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Reply Brief of Edward A. and Doris Zelinsky in the New York Tax Appeals Tribunal

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NEW YORK TAX APPEALS TRIBUNAL
DTA # 830517 and DTA # 830681

EDWARD A. and DORIS ZELINSKY,

Petitioners-Taxpayers

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OVERVIEW

Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University ("Cardozo"). Along with his wife Doris, Professor Zelinsky is a Connecticut resident. Professor and Mrs. Zelinsky seek New York income tax refunds for 2019 and 2020 including the refund of state taxes the Zelinskys paid on the Cardozo salary Professor Zelinsky earned during the COVID-19 period from March 15, 2020 through December 31, 2020. For this COVID period, Governor Andrew Cuomo shut down New York, forbidding Cardozo from conducting in-person classes and requiring Professor Zelinsky to teach remotely from his home.

In the proceeding below, the ALJ rejected Professor Zelinsky's claims. Determination in DTA # 830517 and DTA # 830681, November 30, 2023 (Administrative Law Judge Jessica DiFiore) ("the Determination"). On December 27, 2023, Professor and Mrs. Zelinsky filed exceptions to the Determination. The Zelinskys then filed a brief with this Tribunal on January 24, 2024. On March 20, 2024, the Division of Taxation filed its brief ("the Division's Brief"), defending the ALJ's Determination. In response to the Division's Brief, the Zelinskys now submit this reply brief.

The Division's Brief confirms that, both as a matter of state law and as a matter of federal law, the Zelinskys are correct and the ALJ and the Division are wrong. The Division persists in Pandemic denial. The Division's Brief (like the Determination below) disregards the salient facts of the Pandemic including Governor Cuomo's shutdown order which forbade Cardozo from operating in-person classes during the Pandemic and which required Professor Zelinsky to work remotely from his home.

Three reasons of state law independently compel a refund of the New York income tax Professor Zelinsky paid on the Cardozo salary Professor Zelinsky earned during the COVID

period of 2020. That salary was not New York source income because Professor Zelinsky earned that COVID period salary at his home in Connecticut "wholly without" New York's borders. 20 N.Y.C.R.R. § 132.4(b). In addition, New York's "convenience of the employer" rule does not apply to that COVID period salary because Professor Zelinsky's remote work at home was for Cardozo's necessity rather than for anyone's convenience. Governor Cuomo's shutdown order only permitted Cardozo to conduct classes remotely. Cardozo was out of business if Professor Zelinsky did not teach his Pandemic classes remotely from his home. Employer necessity does not get stronger than this. 20 N.Y.C.R.R. § 132.18.

New York's "convenience of the employer" rule also does not apply to Professor Zelinsky's Cardozo salary for the COVID period of 2020 because Governor Cuomo's shutdown order denied Professor Zelinsky the use of his Cardozo office and classroom. The employer convenience rule only applies to a nonresident's income if the nonresident has or could have had a New York office or other facility in which to work. *Fass v. State Tax Commission*, 68 A.D. 2d 977 (3d Dept. 1979). But Governor Cuomo deprived Professor Zelinsky of the use of any New York office or classroom for the duration of the Pandemic. Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6.

As a matter of federal law, the Due Process and dormant Commerce Clauses of the U.S. Constitution prohibit New York from taxing Professor Zelinsky's Cardozo salary earned at his Connecticut home in 2019 and 2020. Such unapportioned, extraterritorial taxation taxes Professor Zelinsky as if he were a New York resident – which he is not.

Responding to Professor Zelinsky's constitutional claims for 2019 and 2020, the Division's Brief (like the Determination) relies heavily on *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004). But this case is factually distinguishable

from *Zelinsky*. Moreover, *Zelinsky* has been undermined by subsequent developments, including criticism of *Zelinsky* by scholars and by judges of the Court of Appeals. Those criticisms make clear that New York taxes unconstitutionally when it levies its extraterritorial, unapportioned "convenience of the employer" income tax on the salary Professor Zelinsky earned remotely at his home in Connecticut in 2019 and 2020. *Zelinsky* has also been eroded by the subsequent decisions of the U.S. Supreme Court in *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16 (2008), and in *Comptroller of the Treasury v. Wynne,* 575 U.S. 542 (2015).

The Division's Brief (like the Determination) asserts that, through a "virtual presence" test, *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080 (2018), supports New York's extraterritorial and unapportioned income tax of Professor Zelinsky's Cardozo salary earned at his Connecticut home in 2019 and 2020. But *Wayfair* is about sales tax collection responsibilities. *Wayfair* neither explicitly or nor implicitly unsettles the century of Due Process and dormant Commerce Clause case law which forbids states from imposing extraterritorial, unapportioned state income taxes on nonresidents like Professor Zelinsky. This unconstitutional taxation is precisely what New York does to Professor Zelinsky for 2019 and 2020 by taxing Cardozo salary Professor Zelinsky earned outside New York's borders at his home in Connecticut.

