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Reply Brief of the Petitioners-Taxpayers Edward A. And Doris Zelinsky

Edward A. Zelinsky

NEW YORK TAX APPEALS TRIBUNAL

BEFORE ADMINISTRATIVE LAW JUDGE JESSICA DiFIORE

DTA # 830517 and DTA # 830681

EDWARD A. and DORIS ZELINSKY,

Petitioners-Taxpayers

REPLY BRIEF OF THE PETITIONERS-TAXPAYERS EDWARD A. AND DORIS ZELINSKY

Edward A. Zelinsky, Esq.
1366 Grasso Boulevard
New Haven, Connecticut 06511
(203) 787-4991
edward.a.zelinsky@gmail.com

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PRELIMINARY STATEMENT

The Division's Brief confirms that the Tribunal should rule for the taxpayers. Perhaps most egregiously, the Division disparages binding factual stipulations to which the parties agreed at the outset of this litigation. These stipulations confirm that, from March 15, 2020 through December 31, 2020 ("the COVID period"), Professor Zelinsky had no New York office or classroom available to him. Consequently, Professor Zelinsky taught his classes and met with students exclusively on zoom from his Connecticut home. He did not step foot in New York for this nine and one-half month period. The stipulations confirm the magnitude of the COVID-19 crisis and the sweeping nature of the Governor's executive order. This crisis and the Governor's order compelled Cardozo to close most in-person classes and to close all faculty offices for the COVID-19 period. *Ironically, the exhibits the Division's Brief improperly introduces to impugn the stipulations actually confirm that, as stipulated, COVID and the Governor's public health order compelled Cardozo to close most in-person classes and to close all faculty offices.*

The Division in its brief relitigates the facts to which it stipulated. This is procedurally improper. The Tribunal should reject the Division's effort to backpeddle from the stipulations to which it agreed.

The stipulated facts lead to straightforward conclusions: Professor Zelinsky's exclusively online services for Cardozo for the last nine and one-half months of 2020 were significantly different from his traditional teaching in 2019 and the first two and one-half months of 2020 ("the pre-COVID period"). As a matter of state law, New York law does not tax Professor Zelinsky's Cardozo salary from March 15, 2020 through December 31, 2020 since Professor Zelinsky did not have a New York classroom or office for that COVID-19 period and could not

have had a New York classroom or office for that period. Cardozo responsibly responded to one of the great public health crises of American history and obeyed Governor Cuomo's executive order. That order shut down New York and required employers like Cardozo to maximize their use of remote work. What Professor Zelinsky did for Cardozo exclusively on zoom starting on March 15, 2020 was significantly different from what he did for Cardozo before then in-person.

The Division also flouts New York's constitutional obligation to apportion Professor Zelinsky's Cardozo salary. Instead, of apportioning, New York taxes all of such salary despite Professor Zelinsky's extensive activity outside New York's borders. For the pre-COVID period, New York taxes 100% of Professor Zelinsky's Cardozo salary even though he spent only 40% of his time in New York. Matters are even worse for the COVID-19 period. For these nine and one-half months of 2020, New York taxes 100% of Professor Zelinsky's Cardozo salary even though he spent 0% of his time in New York. *It is hard to imagine taxation more arbitrary than New York taxing all of Professor Zelinsky's Cardozo salary during the last nine and one-half months of 2020 while Governor Cuomo's public health executive order forbade Professor Zelinsky from working at his New York office and classroom.*

To apportion is to divide. On the facts of this case, New York does nothing of the sort.

ARGUMENT

I. The stipulations of the parties correctly establish that Professor Zelinsky had no office or classroom available to him for the COVID period from March 15, 2020 through December 31, 2020 as Cardozo responsibly managed the COVID crisis and complied with Governor Cuomo's shut down order by switching to remote learning.

1) In its brief, the Division flouts the parties' stipulations, introducing exhibits which were neither disclosed to the petitioners before the April 25th hearing nor offered into evidence on April 25th. This is procedurally improper and substantively wrong. It also trivializes one of the great public health crises of American history.

In the parties' stipulations, the Division agreed that

> [c]commencing on March 16, 2020, Cardozo complied with Governor Cuomo's Covid-related executive order and closed its doors to all in-person activity. From March 16, 2020, through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never physically came into New York to work.[1]
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> Starting on March 16, 2020, Professor Zelinsky did not perform his teaching or scholarly duties for Cardozo in Manhattan due to the closure of the law school and restriction against in-person activity.[2]
>
> For the period March 16, 2020, through December 31, 2020, Professor Zelinsky did not have a classroom or office available to him at the Cardozo campus in Manhattan.[3]

These stipulations are factually accurate, indeed, are confirmed by the very exhibits the Division now improperly seeks to introduce in its brief.

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[1] Division's Brief at page 10 (¶ 23).

[2] *Id.* at ¶ 25.

[3] *Id.* at ¶ 26.

Spurning the stipulations, the Division introduces in its brief new exhibits including a New York Times article[4] and three Cardozo announcements issued in the summer of 2020.[5] As a procedural matter, this is improper. Having agreed to stipulations with the petitioners, the Division is bound by those stipulations. The Division cannot repudiate its own stipulations by introducing in its brief factual exhibits the Division both failed to disclose to the petitioners before the April 25th hearing and failed to properly submit at that hearing.

