachusetts employers. Massachusetts' motivations are as obvious as they are unconstitutional. Facing a Covid-19-caused revenue shortfall, Massachusetts taxes a population that does not vote in Massachusetts, indeed, a population that today no longer sets foot in Massachusetts, namely, the residents of New Hampshire and other states who now work remotely at their out-of-state homes.

This is no isolated, cross-border skirmish. For three reasons, this Court's intervention is desirable and necessary to solve the troubling national problem of unconstitutional double and over-taxation of interstate remote workers.

First, ordinary taxpayers have no practical remedy to the problem of unconstitutional state taxation of their remote working salaries. The Tax Injunction Act, 28 U.S.C. § 1341, requires nonresidents to seek relief from the administrative tribunals and courts of the taxing states. These state tribunals and courts often do not protect nonresidents, but instead burden them with the prohibitive cost of state court litigation in tax

fora frequently hostile to fundamental constitutional norms.

Second, for over a decade and one-half, Congress has proved incapable of solving the problem of unconstitutional state income taxation of nonresidents' incomes. This Court is the only practical forum available for combating the unconstitutional state income taxation of interstate remote workers.

Third, only this Court can delineate the boundaries of state authority in the context of a modern, integrated and digital national economy. In cases such as *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017), this Court has set the rules for the exercise of state authority over nonresidents in our modern economy. This case is of a similar import. This Court should take this case, not simply to enforce constitutionally apportioned and fair state income taxation of nonresident remote workers, but to further delineate the boundaries of state authority over nonresidents in a modern economy. This is a tax case, but it is about more than just taxation.

ARGUMENT

I. A state cannot tax nonresidents' incomes earned beyond the state's borders.

It is a bedrock principle of federalism that a state cannot tax a nonresident on income the nonresident

earns outside that state. If a state could grab income generated by nonresidents outside the state's borders, every state would seek a free lunch served by a sister state's residents.

Under the Due Process Clause, a state taxing nonresidents "generally may tax only income earned within the" state, not income nonresidents earn outside the taxing state's boundaries. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n. 11 (1995); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) ("As to nonresidents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (state "has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders . . . ").

Moreover, when income is earned by activity that straddles state borders, the Commerce Clause independently requires that a state must stop at its border and tax only the portion of such interstate income properly apportioned to that state. *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) ("The Commerce Clause forbids the States to levy . . . unfairly apportioned taxation."); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977) (state tax must be "fairly apportioned" to the taxing state); *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 207 (1995) (Breyer, J., dissenting) ("reaffirm[ing] the

Central Greyhound principle" of apportionment); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948) (New York "gross receipts" tax must be "fairly apportioned" to business done in New York).

Consider, for example, an Iowa resident who works for her Nebraska employer one day a week in Omaha and works the other four days at the Iowa resident's home in Council Bluffs. This Court's Due Process and Commerce Clause case law requires Nebraska to tax only the one-fifth of this Iowa resident's income earned in Nebraska.[2] Failure to observe this constitutional norm results in double taxation by Nebraska and Iowa, the state of this worker's residence.

II. Massachusetts' recent attempt to tax New Hampshire residents working at home reflects an older and broader problem.

A) Unfortunately, some states flout the longstanding constitutional prohibition by taxing nonresidents' incomes earned outside the taxing states' borders.

New York is the oldest and most glaring example of a state that leaps beyond its borders to tax income earned by nonresidents at their out-of-state homes.

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[2] As we shall see *infra*, Nebraska unconstitutionally emulates New York (and now Massachusetts) by reaching into Iowa to tax all of the income earned by this Iowa resident at her home. This subjects the Iowa resident to double taxation by her home state of Iowa and by Nebraska.

Nominally, New York purports to tax nonresident employees (as other states do[3]) based only on the portion of the nonresident's work days in New York. 20 NYCRR § 132.18(a). In practice, however, New York does nothing of the sort. Instead, New York considers an employee's work day as an out-of-state day for tax purposes *only* if the nonresident works remotely "of necessity, as distinguished from convenience." *Id.*[4]

Thus, New York's apportionment regulation effectively provides for no apportionment at all. If, for example, a computer programmer works one day a week in Manhattan but chooses on the other days to work remotely from her home in Connecticut, Tennessee, Florida or Arizona, New York asserts tax on *100%* of her income because she works at her out-of-state home for her "convenience," not for the employer's "necessity."

