NO. _____

IN THE

Supreme Court of the United States

M. CHRISTINE SHAFFER, AS EXECUTRIX OF THE ESTATE OF ADELAIDE CHUCKROW,

Petitioner,

—v.—

COMMONWEALTH OF MASSACHUSETTS, COMMISSIONER OF REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR WRIT OF CERTIORARI and APPENDIX pp. 1a – 380a

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Dated: October 8, 2020

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Can a state impose an estate tax on the termination of an income interest in a trust solely on the basis that a federal election to qualify such trust for the federal marital deduction was made in the estate of the decedent's predeceased spouse, when such predeceased spouse died a domiciliary of another state, and the decedent did not have a power of appointment over the trust assets?

2. Did this Court's ruling in *Fernandez v. Weiner*, 326 U.S. 340 (1945) ("Fernandez") limit or overrule its ruling in *Coolidge v. Long*, 282 U.S. 582 (1931)("Coolidge")?

3. Is the termination of an income interest in a QTIP trust upon the death of the surviving spouse who did not hold a power of appointment over the trust assets and where there was no state QTIP election made upon the death of the predeceased spouse, a transfer causing sufficient nexus to a state to grant it taxing authority under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

There are no other parties in addition to the parties listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, M. Christine Shaffer, as Executrix of the Estate of Adelaide P. Chuckrow ("Executrix"), respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court ("SJC").

OPINIONS BELOW

The opinion of the SJC is reported at 485 Mass. 198 (Mass. 2020) and is reproduced at App. 1-16. The ATB's Findings of Facts and Rulings of Law are unpublished and is reproduced at App. 20 – 46. The relevant Decisions of the ATB are unpublished and reproduced at App. 17 – 19, 314 – 317.

JURISDICTION

The SJC issued its decision on July 10, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The statutory provisions of Massachusetts General Laws chapter 62C §§ 1(f), 2A, 2A(a), 3A, are reproduced at App. 54 – 62, 66 – 68.

INTRODUCTION

The question presented for this Court to consider is if a state may, without violating the Due Process Clause of the United States Constitution ("Constitution"), impose an estate tax on a trust

solely on the basis that a federal election to qualify such trust for a federal marital deduction was made by the executors of a predeceased spouse who died a domiciliary of another state where the surviving spouse did not hold a power of appointment over the trust assets and the only nexus to the state levying the estate tax is that the lifetime income beneficiary of the trust (the surviving spouse), died domiciled in the state. The SJC answered this question in the affirmative in its holding in *M. Christine Shaffer, as Executrix of the Estate of Adelaide Chuckrow v. Commissioner of Revenue*, 485 Mass. 198 (Mass. 2020) ("Shaffer") and its decision is contravention of this Court's rulings in *Coolidge*, *Frick v. Pennsylvania*, 268 U.S. 473 (1925)("Frick"), *Quill Corp. v. N.D.*, 504 U.S. 298 (1992)("Quill"), *Treichler v. Wisconsin*, 338 U.S. 251 (1949)("Treichler"), *Orr v. Gilman*, 183 U.S. 278 (1902) ("Orr") and *North Carolina v. Kaestner*, 139 S.Ct. 2213 (2019) ("Kaestner"), and is repugnant to the requirements imposed on the States by the Due Process Clause of the Fourteenth Amendment to the Constitution. The taxing statute is especially offensive to Due Process of Law where Massachusetts has afforded the trust and Mr. Chuckrow nothing for which it is asking to receive taxes in return. *See Treichler v. Wisconsin*, 338 U.S. 251, 257 (1949).

In coming to their conclusion the SJC heavily relied upon *Estate of Brooks v. Comm'r of Revenue Servs.*, 159 A.3d 1149 (Conn. 2017), *cert. denied*, 138 S.Ct. 1181 (2018)("Brooks") analysis of *Fernandez* despite the fact that the decedent in Brooks held and exercised a power of appointment over the trust assets under the laws of Connecticut while domiciled in Connecticut, an important distinction that affects

the rights of the beneficiaries of the trust and the rights of a state to tax the assets of a trust.

In light of Connecticut and Massachusetts reliance upon *Fernandez* in rendering their decisions, in answering the question presented, this Court must consider whether or not its ruling in *Fernandez* limited or overruled its decision in *Coolidge* that

> The provision for payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remainderman, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds . . . The succession, when the time came, did not depend upon any permission or grant of the commonwealth . . . the commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds.