ARGUMENT

I) THE DIVISION PERSISTS IN PANDEMIC DENIAL.

The Division's Brief confirms the Division's Pandemic denial. The Division's Brief (like the Determination below) slights the salient facts of the Pandemic. These facts include Governor Cuomo's shutdown order which forbade Cardozo from operating in-person classes in New York during the Pandemic and which required Professor Zelinsky to work remotely at his home for the duration of the Pandemic. Professor Zelinsky's remote work at home during the COVID period was for Cardozo's necessity, the only way Cardozo could stay in business during the Pandemic in light of the Governor's shutdown order.

Consequently, as a matter of state law, the "convenience of the employer" rule does not apply to Professor Zelinsky's COVID period income. Moreover, that income is not New York source income since, after March 15, 2020, Professor Zelinsky exclusively earned his Cardozo salary remotely at his home "wholly without" the borders of New York due to the Governor's shutdown order.

The Brief's treatment of *Fass* similarly confirms the Division's Pandemic denial. Governor Cuomo's shutdown order forbade Professor Zelinsky from working in New York during the COVID period. The "convenience of the employer" doctrine did not apply to Mr. Fass whose employer could have built a specialized facility for him in New York. *A fortiori* that doctrine does not apply to Professor Zelinsky whose employer was forbidden by Governor Cuomo from providing Professor Zelinsky with *any* in-person New York office or classroom during the Pandemic.

The Brief's discussion of 2020 fails to acknowledge the fundamental difference between the traditional working conditions of the pre-COVID world and the remote work imposed by the

Governor's Pandemic restrictions. Before March 15, 2020, Professor Zelinsky taught in-person. For the subsequent duration of the Pandemic, Governor Cuomo mandated full-time remote work at home, a fundamentally different task.

As a result of the Division's Pandemic denial, the Division misstates Professor Zelinsky's New York income tax obligations for the COVID period starting March 15, 2020. Both as a matter of state law and as a matter of federal constitutional law, the taxpayers should receive their requested refund for 2020 in light of the realities of the Pandemic.

A) By effectively disregarding the facts of the Pandemic, the Division doubles down on its Pandemic denial.

The Division's Brief, like the Determination below, ignores the critical facts of the Pandemic: For the last 9 ½ months of 2020, Governor Cuomo required Cardozo to operate remotely[1] and required Professor Zelinsky to work remotely at home.[2] For the COVID period starting on March 15, 2020 through December 31, 2020, Professor Zelinsky had no New York office or classroom available to him because of Governor Cuomo's shutdown order.[3]

Consequently, Professor Zelinsky did not set foot in New York for the duration of the

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[1] Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020) ("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""); Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020); Governor Andrew Cuomo, Executive Order 202.8 (March 20, 2020), (amending Order No. 202.6 to provide that "[e]ach employer shall reduce the in-person workforce at any location by 100% no later than March 22 at 8 pm"). *See also* Determination, Finding of Fact 15, page 4.

[2] *Id.*

[3] Determination, Findings of Fact 16, 17, 18 and 19, page 5.

COVID period.[4] He thus had no New York source income for this period according to New York's own regulations since Professor Zelinsky worked "wholly without" New York's boundaries for the COVID period. See 20 N.Y.C.R.R. § 132.4(b).

The Division's Brief (like the ALJ's Determination) acknowledges some of these facts pro forma.[5] But this throw away line ignores the implications of these facts: Professor Zelinsky's Zoom teaching from his Connecticut home during the COVID period was for Cardozo's necessity under 20 N.Y.C.R.R. § 132.18. If Professor Zelinsky had not taught from his home, Cardozo was out of business for the COVID period since the Governor permitted only remote work for the duration of the Pandemic.[6] Employer necessity does not get stronger than this.

Ironically, the Division's Brief admits that "services...that could *not* be performed at the employer's office" do *not* generate New York income under New York's "convenience of the employer" rule.[7] That is precisely what happened during the COVID period to Professor Zelinsky. His teaching services for Cardozo "could not be performed at" Cardozo because Governor Cuomo's shutdown order closed Cardozo to in-person activity and mandated that Professor Zelinsky work at home. By slighting these realities, the Division's Brief (like the

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[4] Determination, Finding of Fact 16, p. 5.

[5] *See* Division of Taxation's Brief in Opposition to Petitioners' Exception, dated March 20, 2024 (hereinafter, "Division's Brief") at page 12 ("The ALJ properly determined that for tax year 2020, the facts and effects of the COVID-19 pandemic are unprecedented..."); Determination, Conclusion of Law H, pages 16-17 ("unprecedented").

[6] Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020); Governor Andrew Cuomo, Executive Order 202.8 (March 20, 2020),

[7] Division's Brief at page 9 (emphasis added).