See Tax Appeals Tribunal, Rules of Practice and Procedure 3000.11(e), 20 N.Y.C.R.R. § 3000.11(e) ("binding effect" of stipulations, stipulations are "conclusive admission"); *In the Matter of the Petition of Jane A. Mallinckrodt*, DTA No. 807553 (1992), 1992 N.Y. Tax LEXIS 595, 1992 WL 346998 (it is error to "disregard...stipulated fact."). As the Tribunal said in *Mallinckrodt*:

> [N]arrowing disputes to the essential disputed issues is the primary function of stipulations. It would seem that if parties could challenge their prior stipulations at will, stipulations would lose much of their purpose[.] *Id.* (internal citations and quotations deleted)

See also In the Matter of the Petitions of Island Recycling Corp., DTA Nos. 822193, 822194, 822195, 822196 and 822197 (2012), 2012 N.Y. Tax LEXIS 105, 2012 WL 6560797 ("The Rules of Practice and Procedure of the Tax Appeals Tribunal recognize the conclusive effect of stipulations..."); *In the Matter of the Petition of Amherst Cablevision, Inc.*, DTA Nos. 806105, 806106, 806107, 806808 and 806809 (1996), 1996 N.Y. Tax LEXIS 124, 1996 WL

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[4] Michael Gold and Matt Stevens, *What Restrictions on Reopening Remain in New York?* N.Y. TIMES (May 1, 2021) cited in Division's Brief at page 18-19.

[5] Division's Brief at pages 19-21 (Cardozo announcements of June 30, 2020, July 14, 2020 and July 28, 2020).

115475 ("the Division is bound by the clear and unambiguous terms of the stipulation").

If, notwithstanding all this law to the contrary, the Tribunal is tempted to admit these last-minute exhibits to contravene the stipulations, the April 25th hearing should be reopened in the interests of justice to enable the taxpayers to provide their additional evidence. More compellingly, the Tribunal should enforce in this case the parties' stipulations per the Tribunal's own rules and decisions. Those stipulations correctly confirm that Professor Zelinsky had no New York office or classroom available to him for the COVID-19 period from March 15, 2020 through December 31, 2020 as he taught exclusively on zoom from his home.[6] As stipulated, Professor Zelinsky's zoom teaching from his Connecticut home was compelled by the COVID-19 crisis and the Governor's public health shutdown order responding to that crisis.

2) Ironically, the Division's improperly-introduced exhibits confirm the factual accuracy of the stipulations the Division seeks to impugn: Cardozo conscientiously responded to the COVID-19 crisis and complied with Governor Cuomo's public health order by curtailing in-person operations. Consequently, Professor Zelinsky had neither an office nor a classroom at Cardozo from March 15, 2020 through December 31, 2020 as Cardozo shifted to remote education.

As the New York Times article cited by the Division indicates,[7] even under the phase IV protocol, Cardozo could not offer in-person classes larger than 50 students. Moreover, the

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[6] *Id.* at page 10 (¶ 23) ("From March 16, 2020 through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never physically came into New York to work.") and ¶ 24 ("Beginning on March 16, 2020, Professor Zelinsky taught from his Connecticut home and met with Cardozo students and faculty using the internet-based Zoom video conferencing platform.").

[7] Gold and Stevens, *supra*, note 4.

Governor's Executive Order 202.6 remained in effect until June 25, 2021.[8] This order, enforced by the penalties of Public Health Law § 12-1, required Cardozo to "utilize, to the maximum extent possible, any telecommuting or work from home procedures that [it] can safely utilize."[9] Contrary to what the Division implies, Cardozo could not just reopen willy-nilly nor could Professor Zelinsky magically arrange to teach in-person during the COVID crisis.

As Cardozo's three announcements indicate,[10] Cardozo complied with Executive Order 202.6 and managed the COVID public health crisis through limited in-person accommodations. Chief among these, Cardozo gave each incoming first year student the option of one, small in-person class.[11] Obeying the Governor's public health order, Cardozo offered no second- or third-year classes in-person nor did Cardozo open faculty offices. Instead, Cardozo continued to operate remotely for the remainder of 2020, as the Governor ordered.

Professor Zelinsky does not teach first year classes and thus, as stipulated, had no Cardozo classroom available to him in Manhattan from March 15, 2020 through December 31, 2020 due to the Governor's public health order, which required Cardozo to use telecommuting. The Cardozo announcements improperly introduced by the Division in its brief confirm that faculty offices and upper level classrooms were not among the facilities Cardozo managed to

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[8] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020); Governor Andrew Cuomo, Executive Order No. 210. 9 N.Y.C.R.R. § 8.210 (June 24, 2021) (rescinding Executive Order No. 202.6, effective June 25, 2021).

[9] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020).

[10] Cardozo announcements, *supra*, note 5.

[11] Division's Brief at page 19 (quoting Cardozo's June 30, 2020 announcement).

open in 2020.[12] Cardozo struggled to give incoming first-year students a minimal in-person experience (one small class) while Cardozo's basic functions, including upper level classes and faculty offices, remained closed under Governor Cuomo's COVID-related order.

3) In summary, both as a procedural matter and as a matter of substance, the stipulations control and correctly confirm that Professor Zelinsky had neither a classroom nor an office available to him at Cardozo during the COVID period from March 15, 2020 through December 31, 2020. The Division's Brief improperly introduces exhibits which, ironically, confirm the substance of the stipulations. As a matter of elemental procedural fairness, the Tribunal should not accept the Division's last minute exhibits unless it affords Professor Zelinsky an opportunity to similarly introduce new evidence. As a matter of substance, Cardozo was constrained throughout 2020 by the gravity of the COVID-19 crisis and by Executive Order 202.6. The Division resists the metaphor that Governor Cuomo padlocked Professor Zelinsky's Cardozo office[13] and classroom but that is indeed what happened for the COVID-19 period.

II. For three independent reasons of state law, New York does not tax Professor Zelinsky's Cardozo salary for the nine and one-half month COVID period of 2020 when he had neither an office nor a classroom available to him in New York.

Because Professor Zelinsky had no New York office or classroom available to him for the COVID-19 period, for three independent state law reasons,[14] New York does not tax

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[12] *Id.* at pages 19-21. Among the limited facilities Cardozo was able to open were "the library" and "one first-year class in person." Upper level classes (such as Professor Zelinsky's tax classes) and faculty offices were not opened at this time but remain closed through the remainder of 2020 pursuant to Executive Order No. 202.6, as amended.

[13] Division's Brief at pages 21-22.