If *Coolidge* was not overruled by *Fernandez* it would govern the result here. In *Coolidge* this Court overruled the SJC's decision that a transfer occurred

upon the death of the income beneficiary of a trust rather than the assets being vested in the remainder beneficiaries at the time of the transfer to the trust. In the last decade states across the country have grappled with answering this question; only this Court can provide the needed guidance to legislators, governmental agencies, and taxpayers regarding a state's right to impose estate taxes upon a trust where the surviving spouse has no power to revoke, amend, or appoint assets and the only nexus to the state is that the income beneficiary of the trust died domiciled in the state.

STATEMENT OF THE CASE

The issue before this Court is whether a state may impose an estate tax on a surviving spouse, who was only a beneficiary of a QTIP trust that was established upon the death of the first-to-die spouse, where the only nexus to the state (in this instance Massachusetts) is that the surviving spouse--an income beneficiary with no power of appointment--moved to Massachusetts after her husband's death. According to the Constitution, the answer must be no in order to avoid an unconstitutional taking in violation of the Due Process clause of the Fourteenth Amendment.

Mr. Chuckrow's executrix made a federal and NY QTIP election on the value of property which funded a NY testamentary trust under the terms of his Will. The Decedent, Mr. Chuckrow's widow and income beneficiary of the QTIP Trust, moved to Massachusetts and died domiciled there on August 14, 2011. By virtue of Mrs. Chuckrow being domiciled in Massachusetts, Massachusetts has ruled that it may impose an estate tax upon the QTIP property based upon its inclusion in Mrs.

Chuckrow's Federal Gross Estate under the current "sponge tax" scheme despite Mrs. Chuckrow not being able to alter the economic or legal rights of the beneficiaries of the trust; or in other words, she could not make a transfer. This is an unconstitutional basis for assessing estate taxes and the taking of personal property for public use under the Fourteenth Amendment because the estate tax is an excise tax on the privilege of transferring property and no transfer occurred upon the death of Mrs. Chuckrow by Mrs. Chuckrow as required by the Constitution. In this case, the only transfer took place when Mr. Chuckrow died and the NY and federal QTIP elections were made in accordance with I.R.C. § 2056(b)(7)(B)(v) and its NY corollary.

For the reasons set forth herein, as the QTIP Trust has no nexus to MA other than the Decedent being domiciled there at death, and no transfer of the QTIP trust occurred upon the death of the Decedent, the collection of the $1,953,052.00 from the Decedent's estate based upon the so-called "sponge tax" is an unconstitutional taking under the Fourteenth Amendment.

A. PROCEDURAL HISTORY

The Decedent died domiciled in Williamstown, MA on August 14, 2011. App. 327. On May 14, 2012, the Decedent's Estate filed a M-706 along with the required copy of its Federal Estate Tax Return ("706") reporting a tax due to the DOR in the amount of $100,997.00 along with payment of same. App. 333. On the M-706, the Estate reported a Gross Estate of $2,382,148.00 and on the Federal Return, reported a Gross Estate of $15,633,617.00. App. 329. The difference between the gross estate reported on the M-706 and 706 of $13,251,469.00 was the value

of the NY QTIP Trust created u/w/o Robert Chuckrow, the Decedent's spouse, a NY domiciliary who died on July 11, 1993, which was included in the Decedent's Federal estate under I.R.C. § 2044. App. 470 - 546.

The Commissioner selected the M-706 for audit and sent the Estate a Notice of Intention to Assess Work Papers dated August 29, 2013 ("Work Papers"), which showed the Commissioner proposed to assess an additional estate tax in the amount of $1,809,141.88 based upon increasing the Federal Gross Estate by $13,251,469.00 due solely to the inclusion of the QTIP assets in Mrs. Chuckrow's Federal Gross Estate. App. 234 – 240. The Estate also received a Notice of Intention to Assess ("NIA") dated September 27, 2013. App. 241 – 247.