The *amicus curiae*'s case is the leading example of this troubling taxation and of the difficulty remote workers have obtaining constitutional relief from the state courts. *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004). After New York's highest court rejected his challenge to New York's overreaching taxation in 2003, New York has

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[3] *See*, *e.g.*, La. Admin. Code tit. 61 § I-1304D.

[4] Somewhat confusingly, this regulation is colloquially called the "convenience of the employer" rule though that term does not actually appear in the regulation. *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85, 89 (2003), cert. denied, 541 U.S. 1009 (2004) (characterizing New York regulation as "convenience of the employer" test).

sent income tax bills to nonresidents as far away as Tennessee,[5] Florida[6] and Arizona.[7]

Professor Zelinsky teaches at the Benjamin N. Cardozo School of Law of Yeshiva University. The Cardozo Law School is located in New York. Professor Zelinsky lives in Connecticut. He divides his working time between teaching days in Manhattan and days writing and researching at home in Connecticut. *Zelinsky*, 1 N.Y. 3d at 88-89.

In 1994 and 1995, Professor Zelinsky filed his New York nonresident income tax returns by apportioning to New York the 40% of his Cardozo salary attributable to his days teaching in New York. *Id.*

New York's Department of Taxation and Finance instead taxed all of Professor Zelinsky's Cardozo salary including the portion of his salary apportionable to his days worked remotely at his home in Connecticut. Professor Zelinsky, the Department asserted, did his legal writing and research at home in Connecticut for his personal convenience, rather than for Cardozo's necessity. New York's tax collector thereby leapt over New

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[5] *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y. 3d 427 (2005), cert. denied 546 U.S. 976 (2005).

[6] *In the Matter of the Petition of R. Michael Holt*, N.Y. Tax Appeals Tribunal, DTA No. 821018, 2008 N.Y. Tax LEXIS 133, 2008 WL 2880343 (N.Y. Tax App. Trib.).

[7] *In the Matter of the Petition of Manohar and Asha Kakar*, State of New York, Division of Tax Appeals, Small Claims Determination, DTA No. 820440, 2006 WL 721643 (N.Y. Div. Tax App.).

York's border and taxed the salary Professor Zelinsky actually earned at home in Connecticut.

Disregarding the strictures of the Due Process and Commerce Clauses as explicated in this Court's decisions, New York's highest court sustained New York's extraterritorial and unconstitutional tax on the Cardozo salary Professor Zelinsky earned working at home in Connecticut without setting foot in New York.

Commentators have roundly criticized the New York Court of Appeals' decision in *Zelinsky* sustaining New York's income taxation of nonresidents who work remotely at their out-of-state homes.[8] The upshot is often double taxation of remote work income, by New York as well as the state of the employee's residence.

When, a year later, New York's Court of Appeals again confronted this question, three of the Court's seven judges declared New York's regulation unconstitutional – even though two of these judges had decided

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[8] *See*, *e.g.*, Jerome R. Hellerstein, Walter Hellerstein, and John A. Swain, STATE TAXATION, para. 20.05[4][e][i] (3rd ed. 2020 rev.) (*Zelinsky* decision "does not withstand analysis"); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in our National Economy*, 8 FLA. TAX. REV. 885, 922 (2008) ("the *Zelinsky* court erred"); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents, Part 2*, 42 STATE TAX NOTES 229 (2006) ("The Court of Appeals' statements in *Zelinsky* are inconsistent with its own decision in *City of New York v. State of New York . . .* "); Edward A. Zelinsky, *Coronavirus, Telecommuting and the "Employer Convenience" Rule*, 95 TAX NOTES STATE 1101 (2020); Edward A. Zelinsky, *New York's "Convenience of the Employer" Rule is Unconstitutional*, 48 STATE TAX NOTES 553 (2008).

the other way in *Zelinsky.* Nevertheless, a majority of four judges still sustained New York's taxation of income earned remotely in another state, in that case, Tennessee. *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y. 3d 427 (2005), cert. denied, 546 U.S. 976 (2005).

In the wake of *Zelinsky* and *Huckaby*, New York has taxed income earned as far away from the Empire State as Arizona and Florida. *In the Matter of the Petition of Manohar and Asha Kakar*, State of New York, Division of Tax Appeals, Small Claims Determination, DTA No. 820440, 2006 WL 721643 (N.Y. Div. Tax App.) (New York taxes nonresident's income earned in Arizona); *In the Matter of the Petition of R. Michael Holt*, N.Y. Tax Appeals Tribunal, DTA No. 821018, 2008 N.Y. Tax LEXIS 133, 2008 WL 2880343 (N.Y. Tax App. Trib.) (New York taxes nonresident's income earned in Florida).