Determination) applies the employer convenience rule erroneously since Professor Zelinsky could not perform his Pandemic teaching duties at Cardozo or anywhere else in New York.

For the duration of the Pandemic, Professor Zelinsky earned no New York source income because he worked exclusively at home for these last nine and one-half months of 2020 – as Governor Cuomo ordered. Professor Zelinsky had no New York office or classroom available to him during the Pandemic because Governor Cuomo's shutdown order (enforced by Public Health Law § 12-1) closed Cardozo to in-person activity starting on March 15, 2020.

The Division's Brief denies that any of this matters, citing the Determination for the proposition that it does not matter that "that petitioner's New York office at the law school was not available due to the COVID-19 pandemic."[8] But it does matter, indeed, it is the core of this case that Governor Cuomo shut Professor Zelinsky out of New York for the duration of the Pandemic.

Further indicating the Division's Pandemic denial is the Brief's repetition of the Determination's misstatement that Cardozo "allowed [Professor Zelinsky] to work out-of-state at home" for the duration of the Pandemic.[9] No: Cardozo did not "allow" Professor Zelinsky to work at home. For the duration of the Pandemic, *Andrew Cuomo's executive order required Professor Zelinsky to work at home and required Cardozo to make Professor Zelinsky work at home.* The Division's Brief denies the implications of Governor Cuomo's shutdown order which closed Cardozo and which closed Professor Zelinsky's New York office and classroom to in-

[8] *Id.* page 13 (citing Determination).

[9] *Id.* at page 12 (citing Determination).

person activity for the length of the Pandemic.[10] In light of the Governor's order, Professor Zelinsky's remote work was for Cardozo's necessity, not for anyone's convenience. 20 N.Y.C.R.R. §132.18. Also in light of that order, Professor Zelinsky's Cardozo salary for the Pandemic was not New York source income because Professor Zelinsky worked for the COVID period "wholly without" New York State. 20 N.Y.C.R.R. § 132.4(b).

B) The Brief's treatment of *Fass* further evidences the Division's Pandemic denial.

Further manifesting the Division's Pandemic denial is the Division's treatment of *Fass v. State Tax Commission*, 68 A.D. 2d 977 (3d Dept. 1979), a leading case under the convenience of the employer rule. *Fass* held that the employer convenience rule did not apply to Mr. Fass, a writer for hobbyist magazines, because he lacked access to specialized facilities in New York for his work. Mr. Fass' employer could have built such specialized facilities in New York but chose not to. Because the magazines for which Mr. Fass wrote declined to build appropriate facilities in New York, the employer convenience doctrine did not apply to Mr. Fass's income on the days Mr. Fass worked at home in New Jersey, where those specialized facilities were available to Mr. Fass.

The Division's Brief asserts that *Fass* does not protect Professor Zelinsky from the

[10] *See also* Division's Brief at 18 ("Cardozo *permitted* Professor Zelinsky to work at his out-of-state home in 2020 to perform his tasks for Cardozo, and Professor Zelinsky *made the choice*, for his own convenience, to do so.") (emphasis added). This statement by the Division again ignores Governor Cuomo's shutdown order which *required* Cardozo and Professor Zelinsky to shift to remote education with Professor Zelinsky teaching from his home. For the COVID period, Cardozo did not "permit" anything nor did Professor Zelinsky "choose" anything. Both Cardozo and Professor Zelinsky were forbidden by Governor Cuomo from conducting in-person activity in New York.

application of the employer convenience rule.[11] This assertion is wrong and, again, ignores the realities of the Pandemic. Mr. Fass's employer declined to build specialized facilities in New York but could have built such facilities had it chose to do so. In contrast, for the COVID period, *Governor Cuomo forbade Professor Zelinsky's employer altogether from providing him with any in-person work facility in New York.* There was no legal way Professor Zelinsky could have used any New York office or classroom during the Pandemic because Governor Cuomo prohibited Cardozo from operating in-person and ordered Professor Zelinsky to work at home.[12] Cardozo did not have the choice Mr. Fass's employer had, i.e., to build a specialized facility in New York for Mr. Fass's use. The Governor forbade Cardozo from letting Professor Zelinsky use any New York facility.

The Appellate Division held that the "convenience of the employer" doctrine did not apply to Mr. Fass whose employer could have built a specialized facility for him in New York but did not. *Fass, supra*. *A fortiori* that doctrine does not apply to Professor Zelinsky whose New York employer was prohibited by Governor Cuomo from providing Professor Zelinsky with *any* in-person facility for the duration of the Pandemic.

The Division (like the ALJ) denies the reality of the Pandemic by effectively ignoring the situation Governor Cuomo and the Pandemic created for Cardozo and Professor Zelinsky[13] and by denying the realities of Professor Zelinsky's situation during the Pandemic. Unlike Mr. Fass'

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[11] Division's Brief at page 16 ("The ALJ correctly rejected Professor Zelinsky's citation to" *Fass*).