The Estate requested a conference regarding the NIA, held on February 12, 2014. See App. 414 - 546. After the conference, the DOR assessed the tax as proposed and sent the Estate a Notice of Assessment ("NOA") dated March 18, 2014, which also assessed interest in the amount of $143,890.00 resulting in a total balance due in the amount of $1,953,032.00. App. 248 - 256. On April 11, 2014, the Commissioner received a check from the QTIP Trust u/w/o Robert Chuckrow, deceased, in the amount of $1,953,032.00. App. 408 – 413. On April 17, 2014, the Commissioner refunded $1,283.77 to the Estate consisting of an overpayment of $1,283.34 and $0.42 in refunded interest pursuant to G. L. c. 62C, § 40.

On November 11, 2014, the Estate filed an Abatement Application, and requested a conference. See App. 14 – 546. The request was denied citing G. L. c. 62C, § 37 since no new facts or legal

precedent was presented in the Abatement. App. 314 – 317. The Abatement Application was denied, and the Estate received a Notice Abatement Determination on May 19, 2015. *Id.* The NOA at issue has been paid in full, and the DOR's records show the following MA Return and Audit assessments and payments:

	Tax Assessed	Interest Assessed	Total Paid
MA Return	100,997.00	0.00	100,997.00
Audit	1,809,141.88	142,606.35	1,951,748.23
Total	1,910,138.	142,606.35	2,052,745.23

On June 25, 2015, the Estate timely filed a Petition to Appeal the abatement. Between November 4, 2016 and August 21, 2017, the Decedent's Estate and the Massachusetts Department of Revenue ("MDOR") filed briefs with the ATB supporting their positions. App. 547 – 765. The ATB heard oral arguments from both Parties. On September 11, 2017, the ATB issued a decision in favor of the MDOR. App. 17 – 19. Comm'r Scharaffa dissented. App. 39 – 43.

On September 11, 2017, the Decedent's Estate filed a request for the ATB to promulgate written findings of facts pursuant to G. L. c. 58A, § 13 and they were promulgated on April 29, 2019. App. 20 – 46. The Decedent's Estate timely filed a Notice of Appeal. On July 15, 2019 the Decedent's Estate filed an application for direct appellate review which was allowed on September 13, 2019. On February 6, 2020 the SJC heard oral arguments and on July 10, 2020 ruled against the Petitioner. App. 1- 16.

REASONS FOR GRANTING THE WRIT

I. Massachusetts cannot participate in the fictional transfer on death created by §2044 of the Internal Revenue Code("Code") because Mr. Chuckrow died a domiciliary of NY.

There is no dispute that under Massachusetts Estate Tax Law the Decedent's Massachusetts taxable estate is calculated using the Federal Gross Estate. See M. G. L. c. 65C § 2A. However, simply using the Federal Gross Estate as a basis for determining the gross estate unconstitutionally includes property over which Massachusetts has no right to tax. This includes real property located in another state, as well as QTIP property for which there was no Massachusetts QTIP election made leading to an unconstitutional result. The SJC held, in *Shaffer* in reliance upon the *Brooks* Court's analysis of *Fernandez*, that pursuant to M. G. L. c. 65C § 2A Massachusetts could ignore the basis for how the U.S. calculated the Federal Gross Estate and could rely solely on the Decedent's Federal Gross Estate without giving adequate consideration to whether that approach includes assets that are not within the taxing authority of the Commonwealth of Massachusetts. This has led to an unconstitutional result that must be abrogated.

Sections 2033 and 2056 of the Code and this Court's decision in *Coolidge*, make clear that the first-to-die spouse engages in the actual transfer of the QTIP Property.[1] Because the United States

[1] Under federal law, property is transferred from a trustor when a trust is created, not when an income interest in the trust expires. *Coolidge v. Long*, 282 U.S. 582, 605 (1931).

("U.S.") has the right to tax that transfer from the first-to-die spouse to the QTIP Trust, it also has the right to defer the collection of that tax under a specific statutory protocol. If those statutory requirements are met, the U.S. agrees to take its tax later, upon the death of the surviving spouse, even though no real transfer of the property occurs at that time. Thus, arises the "fictional transfer" which is central to the operation of the tax on the surviving spouse and to this case. To allow the estate tax to be deferred until the death of the surviving spouse, Congress needed to create a fictional transfer from the surviving spouse to the trust remaindermen upon the death of the surviving spouse. I.R.S. Tech. Adv. Mem. 9608001, 1996 WL 76435 at *4, (Feb. 23, 1996); see also, *In re Estate of Bracken*, 290 P.3d 99, 107-109 (Wash. 2012).