New York's disregard of the constitutional limitations on state taxation of nonresidents started the proverbial race-to-the-bottom as other states emulated New York. Pennsylvania,[9] for example, adopted a

[9] 61 Pa. Code § 109.8 ("However, any allowance claimed for days worked outside of this Commonwealth shall be based upon the performance of services which, of necessity, obligate the employee or casual employee to perform out-of-State duties in the service of his employer or casual employer."). Like New York, Pennsylvania is doubling down on its taxation of nonresidents who work remotely at their out-of-state homes because of the pandemic. Pennsylvania Department of Revenue, *Telework During the COVID-19 Pandemic*, available at https://www.revenue.pa.gov/COVID19/Pages/Telework.aspx ("For non-residents" now working remotely at their homes outside Pennsylvania, "their

regulation mirroring New York's. Pennsylvania's Board of Finance and Revenue used that regulation to uphold the Keystone State's taxation of a nonresident on income he actually earned in Florida. *In re: Gary T. Bergstein Petition for Review for Personal Income Tax Period(s) 2006-2009*, 2015 PA BDFR LEXIS 2062 (Pennsylvania taxes nonresident's income earned in Florida). Nebraska[10] and Delaware[11] adopted similar regulations, taxing nonresidents' salary income to those states even on days when the nonresidents work remotely outside these states' borders. Pursuant to Delaware's regulation, Delaware's Tax Appeal Board sustained Delaware's tax bill sent to a Pennsylvania resident for the income she earned on days she worked at her home in Pennsylvania. *Dorothy A. Flynn, Petitioner v. Director of Revenue, Respondent*, Tax Appeal Board for the State of Delaware, Dkt. No. 1504 (Sept. 14, 2011), available at https://financefiles.delaware.

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compensation would remain Pennsylvania sourced income for all tax purposes.").

[10] 316 Neb. Admin. Code § 22-003.01C(1) ("If the nonresident's service is performed without Nebraska for his or her convenience, but the service is directly related to a business, trade, or profession carried on within Nebraska and except for the nonresident's convenience, the service could have been performed within Nebraska, the compensation for such services shall be Nebraska source income.").

[11] Del. Code Regs. 31-200-800, Director's Ruling 71-13.3(b) ("Any allowance claimed for days worked outside Delaware must be based upon the performance of services which of necessity, as distinguished from convenience, obligates the employee to out-of-state duties in the service of his employer.").

gov/TAB/1504%20Flynn.pdf (Delaware taxes nonresident's income earned in Pennsylvania).

Massachusetts' motivations for joining this parade are as obvious as they are unconstitutional. Facing a Covid-caused revenue shortfall, Massachusetts taxes a population that does not vote in Massachusetts, indeed, a population that today no longer sets foot in Massachusetts, namely, the residents of New Hampshire and other states who now work remotely at their out-of-state homes. Massachusetts and the other states taxing nonresidents on their remote work income penalize interstate remote work with double state income taxation and over-taxation.

In short, New Hampshire's challenge to Massachusetts' taxation of remote workers is no isolated, cross-border skirmish. Massachusetts' current tax overreach is part of an older and broader problem: Well before the Covid-19 crisis, other states have for decades unconstitutionally taxed the incomes nonresidents earn on the days these nonresidents work at their out-of-state homes and never set foot in the taxing state.

B) Massachusetts and the other states taxing beyond their borders cause the double and over-taxation of interstate remote work income.

The remote worker's home state has the strongest constitutional claim to tax the income the remote worker generates working at home. As a matter of Due

Process, the home state has jurisdiction to tax its residents on their worldwide incomes.[12] Since this resident works in her home state, that state is also the "source" jurisdiction in which the remote worker conducts her occupation and earns her income.[13]

The Commerce Clause requires that a state's income tax be "fairly related to benefits provided the taxpayer."[14] The remote worker's home state provides the remote worker all of her public services while she lives and works at home.

Thus, the remote worker's home state does not cause double taxation of the worker's income. This double tax is the fault of Massachusetts and the other states that tax individuals who work remotely at their homes outside the taxing state's borders.