[14] Taxpayers' Brief at pages 13-21 (discussing the three independent state law reasons that New York law does not tax Professor Zelinsky's salary for the COVID-19 period because he

Professor Zelinsky's salary for that nine and one-half month period of 2020. First, New York's own regulations define Professor Zelinsky's salary for this nine and one-half month period as not derived from New York sources. For this period, Professor Zelinsky worked "wholly without New York State" for purposes of 20 N.Y.C.R.R. § 132.4(b). Second, the "convenience of the employer" doctrine does not apply during this nine and one-half month COVID period since Professor Zelinsky's remote teaching at his Connecticut home was caused by Cardozo's "necessity,"[15] not by anybody's "convenience." Third, under the relevant cases, a sine qua non of the employer convenience doctrine is the availability to the nonresident employee of a New York office. For the COVID-19 period from March 15, 2020 through December 31, 2020, Professor Zelinsky had no New York office or classroom nor could Cardozo provide such an office or classroom in light of the continuing severity of the COVID crisis and the Governor's shutdown order.

1) The Division's Brief cursorily mentions the controlling state case law – *Fass*,[16] *Linsley*[17], *Hayes*[18] - without analyzing those decisions. The closest the Division comes to confronting the relevant case law are two perfunctory citations to *Evans v. Tax Commission of*

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had no New York office or classroom available to him).

[15] 20 N.Y.C.R.R. § 132.18 ("services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.").

[16] *Fass v. State Tax Commission,* 68 A.D. 2d 977 (3d Dept. 1979), discussed in the Taxpayers' Brief at pages 18-19.

[17] *Linsley v Gallman*, 38 A.D. 2d 367 (3d Dept. 1972), affd. 33 N.Y. 2d 863 (1973), discussed in the Taxpayers' Brief at pages 15-16.

[18] *Hayes v. State Tax Commission*, 61 A.D.2d 62 (3d Dept. 1978), discussed in the Taxpayers' Brief at pages 16-17.

State of New York.[19] Mr. Evans was taxed in New York despite *Linsley* and *Hayes* because he "could have continued to work out of his office" in New York.[20] But that is not the case here. As the stipulations indicate and as the Division's improperly-introduced exhibits confirm, Professor Zelinsky (unlike Mr. Evans) had no office (or classroom) available to him at Cardozo for the COVID period from March 15, 2020 through December 31, 2020.

Thus, the controlling decisions are *Linsley*, *Hayes* and *Fass*, not *Evans*. Per these decisions, because Professor Zelinsky lacked a New York office and classroom for the COVID-19 period, Professor Zelinsky's Cardozo salary was neither New York source income under 20 N.Y.C.R.R. § 132.4(b) nor was that salary taxable to New York under the "convenience of the employer" rule under 20 N.Y.C.R.R. § 132.18.

2) The Division's brief neither cites nor analyzes 20 N.Y.C.R.R. § 132.4(b). This regulation holds that, as a matter of state law

> [c]ompensation for personal services rendered by a nonresident individual *wholly without* New York State is *not* included in [the individual's] New York adjusted gross income, regardless of the fact that payment may be made from a point within New York State or that the employer is a resident individual, partnership or corporation. (emphasis added)

This regulation describes exactly what happened to Professor Zelinsky for the COVID-19 period. He was a New York nonresident who performed his teaching duties exclusively on zoom from March 15, 2020 through December 31, 2020 "wholly without New York State" because of the COVID crisis and Cardozo's compliance with the Governor's public health order. Thus,

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[19] *Evans v. Tax Commission of State of New York*, 82 A.D. 2d 1010 (3d Dept. 1981), cited in the Division's Brief at pages 14 and 17.

[20] *Evans*, 82 A.D. 2d at 1011.

Professor Zelinsky's Cardozo salary "is not included in" his "New York adjusted gross income" even though he was paid "from a point within New York State," namely, the Cardozo Law School. 20 N.Y.C.R.R. § 132.4(b).

3) The Division's Brief denies that, from March 15, 2020 on, Professor Zelinsky was teaching on zoom at his Connecticut home for Cardozo's necessity.[21] This denial is belied, both by the stipulated facts of the case as well as by the exhibits the Division seeks to belatedly introduce in its brief. These all indicate that Professor Zelinsky taught at his home starting on March 15, 2020 for Cardozo's necessity in the face of the COVID crisis and Governor Cuomo's continuing COVID-related shutdown order.

Governor Cuomo closed New York through Executive Order 202.6 as of March 18, 2020 and mandated all New York employers to use "telecommuting or work from home procedures" "to the maximum extent possible."[22] From that point on, Professor Zelinsky had neither an office nor a classroom at Cardozo he could use. Either Professor Zelinsky taught on zoom at home or his classes were over. Professor Zelinsky's zoom teaching at his Connecticut home was indispensable to keeping Cardozo operating during the COVID crisis.

The Phase IV protocol did not change this nor did this protocol repeal Executive Order No. 202.6 which (enforced by Public Health Law § 12-1) required organizations like Cardozo to use "telecommuting or work from home procedures" "to the maximum extent possible." As of July 20, 2020, Cardozo, complying with the Governor's public health order, arranged one, small

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[21] Division's Brief at page 22 (Professor Zelinsky's at home teaching was "not for the necessity of the employer.").

[22] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020) In anticipation of the Governor's order, Cardozo actually closed a few days earlier, on March 15, 2020.

in-person seminar for incoming first year students as well as limited access to library and similar facilities. But Professor Zelinsky still had neither an office nor an in-person classroom available to him because of Cardozo's compliance with the Governor's COVID-19 restrictions. Teaching on zoom for the Fall, 2020 semester was an imperative for Cardozo – which, per Governor Cuomo's order, otherwise would have ceased operations in the face of the COVID crisis and Executive Order No. 202.6. There is no greater employer necessity than this.