There is no dispute that there was no actual transfer by the Decedent when the Decedent died. The Decedent's interest in the trust terminated on her death and passed according to the wishes of her predeceased spouse contained in the will that established the QTIP trust. There was nothing for Mrs. Chuckrow to transfer. *Coolidge v. Long, supra*. There was only a fictional transfer at her death and that fiction was needed by the U.S. to avoid violating Article I, Section (9) of the U.S. Constitution.

Accordingly, the actual transfer occurred when the QTIP Property passed from Mr. Chuckrow to the Trust.

A. The I.R.S. can tax the fictional transfer; Massachusetts cannot in the absence of a Massachusetts QTIP election.

The fact that the U.S. can tax the fictional transfer of the QTIP Property from the Decedent but Massachusetts cannot is the result of the proper application of §2044(b)(1)(A) of the Code. The U.S. can tax the fictional transfer of property from the Decedent through §2044 because the U.S. can meet all the requirements of §2044 to impose such a tax. Massachusetts, in contrast, cannot meet the precondition requirement set forth in §2044(b)(1)(A) which states:

> "This section applies to any property if (1) a deduction was allowed with respect to the transfer of such property to the decedent (A) under section 2056 by reason of subsection (b)(7) thereof."

Massachusetts did not previously allow the marital deduction under §2056(b)(7); as a result, §2044(b)(1)(A) is not satisfied. Since §2044(b)(1)(A) is not satisfied, §2044, and consequently §2044(c), does not apply. Since §2044(c) does not apply, Massachusetts cannot take the same position as the U.S. While the U.S. can tax the fictional transfer by way of §§2044(b)(1)(A) and 2044(c), Massachusetts cannot. These tax provisions were designed specifically to allow a married couple to defer estate taxes to be collected until the death of the survivor and not to create a second transfer upon the death of the survivor.

The result above is fair and just. Had Mr. Chuckrow died a resident of Massachusetts, Massachusetts would have had the right to tax that

transfer, and under Massachusetts estate tax law Mr. Chuckrow would have elected to defer that estate tax until the death of the survivor. No such election was made because Mr. Chuckrow died domiciled in NY and there was no nexus to Massachusetts at the time of his death. Therefore, it is unjust for Massachusetts to assess an estate tax solely based on a federal QTIP election without Mr. Chuckrow having been afforded an opportunity to make or not make a Massachusetts QTIP election. Therefore, Massachusetts cannot tax the fictional transfer and Massachusetts cannot participate in the fiction because the prerequisites have not been met.

B. There is no Constitutional basis under which the QTIP trust assets are properly included in the Decedent's Massachusetts taxable estate.

As shown above, the QTIP Property is not includable in the Massachusetts gross estate under §2056 or §2044. There is no other way the QTIP Property is includable because it does not satisfy any other Code sections triggering inclusion and because the Decedent's limited interests do not rise to the level of beneficial ownership; it is merely a terminable income interest akin to a life estate in real property. The estate tax imposed on the Decedent's estate by Massachusetts can only be defined as a direct tax on the value of the property and not an excise on the privilege of transferring the property as is required by the Fourteenth Amendment to the Constitution. *Shaffer v. Comm'r of Revenue*, No. C327773, 2019 WL 2158344, at *6 (Apr. 29, 2019) (citing *Knowlton v. Moore*, 178 U.S. 41 (1900).

Given the difficulties of apportioning a tax among the states, Congress has not adopted a direct tax since 1861 and has instead relied for revenues on the income tax and on excise taxes authorized by the Sixteenth Amendment. See *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1988); *Knowlton* at 47. (Succession, inheritance, estate, and death taxes are excise taxes on the privilege of shifting or transmitting property at death); see also, Treas. Reg. § 20.2033-1(a) (2019) (The estate tax is an excise tax on the transfer of property at death and is not a tax on the property transferred). An estate tax must be tied to a transfer; otherwise, it is unconstitutional. *Levy v. Wardell*, 258 U.S. 542, 544-45 (1922) (attempt to tax at death a lifetime transfer of stock with retained income interest would be an unapportioned direct tax, not a transfer tax). This is exactly what Massachusetts has done.

II. The Massachusetts Supreme Judicial Court Failed to Follow This Court's Precedent on the Constitutional Limitations of the States' Taxing Power.