[12] *See* sources cited *supra* in note 1.

[13] Division's Brief at page 13 (it is irrelevant "that petitioner's New York office at the law school was not available due to the COVID-19 pandemic...") (citing Determination).

employer (which could have built the necessary facilities for Mr. Fass in New York), Cardozo, as Professor Zelinsky's employer, was prohibited from providing Professor Zelinsky with any in-person New York facility for the duration of COVID-19 period. Professor Zelinsky's remote work at home during the Pandemic was for Cardozo's necessity, the only way that Cardozo could operate under the Governor's shutdown order.[14]

Professor Zelinsky has an even stronger case than did Mr. Fass that the "convenience of the employer" rule did not apply to Professor Zelinsky for the COVID period. For that period,

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[14] Troubling in this context is the Division's continuing effort to repudiate the stipulations to which the Division agreed. Division's Brief at pages17-18. In particular, the Division persists in promoting evidence which was neither disclosed to the taxpayers prior to the April 25th hearing before the ALJ nor properly placed into evidence at that hearing. *Id.* This is troubling. Having entered into stipulations, the Division is bound by those stipulations and should not be allowed to sneak into the record exhibits which were neither properly disclosed to the taxpayers before the hearing nor entered into evidence at the 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.").

Ironically, the evidence the Division improperly continues to promote actually confirms the stipulation that Professor Zelinsky had no in-person classroom available to him during the COVID period. Cardozo complied with Executive Order 202.6 and managed the COVID public health crisis by giving each incoming first year student the option of one, small in-person class. 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. This order required Cardozo to use telecommuting for the duration of the Pandemic. 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 open in 2020.

For additional detail and discussion, *see* Reply Brief of the Petitioners-Taxpayers Edward A. and Doris Zelinsky, dated August 4, 2023 at page 3-7 (discussing Division's effort to avoid stipulations with exhibits not properly entered evidence, which exhibits actually confirm the stipulation that Professor Zelinsky had no New York office or classroom available to him due to the Governor's shutdown order).

Governor Cuomo denied Professor Zelinsky access to any in-person facilities in New York. Since the employer convenience doctrine did not apply on the facts of *Fass*, *a fortiori* that doctrine does not apply on the stronger facts of this case. In this case, Governor Cuomo forced Professor Zelinsky to stay out of New York altogether for the duration of the Pandemic. Governor Cuomo did not give Professor Zelinsky's employer the option of building an in-state facility at which Professor Zelinsky could work and teach in-person within the Empire State.

C) The Division refuses to acknowledge the fundamentally different working conditions of the pre-COVID and COVID periods.

For the COVID-19 period, Professor Zelinsky obeyed Governor Cuomo's shutdown order and exclusively worked at home.[15] Consequently, for this 9 ½ month period of 2020, under New York's own regulations, Professor Zelinsky had no New York source income since he worked "wholly without" New York from March 15, 2020 through December 31, 2020. *See* 20 N.Y.C.R.R. § 132.4(b).

To avoid this Pandemic reality, the Division's Brief seeks to negate the significance of the 9 ½ month COVID period of 2020 (when Professor Zelinsky worked exclusively at home in Connecticut) by invoking the first two and one-half months of 2020. During this pre-COVID period, Professor Zelinsky still commuted into Manhattan for in-person classes.[16] This pre-COVID period of 2020, the Division asserts, negates the reality that, for most of 2020, Professor Zelinsky worked exclusively at his home in Connecticut because Governor Cuomo ordered Professor Zelinsky to work at home starting on March 15, 2020.

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[15] Determination, Findings of Fact 16-19, page 5.

[16] *Id.*, Finding of Fact 14, page 4.

In this context, the Division contends that 20 N.Y.C.R.R. § 132.4(b) should be disregarded for the COVID period starting on March 15, 2020 because "Professor Zelinsky's tasks for Cardozo remained the same for the entire year in 2020."[17] This implausible statement equates in-person teaching before March 15, 2020 with Zoom school after that date. This takes Pandemic denial to new heights. Who believes that full-time Zoom education at home during the Pandemic was "the same" as traditional in-person teaching?

Note the tension in the Division's Brief: The Pandemic was "unprecedented"[18] we are told in the Division's Brief. But, a few pages later in the Brief, nothing was different about the pre-COVID and COVID periods "[a]s Professor Zelinsky's tasks for Cardozo remained the same..."[19] The fact remains that the remote work of the Pandemic was very different from pre-COVID work, indeed, constituted a difficult and unprecedented phenomenon.