4) The Division suggests that, despite COVID and Governor Cuomo's shutdown order, Professor Zelinsky could somehow have arranged to teach at Cardozo during the COVID-19 period.[23] This flies in the face of both the stipulations and the exhibits the Division improperly introduces in its brief. The stipulations contradict the Division's contention that Professor Zelinsky could have arranged to teach and work in New York:

> Commencing on March 16, 2020, Cardozo complied with Governor Cuomo's Covid-related executive order and closed its doors to all in-person activity. From March 16, 2020, through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never physically came into New York to work.[24]
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> Starting on March 16, 2020, Professor Zelinsky did not perform his teaching or scholarly duties for Cardozo in Manhattan due to the closure of the law school and restriction against in-person activity.[25]

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[23] Division's Brief at page 18 ("it was not necessary to perform those services out-of-state") and at page 21 (Zelinsky's teaching "could have been performed at the employer's New York location, if accommodations were made").

[24] Division's Brief at page 10 (¶ 23).

[25] *Id.* at ¶ 25.

> For the period March 16, 2020, through December 31, 2020, Professor Zelinsky did not have a classroom or office available to him at the Cardozo campus in Manhattan.[26]

As stipulated, COVID and the Governor's shutdown order compelled Cardozo to close Professor Zelinsky's office and classroom. There was no magic by which Professor Zelinsky could have taught in-person in New York during the COVID-19 crisis.

Alternatively, the Division's Brief could be understood as suggesting that, in the face of one of the great public health crises of American history and the Governor's executive order, Cardozo should somehow have arranged for Professor Zelinsky to teach in New York in-person for the last 9 ½ months of 2020. However, Cardozo was legally obligated through June, 2021 to use "telecommuting or work from home procedures" "to the maximum extent feasible."[27] Even under the Phase IV protocol, Cardozo was forbidden to conduct in-person classes with more than 50 students.

Under these circumstances, Cardozo, a law-abiding institution, complied with the Governor's order by giving mininal in-person access (one small seminar) to some incoming first year students but otherwise continued through 2020 to keep Cardozo shut, i.e., no in-person classes, no faculty offices. It is troubling for the Division, a law enforcement agency of the State of New York, to imply that Cardozo should have defied Governor Cuomo's public health order and ignored the COVID crisis by opening Professor Zelinsky's classroom and office in 2020.

The Division's effort to minimize the gravity of the COVID-19 emergency trivializes one

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[26] *Id.* at ¶ 26.

[27] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020).

of the great public health crises of American history. The Tribunal can properly take judicial notice[28] of what COVID-19 was: a medical catastrophe. *That catastrophe and Governor Cuomo's executive order responding to it compelled Cardozo to close most in-person classes and to keep faculty offices shut through June 25, 2021.* That is why, as stipulated, Professor Zelinsky had neither a classroom nor an office available to him for the COVID period from March 15, 2020 through December 15, 2020.

5) Consider also the Division's argument that, for purposes of 20 N.Y.C.R.R. § 132.4(b), the 9 ½ month COVID period is negated by the pre-COVID two and one-half month period from January 1, 2020 through March 15, 2020. The "entire tax year must be viewed as a whole,"[29] the Division tells us, because "the nature of the services [Professor Zelinsky] rendered" in the COVID period "were not significantly different from those [he] previously performed"[30] earlier from January 1, 2020 through March 15, 2020. Thus, though Professor Zelinsky did not set foot in New York for the last nine and one-half months of 2020, that nine and one-half month period does not fall under 20 N.Y.C.R.R. § 132.4(b) because of the prior, pre-COVID 2 ½ months of 2020 when Professor Zelinsky still commuted three days a week to teach in New York – so the Division contends.[31]

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[28] *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2nd Dept. 2009) ("the test for judicial notice [is] whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven") (internal quotation marks and citation deleted).

[29] Division's Brief at page 17. *See also id.* at page 18 ("we must examine the entire tax year as a whole").

[30] *Id.* at 17.

[31] *Id.*

For three reasons, the Division is wrong. First, contrary to what the Division says, Professor Zelinsky's services were "significantly different" between the COVID and the pre-COVID periods. From January 1, 2020 through March 15, 2020, Professor Zelinsky commuted to New York to teach traditional in-person classes and meet with students at his Cardozo office.[32] Then COVID hit. For the rest of 2020, Professor Zelinsky participated in the great American COVID experiment of zoom education.[33] These zoom-exclusive teaching services, the Division tells us, were not "significantly different" from traditional teaching. By this dismissive argument, the Division defies not just the stipulations but the experience of millions of Americans that COVID-caused remote classes were radically different from in-person classes. What Professor Zelinsky did from January 1, 2020 through March 15, 2020 (traditional in-person teaching and student contact) was "significantly different" from his services for the rest of 2020 (online teaching and remote student contact).

Second, on the facts of this case, the Division's approach is profoundly arbitrary and again trivializes the COVID-19 crisis. Governor Cuomo's ban on in-state activity lasted for 15 months, from March 18, 2020[34] until June 25, 2021.[35] Suppose that the COVID virus had arrived

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[32] *Id.* at page 9 (¶ 21) ("From January 21, 2020, until March 15, 2020, Professor Zelinsky taught his classes in person at the Cardozo Law School in Manhattan by commuting from Connecticut three (3) days per week to Cardozo.").

[33] *Id.* at page 10 (¶ 24) ("Beginning on March 16, 2020, Professor Zelinsky taught from his Connecticut home and met with Cardozo students and faculty using the internet-based Zoom video conferencing platform.").

[34] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020).

[35] Governor Andrew Cuomo, Executive Order No. 210, 9 N.Y.C.R.R. § 8.210 (June 24, 2021) (rescinding Executive Order No. 202.6, effective June 25, 2021).

on our shores slightly earlier and thus the Governor's 15 month shut down had started on January 1, 2020 and gone through March 2021. Then, the Division's Brief indicates, Professor Zelinsky's 2020 Cardozo salary would have been excluded from New York gross income per 20 N.Y.C.R.R. § 132.4(b) because Professor Zelinsky would then have worked outside New York for the "entire year...viewed as a whole."[36] But because the virus came to New York somewhat later, the tax result should be different for the 9 ½ months of 2020 when Professor Zelinsky had no New York office or classroom and worked "wholly without New York State."[37]

New York tax law should not be controlled by the vagaries of the COVID-19 virus. Nothing in New York tax law compels this irrational result, a result which belittles the gravity of the COVID-19 crisis.