A. *Coolidge v. Long*, 282 U.S. 582 (1931), on termination of an income beneficiary's interest on death not being a transfer.

This Court held in *Coolidge* that the termination of an income interest in a trust by reason of a beneficiary's death, without more, is not a transfer because the interest of the income beneficiary ends with his or her death and thus the decedent has nothing to transfer. In this case, the sole reason to include the QTIP assets is the federal QTIP election made on the death of Mr. Chuckrow.

This election was made to defer Federal not Massachusetts estate tax.

In order to justify the imposition of the estate tax on Mrs. Chuckrow's estate, the SJC, like the *Brooks* court, resorted to language from *Fernandez* dealing with community property, wherein this Court determined that any transmutation of rights constitutes a transfer. The *Fernandez* ruling comes from a time where the women of this country were fighting to be viewed equally to men under the law and were viewed by many states as being incapable of owning any property without their husband exercising dominion and control over it. Therefore, upon their husband's death there was a transmutation of rights because the dominion and control of the property was released. This conceptual framework is a vestige of this nation's history that is not in line with modern sensibilities that rightly consider both males and females to be equal in their capacity as property owners. The *Shaffer* decision cannot be allowed to stand on *Fernandez* whose time and utility has passed. Nonetheless, states like Connecticut and Massachusetts are using this Court's ruling to justify an unconstitutional taking and view *Fernandez* as overruling *Coolidge.* In *Coolidge* this Court ruled that Massachusetts' imposition of an estate tax in the absence of a transfer is unconstitutional and this Court's ruling in *Coolidge* should controlled here.

The SJC chose not to address this Court's ruling in *Coolidge* and instead relied upon the Connecticut Supreme Court's interpretation of both *Coolidge* and *Fernandez*. The Connecticut Supreme Court in *Brooks* purports to distinguish this Court's holding in *Coolidge, supra*:

> Put more simply, the statute, by its terms, taxed the transfer in trust of the property. In the present case, the statute does not purport to tax the transfer of assets from Everett; rather, the statute taxes property in which the decedent had a federally qualifying life interest. See 26 U.S.C. §2044 (a); General Statutes §12-391 (c) (3). ***The tax in the present case is directly targeting the changes in legal and economic relationships to the property, not a prior transfer.***

Brooks, 159 A.3d at 1168 (emphasis added).

However, Massachusetts' reliance upon the findings in *Brooks* is misplaced because there is a vast factual distinction in that Mrs. Brooks exercised a testamentary limited power of appointment in a Will that was Probated in the Connecticut courts. *Brooks* fn. 21. The Connecticut Supreme Court relied upon the exercise of this power of appointment in finding that the Decedent had changed the legal and economic relationships to the property giving rise to a sufficient nexus to Connecticut to tax the trust assets. *Brooks* at fn. 21. In stark contrast, Mrs. Chuckrow had no power of appointment available to exercise. In their analysis of *Brooks,* the SJC found:

> The Connecticut Supreme Court determined that a second transfer of the QTIP assets occurred upon the death of the surviving spouse. *Id.* at 730-731, 159 A.3d 1149. In reaching this conclusion, the court stated that "a sovereign may tax the transmutation of legal rights in property occasioned by death." *Id.* at 729, 159 A.3d 1149, citing *Fernandez*, *supr*a at 358, 66 S.Ct. 178. The Connecticut Supreme Court noted that the Fernandez

> Court's practical approach "looked not to whether death was the generating source of 'rights,' but rather whether death was the generating source of 'changes in the legal and economic relationships to the property taxed.'" *Estate of Brooks, supr*a at 733, 159 A.3d 1149, quoting *Fernandez, supra* at 356-357, 66 S.Ct. 178.

In reliance upon this analysis and without consideration of Mrs. Brooks exercise of a testamentary power of appointment altering the disposition of trust assets, the SJC determined that in this case a:

> change in legal relationship that occurred upon the death of the decedent that constitutes a transfer for estate tax purposes and brings the QTIP assets within the Massachusetts taxable estate. See *Fernandez*, *supra* at 355, 66 S.Ct. 178; *Estate of Brooks, supra* at 729, 733, 159 A.3d 1149.