The text of New York's sourcing regulation belies the Division's approach. 20 N.Y.C.R.R. § 132.4(b) simply asks whether Professor Zelinsky worked "wholly without" New York State – which he did starting on March 15, 2020 as he complied with Governor Cuomo's mandate to work remotely at his home. Since Professor Zelinsky worked "wholly" outside New York for the COVID period teaching remotely, his Cardozo salary for that 9 ½ month period of 2020 was not New York source income.

Consider as well the irrational implications of the Division's analysis: According to this analysis, if the coronavirus had hit New York two and one-half months earlier, then Professor

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[17] Division's Brief at page 15.

[18] *Id.* at pages 12 and 13.

[19] *Id.* at page 15.

Zelinsky would have had no New York source income for 2020 since the Governor's shutdown order would then have covered all of 2020. But because the coronavirus chose instead to come to New York in March, the 2 ½ pre-COVID months of 2020 overwhelm the subsequent 9 ½ months of 2020 when Professor Zelinsky worked exclusively at his home outside Connecticut's borders. This is a strange argument which subjects New York taxpayers to the vagaries of the coronavirus. Had the coronavirus elected to come to New York a little earlier, the tax result for Professor Zelinsky would have been different – so the Division apparently contends, with no basis in the language of New York's sourcing regulation for this counterintuitive contention.

D) Conclusion.

The Division resists the characterization of Pandemic denial.[20] But the Division's Brief obscures the realities of the Pandemic. Professor Zelinsky's remote work teaching at home (mandated by Governor Cuomo) was for Cardozo's necessity, not for anyone's convenience. 20 N.Y.C.R.R. §§ 132.18 . Under the Governor's shutdown order,[21] the only way Cardozo could stay in business during the 9 ½ month COVID period of 2020 was through remote teaching. Due to the Governor's public health order, Professor Zelinsky could not use his (or any other) New York office or classroom. Obeying the Governor's mandate, Professor Zelinsky worked "wholly without" New York for the Pandemic period starting on March 15, 2020. Governor Cuomo's order forbade Professor Zelinsky from working in New York altogether during the COVID period. Cardozo could not have built a facility for Professor Zelinsky during the COVID period unlike Mr. Fass's employer which, for the year in question, could have built in New York the

[20] Division's Brief at 13 ("Professor Zelinsky accuses the ALJ of `pandemic denial.'").

[21] Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020); Governor Andrew Cuomo, Executive Order 202.8 (March 20, 2020),

special facilities Mr. Fass needed for his job. The Division's Brief refuses to acknowledge the fundamentally different working conditions of the pre-COVID world and the entirely remote work of the Pandemic. Before March 15, 2020, Professor Zelinsky taught in-person. For the Pandemic period starting on March 15, 2020, Governor Cuomo mandated full-time remote work at home, a fundamentally different task performed by Professor Zelinsky "wholly without" New York. 20 N.Y.C.R.R. § 132.4(b).

In light of these realities of the Pandemic, the taxpayers should receive their requested refund for 2020 both as a matter of state law and, as observed next, as a matter of federal constitutional law.

II) THIS CASE IS DISTINGUISHABLE FROM *ZELINSKY*, A DECISION WHICH HAS BEEN UNDERMINED BY SUBSEQUENT DEVELOPMENTS.

Responding to Professor Zelinsky's claims under the Due Process and dormant Commerce Clauses, the Division's Brief (like the Determination) relies heavily on the Court of Appeals' 2003 *Zelinsky* decision.[22] But, just as the Division's Brief refuses to recognize the realities of the Pandemic, that Brief disregards the factual differences between *Zelinsky* and the current case. The Division's Brief also ignores the ways in which *Zelinsky* has been undermined by subsequent developments including criticism from scholarly commentators and from Court of Appeals judges. These undermining developments further include the U.S. Supreme Court's post-*Zelinsky* decisions in *Wynne* and *MeadWestvaco*. *Zelinsky* has also been eroded by changed circumstances as remote work has become an accepted, legitimate and central feature of American life. A candid assessment of *Zelinsky* confirms that New York's taxation of the Cardozo income Professor Zelinsky earned in 2019 and 2020 at his home in Connecticut is unconstitutional. That taxation for both years is extraterritorial and unapportioned and is thus forbidden by the Due Process and dormant Commerce Clauses of the U.S. Constitution. Art. I, § 8, cl. 3 (Commerce Clause); Amend. XIV, § 1 (Due Process Clause).

A) The current case is factually distinguishable from the 2003 *Zelinsky* decision.

In at least three respects, this case is distinguishable from *Zelinsky*. First, critical to *Zelinsky* is its characterization of Professor Zelinsky's scholarship as "auxiliary work,"[23]

[22] Division's Brief at page 10 (*Zelinsky* is "binding precedent") and page 11 (same).

[23] *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85, 93, 94 (2003).