Third, the Division's "entire tax year argument" is a classic case of the tail (the first 2 ½ months of 2020) wagging the dog (the remaining 9 ½ months of 2020). There is no reason why the longer period of 9 ½ months during which Professor Zelinsky worked on zoom "wholly outside New York State" should be disregarded under 20 N.Y.C.R.R. § 132.4(b) because of the preceding and much shorter period of 2 ½ months when Professor Zelinsky commuted to and taught in New York in-person.

7) To summarize: Nothing in the Division's brief refutes the taxpayers' argument that, for three independent reasons,[38] New York law does not tax Professor Zelinsky's Cardozo salary for the COVID-19 period from March 15, 2020 through December 15, 2020. The stipulations

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[36] Division's Brief at pages 17-18.

[37] 20 N.Y.C.R.R. § 132.4(b).

[38] Taxpayers' Brief at pages 13-21.

correctly establish that Professor Zelinsky had no office or classroom available to him for the COVID-19 period from March 15, 2020 through December 31, 2020 as Cardozo responsibly navigated the COVID crisis and complied with Executive Order 202.6 by having Cardozo faculty and students "telecommut[e]" or otherwise "work from home" "to the maximum extent feasible."[39] Accordingly, for these three independent state law reasons,[40] New York law does not tax Professor Zelinsky's Cardozo salary for the nine and one-half month COVID-19 period when he exclusively taught from his Connecticut home on zoom.[41]

III. The Division's Brief ignores the substance of New York's constitutional duty to apportion nonresidents' income taxes.

1) States have a constitutional obligation to reasonably apportion the incomes of nonresidents who earn income in two or more states. [42] Critical to the U.S. Supreme Court's income tax apportionment case law is *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). In *Central Greyhound*, the Court held that, when buses travel on the roads of New York,

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[39] Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020).

[40] As the Taxpayers' Brief notes, by granting Professor Zelinsky his claimed refund on state law grounds for the COVID-19 period, the Tribunal would avoid the need to address his constitutional arguments for this period. See Taxpayers' Brief at page 22 (discussing *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J. concurring)).

[41] The Division's Brief addresses a point which is not contested. The taxpayers agree that, for 2019 and the first two and one-half months of 2020, the employer convenience rule applies to Professor Zelinsky's Cardozo income. As to this income, the taxpayers only raise federal constitutional issues. *Cf*. Division's Brief at pages 15-16 (arguing that the employer convenience rule applies to Professor Zelinsky's 2019 income) with Taxpayers' Brief at pages 42-43 ("petitioners do not contest the application of the `convenience of the employer' rule to the pre-COVID period.").

[42] Taxpayers' Brief at pp. 23-24.

Pennsylvania and New Jersey, New York's "gross receipts tax" must be "fairly apportioned" to New York based on the buses' mileage in New York. *Id.* at 663. Reinforcing this message of limited state income taxation, the U.S. Supreme Court declared over a century ago that a state may tax a nonresident on income only from activity "carried on within [the] borders" of the taxing state. *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920). While states have discretion to fashion reasonable apportionment formulas, a state cannot use an apportionment formula which achieves "arbitrary results" by "grossly distort[ing]" the income earned in the state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274, 281 (1978). "The Due Process and Commerce Clauses forbid the States to tax "`extraterritorial values.'" *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 19 (2008).

2) The Division's Brief ignores the substance of these constitutional limitations on New York's power to tax Professor Zelinsky's nonresident income. Start with the most basic fact: New York does not apportion Professor Zelinsky's Cardozo salary between New York and Connecticut. New York taxes **all** of that salary under the rubric of employer convenience. To apportion is "to divide."[43] But New York does not divide Professor Zelinsky's Cardozo salary between Connecticut and New York. On the facts of this case, New York grabs **all** of Professor Zelinsky's Cardozo salary income for itself. This is not apportionment.

As Judge Smith correctly observed in *Huckaby*, in situations like the present case, the employer convenience rule produces arbitrary, unapportioned results by taxing 100% of the income earned by a nonresident who spends considerably less than 100% of his time working in

[43] Merriam-Webster, https://www.merriam-webster.com/dictionary/apportion.

New York.[44] For the pre-COVID period, New York taxes 100% of Professor Zelinsky's Cardozo salary even though he spent only 40% of his time in New York.[45] Matters are even worse for the COVID period. For these nine and one-half months of 2020, New York taxes 100% of Professor Zelinsky's Cardozo salary even though he spent 0% of his time in New York.[46] Whatever discretion New York has, it may not use an apportionment formula which on the facts of this case achieves "arbitrary results," results which "grossly distort" the income Professor Zelinsky earned in New York. *Moorman Mfg. Co.,* 437 U.S. at 274, 281. *It is hard to imagine taxation more "arbitrary" or "grossly distort[ing]" than this case: New York taxes all of Professor Zelinsky's Cardozo salary during the last nine and one-half months of 2020 while Governor Cuomo's public health executive order forbade Professor Zelinsky from working at his New York office or classroom during this COVID period.*

3) Consider as well the Division's treatment of *Central Greyhound*: total silence. *Central Greyhound* is a fundamental decision in the U.S. Supreme Court's apportionment case law[47]--which the Division's Brief totally ignores. At one level, this is not surprising. *Central Greyhound* requires that Professor Zelinsky's Cardozo salary be apportioned between the states in which that salary was earned (New York and Connecticut) just as the gross income of the Central Greyhound buses was apportioned among the states in which that income was earned

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[44] *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427, 447 (2005) (Smith, J., dissenting), discussed in Taxpayers' Brief at page 31.

[45] Taxpayers' Brief at page 44.

[46] Division's Brief at page 10 (¶ 23) ("From March 16, 2020, through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never physically came into New York to work.").

[47] Taxpayers' Brief at pages 25-27.