Consider, for example, a resident of Wilmington, Vermont who, before the Covid-19 crisis, commuted daily to work for his employer in North Adams, Massachusetts. On these commuting days, Massachusetts had the constitutional authority to tax this employee's salary from his conduct of his occupation in Massachusetts. But today, this Vermont resident no longer sets

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[12] *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-463 (1995) (A state "may tax *all* the income of its residents . . . ") (emphasis in original).

[13] Jerome R. Hellerstein, Walter Hellerstein, and John A. Swain, STATE TAXATION, ¶6.04 (3rd ed. 2020 rev.) ("There are two fundamental, but alternative, bases for state power to tax income: residence and source.").

[14] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977).

foot in Massachusetts. Vermont is not just this individual's state of residence. Vermont is also the source state of this individual's income earned at home in Vermont.[15] Vermont today provides all public services the remote worker receives while working at home.

Massachusetts causes unconstitutional double taxation when it leaps over the border to tax the income a Vermont resident earns remotely at home under the umbrella of Vermont's public services.

In other cases, Massachusetts causes overtaxation. New Hampshire (unlike Vermont) does not tax salaried income. Thus, when Massachusetts taxes New Hampshire residents working at home, Massachusetts does not, strictly speaking, cause double taxation. But Massachusetts causes overtaxation by extending Massachusetts' tax into New Hampshire, thereby taxing income that lies exclusively within New Hampshire's jurisdiction on both a source and residence basis. It is New Hampshire's prerogative as a sovereign state to tax or not tax this income earned in New Hampshire by a New Hampshire resident and to finance its public services however New Hampshire chooses.

But Massachusetts overtaxes when it reaches across the border into New Hampshire to tax the

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[15] *Comptroller of the Treasury v. Wynne*, 135 S.Ct. 1787 (2015) involved the opposite situation. In *Wynne*, the taxpayers were Maryland residents who earned money outside of Maryland. In this example, the taxpayer is a Vermont resident who earns money only in Vermont.

income a resident of the Granite State earns at her home under the aegis of New Hampshire's public services.

III. Remote work is growing during the Covid-19 crisis and will continue to grow after the crisis is over.

The problem of unconstitutional state income taxation of nonresidents' remote work incomes predated the Covid-19 crisis.[16] This problem has been exacerbated by the surge of remote work during the Covid-19 crisis. The problem of extraterritorial state income taxation will grow further as remote work continues to expand after the coronavirus crisis ends.

New York has been particularly aggressive about requiring work-at-home during the Covid-19 crisis. New York's governor has been a strong advocate for remote work, often also called "telecommuting."[17] At the same time that New York requires remote work at home to confront the Covid-19 crisis, New York openly doubles down on its unconstitutional taxation of the

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[16] *Zelinsky* involved the tax years 1994 and 1995 and was decided by the New York Court of Appeals in 2003.

[17] *See*, *e.g.*, Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020), available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf ("All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize.").

income interstate remote workers earn at their homes outside New York's borders.[18]

Thus, at the same time that New York mandates work-at-home to fight Covid-19, New York penalizes work-at-home by taxing the out-of-state incomes of remote workers who work at homes outside of New York. Massachusetts's behavior is similar, pressing for remote work[19] and then taxing it.[20]

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[18] New York State Department of Taxation and Finance, *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax* (Oct. 24, 2020), available at https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#file ("If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location . . . you will continue to owe New York State income tax on income earned while telecommuting.").

[19] Steph Solis, *These Massachusetts businesses will continue remote work during coronavirus pandemic, Gov. Charlie Baker says*, MASSLIVE.COM (May 15, 2020) available at https://www.masslive.com/coronavirus/2020/05/these-massachusetts-businesses-will-continue-remote-work-during-coronavirus-pandemic-gov-charlie-baker-says.html (" 'Now as we look to the weeks and months ahead, we're urging businesses to continue to promote remote work and work from home as much as possible,' Baker told reporters during his daily briefing at the Massachusetts State House.").

[20] 830 C.M.R. 62.5A3(3)(a) ("[A]ll compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal

After the coronavirus crisis passes, remote work will continue to grow.[21] Consequently, even after the coronavirus crisis ends, the problem of states unconstitutionally taxing remote workers beyond these states' respective borders will grow further as interstate remote work continues to expand.

IV. This Court is the only practical forum available for combating the unconstitutional state income taxation of interstate remote work.