"ancillary"[24] to his "primary duties of...teaching classes and meeting with students."[25] Second, the *Zelinsky* Court also emphasized that it was Professor Zelinsky's "voluntary" choice to do his legal writing and research at home in 1994 and 1995. Third, the *Zelinsky* Court dismissed remote work as "manipulati[ve],"[26] since remote workers "bring work home for the evenings or weekends"[27] to reduce their tax burdens. None of this rings true today.

The relevant facts of this case are that, for 2019 and 2020, Professor Zelinsky's major and equally important tasks for Cardozo were teaching and legal scholarship.[28] "When Professor Zelinsky worked on his legal scholarship at his home in Connecticut in 2019 and 2020, he was performing an important task for Cardozo."[29] In contrast to what *Zelinsky* says about 1994 and 1995, there was nothing "auxiliary" or "ancillary" about Professor Zelinsky's legal scholarship in 2019 and 2020.

The Division's Brief, following the Determination, says that this doesn't matter.[30] But it mattered to the Court of Appeals in 2003. The Court of Appeals emphasized that Professor

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[24] Id. at 94.

[25] Id. at 92.

[26] Id. at 94.

[27] Id. at 92.

[28] Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 4; § V(E) of the Benjamin N. Cardozo Governance Rules (exhibit 2) ("each faculty member shall, on a regular basis...[p]repar[e]...scholarly works for publication"). The Division objected to neither of these exhibits which reinforce the Division's Admissions.

[29] Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 6.

[30] Division's Brief at 11 ("does not change the outcome here") (quoting Determination).

Zelinsky's legal scholarship undertaken at home in 1994 and 1995 was of secondary importance ("auxiliary,"[31] "ancillary"[32]). The facts of the current case are different. The Division itself admits that, for 2019 and 2020, Professor Zelinsky's major and equally important tasks for Cardozo were teaching and legal scholarship.[33]

Similarly, *Zelinsky* emphasizes that in 1994 and 1995 Professor Zelinsky exercised a "voluntary" choice to undertake his legal scholarship at home. But, for the COVID period of 2020, there was nothing "voluntary" about Professor Zelinsky's remote work at home. During the Pandemic, *Governor Cuomo ordered Professor Zelinsky to work at home.*[34]

Likewise, the *Zelinsky* Court in 2003 dismissed remote work[35] in a manner no one finds persuasive today. Remote work is now a central, legitimate and accepted feature of contemporary American life. As the Determination finds, the coronavirus changed employment and educational patterns in 2020.[36] Interstate remote work expanded in the years subsequent to 2003 when *Zelinsky* was decided and then burgeoned further during the COVID-19 Pandemic.[37]

In short, *Zelinsky* should not be followed because the facts of the current case are

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[31] *Zelinsky,* 1 N.Y.3d at 93, 94 (2003).

[32] *Id*. at 94.

[33] Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 6).

[34] *See* sources cited *supra* in note 1.

[35] *Zelinsky*, 1 N.Y.3d at 94 ("manipulati[ve]").

[36] Determination, Finding of Fact 12, p.4.

[37] Determination, Finding of Fact 13, p. 4.

different from the facts of *Zelinsky* as the Court of Appeals itself framed those facts.[38] In 2019 and 2020, Professor Zelinsky's legal scholarship was of central importance to Cardozo, not an "ancillary" activity. Professor Zelinsky's remote work at home during the Pandemic was not "voluntary," but was ordered by Governor Cuomo. Remote work is not the manipulative oddity described by the *Zelinsky* Court, but is today an accepted, legitimate and central feature of American life.

B) Neither the Determination nor the Division's Brief confronts the adverse commentary criticizing the 2003 *Zelinsky* decision.

The Court of Appeals has indicated that scholarly opposition to an opinion may impel reconsideration of that opinion.[39] Scholarly opposition to *Zelinsky*[40] was cited to both the ALJ and the Division but was not seriously considered by either them. Just as facts do not cease to exist when they are ignored,[41] adverse commentary does not cease to exist when it is ignored.

The Division's Brief does not confront the cited scholarship, claiming that the

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[38] *Cf.* Division's Brief at 10 (*Zelinsky* "controls the outcome in this matter").

[39] *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y. 3d 1, 25-26 (2016) ("legal commentators have taken issue with" prior decision).

[40] Walter Hellerstein, STATE TAXATION, ¶ 20.05[4][e][ii] (3rd ed. 2022) at *27 (*Zelinsky* decision "does not withstand analysis"); Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 UC DAVIS LAW REV. 1149, 1200 (2021) ("The [Zelinsky] court merely evaded the real issue, what the fair apportionment of multistate income would be if the activity impacts interstate commerce."); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX REV. 885, 922 (2008) ("[T]he *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*...").

[41] With apologies to Aldous Huxley. Aldous Huxley, PROPER STUDIES (1927) ("Facts do not cease to exist because they are ignored.").