(New York, New Jersey and Pennsylvania). Rather than acknowledge the inconsistency between *Central Greyhound* and New York's unapportioned taxation of all of Professor Zelinsky's Cardozo salary, the Division's Brief ignores *Central Greyhound* altogether.

Professor Zelinsky's teaching in New York is analogous to a Central Greyhound bus traveling in New York. In both cases, it is "practicable to keep track of" New York activity by recording physical presence. *Goldberg v. Sweet*, 488 U.S. 252, 264 (1989) (citing *Central Greyhound*). In Professor Zelinsky's case, his New York activity can be "ke[pt] track of" by counting his days working in New York – as New York's own regulations provide[48] and as *Central Greyhound* requires on the facts of this case.

4) Equally troubling is the manner in which the Division's Brief fudges the rule of *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920) and *Shaffer v. Carter*, 252 U.S. 37 (1920). Contrary to what the Division's Brief says, these seminal decisions do not declare that a state can tax a nonresident's income "related to sources within a state."[49] *Travis* more carefully says that a state may only tax a nonresident's income from activity "*carried on within [the] borders*" of the taxing state. *Travis*, 252 U.S. at 75 (emphasis added). Similarly, *Shaffer* says that a state may only tax a nonresident's income earned "*within the State*." *Shaffer*, 252 U.S. at 52 (emphasis added).[50]

In the pre-COVID period, Professor Zelinsky only "carried on within [New York's]

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[48] *Id.* at pages 27-28 (discussing 20 NYCRR § 132.18 which apportions the salaries of nonresident employees based on days in and out of New York).

[49] Division's Brief at page 24.

[50] *See also Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 463 n. 11 (1995) ("For nonresidents, in contrast, jurisdictions generally may tax only income earned within the jurisdiction.") (citing *Shaffer v. Carter*).

borders" his teaching activity; he performed his legal scholarship for Cardozo "within [Connecticut's] borders." During the COVID-19 period, Professor Zelinsky conducted all of his teaching and research activity "within [Connecticut's] borders." Rather than faithfully applying what *Travis* and *Shaffer* say, the Division's Brief fudges the rule of these decisions to tax the income Professor Zelinsky earned outside New York's borders under a vague, unmanageable "related to" standard[51] – which is not what *Travis* and *Shaffer* say. Those decisions only allow New York to tax income Professor Zelinsky earned "within [New York's] borders."

5) Another way in which the Division's Brief seeks to avoid New York's obligation to apportion Professor Zelinsky's Cardozo salary is by citing *South Dakota v. Wayfair, Inc*. 138 S. Ct. 2080 (2018).[52] *Wayfair* is a sales tax collection case, of no relevance to New York's obligation to apportion income taxes of nonresidents. In *Wayfair*, the Court held that a state can require out-of-state businesses to collect sales tax on internet and mail order sales made to buyers living within the taxing state. *Wayfair* says nothing about income taxes or about the apportionment of nonresidents' incomes. It is fanciful to think that *Wayfair* abolished a century of income tax case law like *Central Greyhound, Goldberg, Travis* and *Shaffer* without saying so.

6) Another stretch by the Division is its invocation of *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435 (1944) to avoid apportioning Professor Zelinsky's Cardozo salary between New York and Connecticut.[53] In *International Harvester*, the

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[51] *Cal. Div. of Labor Stds. Enforcement v. Dillingham Constr., N.A.*, 519 U.S. 316, 335 (1997) ("as many a curbstone philosopher has observed, everything is related to everything else.") (Scalia, J., concurring).

[52] Division's Brief at pages 26 (citing *Wayfair*).

[53] Division's Brief at page 29 (citing *International Harvester*).

U.S. Supreme Court upheld a Wisconsin tax on corporations' "earnings attributable to their Wisconsin activities and transactions" before such Wisconsin earnings were distributed as dividends to resident and nonresident shareholders. *Id.* at 442 and at 438 (Wisconsin tax levied on "income earned by the corporation in Wisconsin."). Professor Zelinsky agrees that he should likewise pay New York tax on the income he earns when he teaches in New York.

But New York deploys the "convenience of the employer" rule to tax the Cardozo salary Professor Zelinsky earned **outside** New York, teaching at his home in Connecticut on zoom and doing legal research there. *International Harvester* provides no support for New York's extraterritorial taxation of income of earned by Professor Zelinsky at his Connecticut home. In *International Harvester*, Wisconsin did not tax income earned outside its borders nor did the Court approve such taxation of income earned in another state. Indeed, *International Harvester* specifically denies that a state can tax income earned in another state.[54]

In sum, *International Harvester* condoned Wisconsin taxation of income earned in Wisconsin, not Wisconsin taxation of income earned in another state like the portion of Professor Zelinsky's Cardozo salary earned at his home in Connecticut. Requiring a non-Wisconsin corporation to pay Wisconsin tax on corporate income earned **inside** Wisconsin before such income is distributed as a dividend is different from making a non-New York employee pay New York tax on salary he personally earned **outside** New York. The former is constitutional; the latter is not. *See, e.g.*, *Shaffer*, 252 U.S. at 52 (nonresident taxable only on income earned "within the State.")

7) Consider as well the notion of "external consistency." The Division's Brief correctly

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[54] *International Harvester*, 322 U.S. at 444 (confirming that California cannot tax income a corporation earned in Connecticut).

notes that the U.S. Supreme Court has sometimes used the terms "internal consistency" and "external consistency" to understand the states' obligation under the dormant Commerce Clause to apportion income.[55] But the Division is wrong that New York's taxation of Professor Zelinsky's Cardozo income earned in Connecticut passes the Court's external consistency test. To the contrary, New York's use of the employer convenience doctrine in this case flunks the external consistency standard, for both the COVID-19 period and the pre-COVID period.