This is no isolated, cross-border skirmish. For three reasons, this Court's intervention is desirable and necessary to solve the troubling national problem of states unconstitutionally double- and over-taxing interstate remote workers.

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income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2.").

[21] Prithwiraj (Raj) Choudhury, *Our Work-from-Anywhere Future*, HARVARD BUS. REV. 58, 60 (Nov.-Dec. 2020) (Major corporations "have announced that they will make remote work permanent even after a vaccine is available."); Christopher Mims, *Remote Work Won't Be Just for White-Collar Workers*, WALL. ST. J. at R4 (Oct. 23, 2020) ("[A] host of jobs, including storekeeper and field engineer, that seemed out of reach of remote-work are likely to be firmly in the remote work orbit within the next 10 years."); Cecilia Amador de San José, *Future of Work: Tech Companies are Rethinking Workplace Density* (Oct. 23, 2020) https://allwork.space/2020/10/future-of-work-tech-companies-are-rethinking-workplace-density/ ("94% of organizations stated that they expect remote work to be normalized in their organizations in a post-vaccine environment. 76% believe that full-time remote work will be normalized in their organizations.").

First, unless this Court's hears New Hampshire's *parens patriae* case, taxpayers will have no practical remedy for this problem. By the same token, if this Court declines to hear New Hampshire's lawsuit, this Court will likely have no other vehicle for resolving this problem.

If this Court declines to hear New Hampshire's *parens patriae* lawsuit, the Court is unlikely to see a similar case from an individual taxpayer on certiorari review. Key reasons why are the Tax Injunction Act, 28 U.S.C. § 1341, and the prohibitive cost for most individual taxpayers of reaching this Court. The Tax Injunction Act requires someone challenging a state tax to eschew the federal courts and instead seek relief through the taxing state's administrative tribunals and courts. These state procedures often burden litigants with prohibitive costs. A taxpayer usually must initiate his case in a state tax tribunal. These tribunals are typically unsympathetic to nonresidents' constitutional rights.

See, *e.g.*, *In re: Gary T. Bergstein Petition for Review for Personal Income Tax Period(s) 2006-2009*, 2015 PA BDFR LEXIS 2062 (Pennsylvania Board of Finance and Revenue sustains Pennsylvania tax on income earned by nonresident in Florida); *In the Matter of the Petition of Manohar and Asha Kakar*, State of New York, Division of Tax Appeals, Small Claims Determination, DTA No. 820440, 2006 WL 721643 (N.Y. Div. Tax App.) (New York Division of Tax Appeals sustains New York tax on income earned by nonresident in Arizona); *In the Matter of the Petition of R. Michael Holt*,

N.Y. Tax Appeals Tribunal, DTA No. 821018, 2008 N.Y. Tax LEXIS 133, 2008 WL 2880343 (N.Y. Tax App. Trib.) (New York Tax Appeals Tribunal sustains New York tax on income earned by nonresident in Florida); *Dorothy A. Flynn, Petitioner v. Director of Revenue, Respondent*, Tax Appeal Board for the State of Delaware, Dkt. No. 1504 (Sept. 14, 2011), available at https://finance.delaware.gov/state-tax-appeal-board/opinions-of-the-tax-appeal-board/ (Delaware Tax Appeal Board sustains Delaware tax on income earned by nonresident in Pennsylvania).

Then, after exhausting these often futile administrative remedies, taxpayers challenging state taxes must go into the state courts. This results in even more costs in fora often unfriendly to nonresidents.

The taxpayers oppressed by states' unconstitutional taxation of remote work are not big out-of-state corporations with money to litigate their large claims. The affected individuals are rank-and-file taxpayers, nonresident individuals who work for a living at their out-of-state homes.

As this Court noted in *Hibbs v. Winn*, 542 U.S. 88 (2004), Congress's main goal in adopting the Tax Injunction Act was to channel into state tribunals the tax claims of "out-of-state corporations" and similar taxpayers disputing "large sums." *Id.* at 104. But for the rank-and-file taxpayers oppressed by states' unconstitutional taxation of interstate remote work, the sums involved, while important for these individuals, are too

small to justify the costs of state tax litigation, let alone a certiorari appeal to this Court.