Determination reviewed that scholarship.[42] But the reader looks in vain for any such review in the Determination. The ALJ did not substantively address the cited scholarship either.[43]

At one level, it is unsurprising that the ALJ and the Division slight this scholarship. This scholarship affirms that New York's application of the "convenience of the employer" doctrine to a case like Professor Zelinsky's is unconstitutional. The Due Process and dormant Commerce Clauses forbid this kind of extraterritorial, unapportioned income taxation of a nonresident like Professor Zelinsky, as this commentary maintains.[44]

C) The Division's Brief (like the Determination) slights the criticism of *Zelinsky* from judges of the Court of Appeals.

Not only legal commentators have criticized *Zelinsky*. In a remarkable occurrence, two judges of the Court of Appeals who joined in the 2003 *Zelinsky* opinion completely reversed course a little over a year later and joined Judge Robert Smith's dissent in *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427, 440, 450 (2005) (Smith, J., dissenting). The Determination and the Division's Brief slight these unusual events.[45]

These dissents indicate that, from the beginning, *Zelinsky*'s disregard of Due Process and dormant Commerce Clause principles has troubled judges of New York's highest court. As Judge Robert Smith wrote in *Huckaby* for himself and his two colleagues, the Court of Appeals'

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[42] Division's Brief at page 26 (refusing to discuss cited commentary because "the ALJ...correctly analyzed and dismissed Petitioners' arguments that subsequent Supreme Court cases and commentary `eroded' the holding of the Zelinsky Decision.").

[43] Determination, Conclusion of Law L, page 24 (briefly acknowledging critical commentary on *Zelinsky* but failing to discuss it).

[44] *See* commentary cited in note 40.

[45] Division's Brief at page 10 (Division's discussion of *Huckaby* ignores the decisions of Judges G. Smith and C. Ciparick to join Judge R. Smith's *Huckaby* dissent).

application of the employer convenience doctrine to tax nonresidents' incomes earned outside New York's borders is "unsupported by any precedent [and] is a radical departure from long-accepted limits on the powers of states to tax nonresidents." *Huckaby,* 4 N.Y.3d at 447.

Just as the Division's Brief ignores the substance of the legal commentary cited to the Division, that Brief ignores the substance of these judges' arguments that, in situations like the present case, New York's application of the "convenience of the employer" rule runs afoul of the Due Process and dormant Commerce Clauses. These constitutional provisions prohibit extraterritorial state income taxation and require reasonable apportionment of state income taxes imposed on nonresidents working outside the taxing state's borders, as Judges Smith and Ciparick observe in their *Huckaby* dissent. New York's application of the employer convenience rule to tax Professor Zelinsky's 2019 and 2020 salary violates these constitutional norms.

D) The changed reality of remote work in the contemporary economy erodes *Zelinsky.*

Zelinsky dismissed telecommuters' remote work as "manipulating their New York tax liability by choice of auxiliary work location." *Zelinsky,* 1 N.Y. 3d at 94. No one (except apparently the Division) believes this today. Remote work is today a central, accepted and legitimate feature of American life. As the Court of Appeals has observed, subsequent events may require the reassessment of precedent.[46]

That is exactly what has happened between the 2003 *Zelinsky* opinion and today. The growth of remote worked has "undermine[d] the reasoning and practical viability of [the] prior

[46] *Matter of Brooke S.B.*, 28 N.Y. 3d at 25 (internal citation omitted). A precedent should be overturned when an "extraordinary combination of factors undermines the reasoning and practical viability of our prior decision." *Id.* at 23. *See also People v. Taylor,* 9 N.Y. 3d 129, 149 (2007) ("[T]he lessons of time may lead to a different result.").

decision" in *Zelinsky.*[47] Remote work is today fundamental to American life – although both the ALJ and the Division persist in ignoring the voluminous commentary[48] which confirms the legitimacy of remote work in contemporary America[49] and which thus undermines *Zelinsky* and its jaundiced view of remote work.

E) *Wynne* and *Meadwestvaco* erode *Zelinsky*.

MeadWestvaco and *Wynne*, both decided by the U.S. Supreme Court after *Zelinsky*, also erode *Zelinsky*. *MeadWestvaco* strongly affirms the U.S. Supreme Court's opposition to the kind of extraterritorial state income taxation which occurred when New York used the "convenience of the employer" doctrine to tax Professor Zelinsky's Cardozo income earned beyond New York's borders. *MeadWestvaco Corp*., 553 U.S. at 19. *MeadWestvaco* also confirms the importance of apportioning income to the states in which such income is earned. *Id.* at 24.

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[47] *Matter of Brooke S.B*., 28 N.Y. 3d at 23.