"External consistency" is another way of formulating the apportionment requirement of *Central Greyhound*. The Court first used the terms "internal consistency" and "external consistency" in *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). According to that decision, "[a]n apportionment formula" flunks the external consistency standard if "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 170 (internal quotations and citations omitted). As Judge Smith observed,[56] that is what the employer convenience doctrine does in a case like Professor Zelinsky's, taxing 100% of his salary to New York even though he spends most of his work time (during the COVID period, all of his work time) in another state. *Tax distortion does not get any grosser that New York taxing all of Professor Zelinsky's salary when he never set foot in New York due to the Governor's COVID-19 order.*

In *Goldberg v. Sweet*, 488 U.S. 252 (1989), the Court opined further that "the external consistency test is essentially a practical inquiry," invoking *Central Greyhound* as an example of "practicable" apportionment satisfying the external consistency test by apportioning the

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[55] Division's Brief at 28.

[56] *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427, 447 (2005) (Smith, J., dissenting).

taxpayer's income based on the taxpayer's physical presence in different states. *Id.* at 264. Professor Zelinsky is like a Central Greyhound bus: "Practicable" apportionment satisfying external consistency requires that he only pay New York tax on income earned on his days within New York's borders and that he apportion to Connecticut the Cardozo income he earns on his days at home in Connecticut.

The Court's discussion of external consistency in *Okla. Tax Comm'n v. Jefferson Lines,* 514 U.S. 175 (1995), again invokes *Central Greyhound*. In *Jefferson Lines*, the Court concluded that Oklahoma's sales taxation of a bus ticket purchased in Oklahoma satisfied the external consistency test because the ticket was only sold in Oklahoma. Thus, there was no "threat of real multiple taxation" since only Oklahoma could impose a sales tax on this purchase, a one-time event occurring in a single state. *Jefferson Lines*, 514 U.S. at 185. In *Jefferson Lines,* the Court again invoked *Central Greyhound* and its requirement that New York apportion its gross receipts as reflecting what is now called "external consistency." *Jefferson Lines,* 514 U.S. at 189-190.

In short, the Court now sometimes implements the apportionment test articulated in *Central Greyhound* with the notion of "external consistency." On the facts of this case, the employer convenience rule flunks the test of apportionment/external consistency by taxing all of Professor Zelinsky's income to New York rather than apportioning any of that salary to Connecticut as *Central Greyhound* and external consistency require.

8) The Division doubles down on the Court of Appeals' assertion that, on the days he works in Connecticut, Professor Zelinsky receives "police, fire and emergency health services, and public utilities" from New York. [57] This is not true. There is no evidence in the record that

[57] Division's Brief at 28 (quoting Court of Appeals).

New York ships police, fire and EMT personnel over the Connecticut border to serve Professor Zelinsky at home. New York does not do this.[58] Similarly, there is no evidence in the record that New York ships water and electricity to Professor Zelinsky's Connecticut home. It does not.[59]

New York does provide these services to Cardozo on the days Professor Zelinsky works at home, but employers and employees are different persons. On this days at home, Professor Zelinsky receives his government services from Connecticut and its localities.

9) Recognizing that Professor Zelinsky receives his fundamental public services from Connecticut and its localities on the days he works at home, the Division postulates a series of ephemeral benefits he allegedly receives from New York while working in Connecticut. For example, the Division tells us that Professor Zelinsky uses "computer servers" "potentially located" in New York as well as "potential voicemail systems" residing in New York.[60] "Potential" is a euphemism for unsubstantiated. There is no evidence in the record that Cardozo's servers or voice mail systems are located in New York. It is "a grossly distorted result," *Container Corp. of Am.,* 463 U.S. at 170, for New York to tax **all** of Professor Zelinsky's Connecticut-source income for these "potential" services. "Potential," i.e., speculative, benefits do not justify maximal taxation.

Equally ephemeral are the supposed New York benefits Professor Zelinsky receives from

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[58] *Kingsbrook Jewish Med. Ctr.,* 61 A.D.3d at 20 ("the test for judicial notice [is] whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven") (internal quotation marks and citation deleted).

[59] *Id.*

[60] Division's Brief at page 29.

being able to sue in the New York state "courts that enforce contracts."[61] As a Connecticut resident, Professor Zelinsky would maintain a contract action against Cardozo (or any other New York person or entity), not in New York's state courts, but in the federal courts under diversity jurisdiction.[62] Access to New York state courts is another illusory benefit for a nonresident like Professor Zelinsky who can use the federal courts instead.

In short, the New York benefits the Division postulates on the days Professor Zelinsky works outside New York's borders are flimsy at best, not a reasonable basis for taxing **all** of Professor Zelinsky's income on the days he works at home in Connecticut.

10) Consider also the Division's invocation of "virtual presence" to justify New York's taxation of Professor Zelinsky's income earned on his days in Connecticut.[63] In some contexts, the notion of virtual presence is helpful. But on the particular facts of this income tax case, virtual presence is an unmanageable standard which causes duplicative, extraterritorial state income taxation since every day a worker in the modern world may have virtual presence in many jurisdictions throughout the nation and the world. Under the Division's "virtual presence" test, all of the states in which a worker is "virtually present" can tax her income, even as she sits for eight hours at her desk in one state. Nothing compels this unmanageable plethora of duplicative, extraterritorial state income taxes.

Consider again *Wayfair* in which the Court noted that Wayfair, Inc. (and other similar

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[61] *Id.*

[62] 28 U.S.C. § 1332.

[63] Division's Brief at pages 26 and 29.

large corporate sellers) had a virtual presence in South Dakota.[64] This presence helped to justify South Dakota's requirement that Wayfair, Inc. collect sales tax on its sales to South Dakota purchasers. As *Jefferson Lines* observes,[65] a sales tax is levied by the single state in which the sale occurs. Thus, Wayfair's "extensive virtual presence"[66] in South Dakota bolstered the claim of the only state which could levy a sales tax (South Dakota) to collect that tax from the only seller in the sale (Wayfair, Inc.) – a compelling result on these facts.

But in an income tax case like Professor Zelinsky's, "virtual presence" is a vague, unmanageable standard which lacks any limiting principle and which leads to multiple, extraterritorial income taxation by the many jurisdictions in which an individual can have virtual presence during a contemporary work day. The Division's position on virtual presence subjects an individual to income taxation by myriad jurisdictions even as such individual works at a single physical location outside those jurisdictions using modern technology.