Under these circumstances, New Hampshire's *parens patriae* lawsuit invoking this Court's original jurisdiction is the only practical way these nonresidents' constitutional concerns can be vindicated in a neutral forum. An instructive analogy is a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure. Such class actions are necessary to "aggregat[e] the relatively paltry potential recoveries" of many individuals into an economically viable lawsuit. *Amchem Prods. v. Windsor*, 521 U.S. 591, 671 (1997) (internal citations omitted).

So too, in this setting, New Hampshire's invocation of this Court's original jurisdiction is the only practical way to vindicate in a neutral forum a constitutional principle which affects thousands of rank-and-file taxpayers, namely, no taxation of nonresidents who earn income outside the taxing state's borders.

Second, this Court should take this case for another compelling reason: Congress has proved incapable of solving the problem of unconstitutional state income taxation of nonresidents' remote work incomes. For a decade and a half since New York's courts denied the *amicus curiae* relief from double state income taxation, bills have repeatedly been introduced in Congress to stop states from unconstitutionally taxing nonresidents' incomes earned beyond their borders.

These bills have gone nowhere.[22] In fact, these bills have not even received a single committee hearing.

The bottlenecks of the legislative process are well known.[23] It is not surprising that, in a legislative contest pitting large states like New York and Pennsylvania against small, poorly-organized taxpayers of often modest means, the former should prevail over the latter.

But it is one thing for congressional processes to stymie legislation addressing issues within Congress's bailiwick. Constitutional rights are another matter. This Court should not wait any longer for Congress to

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[22] *See*, *e.g.*, Telecommuter Tax Fairness Act of 2004, S. 2785, 108th Cong., 2nd session; Telecommuter Tax Fairness Act of 2004, H.R. 5067, 108th Cong., 2nd session. In 2004, it was more common to use the term "telecommuting" to describe what is often today called "remote work." The two terms are synonymous. Over the years, this legislation has repeatedly been reintroduced. *See*, *e.g.*, Multi-State Workers Tax Fairness Act of 2014, S. 2347, 113th Cong., 2nd session; Multi-State Workers Tax Fairness Act of 2014, H.R. 4085, 113th Cong., 2nd session. Most recently, this legislation has been introduced as the Multi-State Worker Tax Fairness Act of 2020, H.R. 7968, 116th Cong., 2nd session. In the interests of full disclosure, it should be noted that the *amicus curiae* played a role in drafting this legislation.

[23] *See*, *e.g.*, Abner J. Mikva and Eric Lane, LEGISLATIVE PROCESS 126, 556, 558 (3rd ed. 2009); Robert A. Katzmann, JUDGING STATUTES 15 (2014); Frank B. Cross and Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1452 (2001); Walter J. Oleszek, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 18, 184 (9th ed. 2014).

vindicate the constitutional rights of over-taxed remote workers.

Third, this Court should take this case as part of the Court's ongoing project to delineate the constitutional boundaries of state authority over nonresidents in the context of a modern, integrated and digital national economy. This is a tax case, but it is about more than taxation. It is also about the constitutional contours of state authority over nonresidents in the modern economy.

In cases such as *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) and *Bristol-Myers Squibb Co. v. Superior Court*, 137 S.Ct. 1773 (2017), this Court set the rules for the exercise of state authority over nonresidents in our modern economy. In *Wayfair*, this Court concluded that South Dakota could impose sales tax collection responsibilities on an out-of-state vendor without physical presence in that state since the vendor's large "quantity of business could not have occurred unless [it] availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* at 2099. In that case, the taxpayers were "large, national companies that undoubtedly maintain an extensive virtual presence" in the taxing state. *Id*.

In a similar fashion, in *Bristol-Myers Squibb Co.*, this Court held that nonresidents of California could not sue in the California courts about a drug (Plavix) these nonresidents claimed to be defective. These nonresidents, the Court observed, had not been "prescribed Plavix in California, did not purchase Plavix in

California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id.* at 1781. Hence, the California courts lacked jurisdiction to adjudicate these nonresidents' claims.

This case is of a similar import to *Wayfair* and *Bristol-Myers Squibb Co.* This Court should hear New Hampshire's lawsuit, not simply to enforce constitutionally apportioned and fair state income taxation of nonresident remote workers, but to further delineate the constitutional boundaries of state authority over nonresidents in a modern economy. This is a tax case, but it is about more than just taxation.

CONCLUSION

This Court should grant New Hampshire's Motion for Leave and thereby permit New Hampshire to present its case on the merits.

Respectfully submitted,

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December 10, 2020