[48] *See, e.g.* Cevat Giray Aksoy et al., *Time Savings When Working From Home*, National Bureau of Economic Research (NBER) Working Paper 30866 (Jan. 2023) at page 1; Stephanie M. Stern, *Untransit: Remote Work and the Transformation of Zoning*, 33 STAN. L. & POL'Y REV 79, 84 (2022) ("[T]he growth of remote work"); PR Newswire, *GoGlobal Shares 2023 Remote Work Predictions* (Dec. 15, 2022) ("[D]emand for remote work opportunities is not going away."); Bloomberg, *Will remote work continue in 2023?* THE EAST BAY TIMES (Dec. 29, 2022) ("Gallup projects that about 75% of remote-capable workers will be hybrid or fully remote in the long term."); Jose Maria Barrero, Nicholas Bloom, Shelby Buckman, and Steven J. Davis, WFH Research (Jan. 17, 2023) available at https://wfhresearch.com/ ("Days Worked from Home are Stabilizing at Near 30%"); Alex Tanzi, Matthew Boyle and Bloomberg, *Remote work gains momentum despite return-to-office mandates from high-profile CEOs*, FORTUNE (March 25, 2023) ("The shift to remote work is gaining momentum in some of America's largest metro areas..."); Madison Hoff, *How 3 years of work from home have changed the US economy forever*, INSIDER (April 2, 2023), available at https://www.businessinsider.com/work-from-home-remote-work-changed-economy-Pandemic-2023-4.

[49] *See* Determination, Findings of Fact 12 and 13, page 4 ("The coronavirus changed employment...").

Wynne confirms the Supreme Court's insistence that individuals like Professor Zelinsky receive the protections of the dormant Commerce Clause. *Wynne*, 575 U.S. at 553.

These two post-*Zelinsky* decisions of the U.S. Supreme Court undermine *Zelinsky*. The Division's Brief[50] (like the Determination) discusses *MeadWestvaco* and *Wynne* while avoiding the teachings of these decisions most applicable to this case: The Constitution prohibits extraterritorial state income taxation; states must apportion income to the states in which such income is earned; the protections of the dormant Commerce Clause apply to individuals like the Wynnes and Professor Zelinsky. Had the Division's Brief (or the Determination) forthrightly confronted what the U.S. Supreme Court said in *MeadWestvaco* and *Wynne*, neither the Brief nor the Determination could say what it does.

[50] Division's Brief at pages 21 and 23.

III) *WAYFAIR* IS IRRELEVANT.

Equally unavailing is the Brief's and the Determination's citation to *South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080 (2018).[51] *Wayfair* is a sales tax collection case, of no relevance to New York's obligation to apportion income taxes imposed on nonresidents. *Wayfair* says nothing about income taxes or about the taxation of nonresidents' incomes.

Both the Determination and the Division's Brief push *Wayfair* further than it should go, creating an unmanageable standard of "virtual presence"[52] which causes duplicative, extraterritorial state income taxation. Every day a worker in the modern world likely has virtual presence in many jurisdictions throughout the nation and the world. Under the undefined and unlimited virtual presence test, all of the states in which a worker is virtually present on any day 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.

As the Division's Brief acknowledges, the April 25th hearing in this case was conducted on CISCO Webex.[53] Does anyone believe that the ALJ who conducted this hearing must pay income tax on her salary in every state in which she had virtual presence on that day? The taxpayers don't believe this to be the case. But the undefined and unlimited "virtual presence" test leads to this kind of multiple taxation.

To the extent *Wayfair* is relevant to this case, it supports the taxpayers' position. There

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[51] Division's Brief at page 22 (citing *Wayfair*); Determination, Conclusion of Law I, pages 20-21 (same).

[52] Determination, Conclusion of Law J, page 22.

[53] Division's Brief at page 3 ("by videoconference via Cisco Webex on April 25, 2023") and page 4 ("virtual hearing was held..."); *see also* Determination at page 1.

was no danger of double taxation in *Wayfair.* Wayfair's "virtual presence" in North Dakota permitted the only state which could collect sales tax, i.e., North Dakota, to collect such tax. Nothing in *Wayfair* suggests that the U.S. Supreme Court intended to use "virtual presence" to create multiple state taxes of the income a taxpayer earns sitting for the day at her desk in one state – which is what the limitless "virtual presence" standard pushed by the Determination and the Division does.

CONCLUSION

For the reasons stated in the taxpayers' exceptions, in the taxpayers' brief to the Tribunal and in this reply brief, the Tribunal should rule for the taxpayers in DTA # 830681 and in DTA # 830517. Specifically, the Tribunal should order on state law grounds the refund of the New York income taxes Professor and Mrs. Zelinsky paid during the Pandemic on Professor Zelinsky's Cardozo salary. The Tribunal should also order on federal constitutional grounds the refund of the New York income taxes the Zelinskys paid on the Cardozo income Professor Zelinsky earned at home in both 2019 and 2020.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Edward A. Zelinsky, Esq., hereby certify that, on April 9, 2024, served the foregoing reply brief by U.S. Express Mail and email to the following:

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