In the modern world, workers every day use computer servers located throughout the nation and abroad. Workers routinely use the internet to speak and meet with people throughout the country and the world. When Professor Zelinsky taught classes remotely, his students could have been (and likely were) located throughout the nation, indeed throughout the globe. On a day when Professor Zelinsky works at his Cardozo office, he may be in zoom contact with individuals located throughout the nation and he may use computer services from throughout the

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[64] *South Dakota v. Wayfair, Inc*. 138 S. Ct. 2080, 2099 (2018).

[65] *Jefferson Lines,* 514 U.S. at 185 ("no sale would be subject to more than one State's tax.") and at 186 ("A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale...").

[66] *Wayfair, Inc*. 138 S. Ct. at 2099.

world. This Tribunal's April 25th hearing in this case was watched on Webex by persons in different jurisdictions, giving the hearing's participants "virtual presence" in all these jurisdictions.

Under the Division's theory of virtual presence, everyone in the modern world routinely earns income in myriad states and nations because they are virtually present in all of these locations through the internet and thus owe taxes in all of these locations. Does the Division really advocate this unmanageable scenario of duplicative, extraterritorial income taxation?

In short, the Division's talismanic invocation of "virtual presence" is unpersuasive on the facts of an income case like this. Workers in the 21st century routinely have virtual presence in many states and jurisdictions on a daily basis as they use computer services in different states and have remote contacts with persons on the internet. If virtual presence in a state justifies income taxation by that state, all of us routinely owe income tax in numerous states every day as we have virtual presences in many different states (and countries) during the typical remote work day. The Constitution proscribes this unmanageable morass of duplicative, extraterritorial state income taxation. *MeadWestvaco Corp.,* 553 U.S. at 19 ("The Due Process and Commerce Clauses forbid the States to tax "`extraterritorial values.'").

11) In sum, the Division's Brief ignores the substance of New York's constitutional duty to apportion nonresidents' income taxes.

IV. The Division's Brief ignores the factors which have undermined and which distinguish the 2003 *Zelinsky* decision.

1) The Taxpayers' Brief identifies the factors which have undermined the 2003 *Zelinsky*

decision.[67] These include the commentary criticizing *Zelinsky*[68] and the enormous growth of remote work since *Zelinsky* was decided, growth which accelerated during the COVID-19 crisis.[69] As the taxpayers observe,[70] the April 25th hearing in this case was conducted remotely on Webex. What is remarkable is that today this isn't remarkable. *Zelinsky* was decided in a different world in which remote work was an odd rarity.

Zelinsky was also undermined by the extraordinary events in *Huckaby*[71] when two judges (Judges George Smith and Carmen Ciparick) who had joined the *Zelinsky* opinion switched sides shortly thereafter and endorsed Judge Robert Smith's *Huckaby* dissent.[72] The Division seeks to minimize this unique event by dismissing "the dissent in *Huckaby* [as] just that, the minority position."[73] But the *Huckaby* dissent was sui generis, a repudiation by two members of the *Zelinsky* majority of the earlier opinion in which they had participated.

These factors erode *Zelinsky*. Ignoring these factors does not make them go away.

2) The facts of this case distinguish this case from *Zelinsky.* As to the COVID period of 2020, the taxpayers raise state law issues which *Zelinsky* does not address since no state law

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[67] *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004).

[68] Taxpayers' Brief at pages 37-38.

[69] *Id.* at 38-40. *See also* Division's Brief at page 9 (¶¶ 19 and 20) ("Interstate remote work expanded in the years subsequent to 2003 when *Zelinsky* was decided and then burgeoned further during the COVID-19 pandemic.").

[70] Taxpayers' Brief at page 38.

[71] *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427 (2005).

[72] Taxpayers' Brief at pages 35-37.

[73] Division's Brief at page 15.

questions were raised in *Zelinsky.* Moreover, the basic facts of *Zelinsky* (Professor Zelinsky commuting to New York to teach in-person classes) are radically different from the facts of the COVID period (Professor Zelinsky teaching remotely and never setting foot in New York).[74] In addition, a critical factual premise of *Zelinsky* was its dismissal of Professor Zelinsky's legal scholarship done at home as an "ancillary" activity.[75] For the present case, it has been established, as an uncontroverted matter of fact, that Professor Zelinsky's scholarship performed at home was not an ancillary activity but was of equal importance to Cardozo as Professor Zelinsky's teaching.[76] This factual change also erodes *Zelinsky*'s relevance to the present case.

The Division in its brief nevertheless clings to the *Zelinsky* decision like a life-raft, but *Zelinsky* is a life-raft with huge holes. Whether or not it was correct when decided, *Zelinsky* today is not good law.

V. Conclusion

For the reasons stated above and stated in the taxpayers' initial brief, the Tribunal should grant the taxpayers' claims for state income tax refunds in DTA # 830681 and DTA # 830517.

Respectfully submitted

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Edward A. Zelinsky

Doris Zelinsky

By_____
Edward A. Zelinsky, Esq.

[74] Taxpayers' Brief at pages 34-35.

[75] *Id.* at page 49.

[76] *Id.*

Certification of Service

I, Edward A. Zelinsky, Esq., hereby certify that, on August 4, 2023, I served the foregoing reply brief by U.S. Express Mail to the following:

The Hon. Jessica DiFiore
Administrative Law Judge
New York State Tax Appeals
Agency Building 1
Empire State Plaza
Albany, NY 12223

Attorney Michele W. Milavec
Office of Counsel
Division of Taxation
Room 100
Building 9
W.A. Harriman Campus
Albany, NY 12227

I further certify that, on August 4, 2023, I also emailed copies of the foregoing reply brief to Michele.Milavec@tax.ny.gov and to Judge DiFiore c/o Tiffani.Beza-Gaffney@dta.ny.gov.

_____
Edward A. Zelinsky, Esq.