Without Mrs. Chuckrow holding and/or exercising a power of appointment, the sole nexus between Massachusetts and the trust assets was the mere fact that Mrs. Chuckrow died domiciled in Massachusetts which is not a sufficient nexus to allow Massachusetts to tax the assets. *See Kaestner,* 139 S.Ct. at 2227 – 2228. Without Mrs. Chuckrow having any additional control over the trust assets, under this Court's ruling in *Coolidge* the transfer to the contingent beneficiaries fully vested upon the death of Mr. Chuckrow and there was no second transfer upon the death of Mrs. Chuckrow.

Massachusetts is attempting to rely on the inclusion provision of §2044(a), based on a fictional

transfer provided by §2044(c) and while simultaneously ignoring the marital deduction precondition required by §2044(b). Allowing a state to cherry-pick the parts of the Code that produce favorable results without a statutory basis is unjust and illogical. How would a taxpayer know which Code provisions apply? If Massachusetts wishes to rely on §2044, it must be required to comply with all three parts of Code §2044, including §2044(b).

The conclusion of the SJC is incorrect. The SJC is ignoring of Mrs. Brooks' exercise of a limited testamentary power of appointment in a will drafted and probated under the laws of Connecticut. The exercise of the power of appointment underpins the Connecticut Supreme Court's finding that upon Mrs. Brooks' death there was a change in the legal and economic relationships that allowed Connecticut to tax the assets. In *Shaffer* there was no such change in the legal or economic relationship to the trust property and Mrs. Chuckrow did not have the ability to alter the legal and economic relationships without an available power of appointment.

But for §2044, the trust corpus would not be includable in the Decedent's Federal Gross Estate. Had the §2056(b)(7) marital deduction not been taken on the federal estate tax of Mr. Chuckrow (thereby triggering §2044 inclusion), the very same property under the same circumstances would not be includable in the Decedent's Federal Gross Estate because the termination of a life interest does not cause inclusion. It is only the transfer itself that can be taxed by Congress without violating Article I Section 9 of the U.S. Constitution, unless the tax is apportioned among the states based on population. There are no changes in the legal and economic relationships to the property on the death of the

Decedent do not change as a result of a federal estate tax deferral election made by the executors of her husband's estate.

The upholding of an estate tax based solely upon the Decedent dying domiciled in Massachusetts after her husband's estate elected to defer NY estate taxes grants the Commonwealth of Massachusetts taxing powers beyond its Constitutional limits, ignores *Coolidge*, and violates the Due Process Clause. Despite this, this is exactly what the SJC is permitting the Commonwealth of Massachusetts to do in ruling that:

> Because Robert's estate did not make a Massachusetts QTIP election, nor was there otherwise any Massachusetts QTIP property as defined in G. L. c. 65C, § 3A, the board did not err in determining that G. L. c. 65C, §§ 1(f) and 3A, do not bear upon the estate's Massachusetts estate tax obligation under G. L. c. 65C, § 2A. Therefore, we look to the plain meaning of § 2A, which requires the inclusion of all assets that the estate reported in the Federal gross estate. Therefore, the QTIP assets were includable in the estate for purposes of the Massachusetts estate tax.

The effect of this ruling is that Massachusetts can tax transfers that happened in another state, outside of their jurisdiction, merely because an income beneficiary of a trust with no possession, control or enjoyment, over the trust assets, died domiciled in Massachusetts.

B. *Quill Corp. v. N.D.*, 504 U.S. 298 (1992), on minimum contacts needed to satisfy Due Process.

In *Quill*, this Court held that the Due Process Clause of the Constitution "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' … and that the 'income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Quill*, 504 U.S. at 306 (internal cites omitted).

> Due Process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the Due Process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him.

Id. at 312.

In *Shaffer*, *supra*, the SJC relied upon this Court's decision in *Curry v. McCanless*, 307 U.S. 357 (1939)("Curry"), to conclude that minimum contacts had been established by Mrs. Chuckrow merely dying domiciled in Massachusetts in ruling

> a State's imposition of an estate tax on intangible property, such as the QTIP assets here, with the decedent's domicil [*sic*] in the State at death forming the requisite nexus for the State to impose the estate tax.

The SJC's reliance on *Curry* is unwarranted. In *Curry,* the trust was created in Alabama by Ms. Curry (a domiciliary of Tennessee), and the trust securities were always held in Alabama. She retained, *inter alia*, an income interest in the trust

property and, unlike Mrs. Chuckrow, a general testamentary power to appoint the trust assets. Accordingly, when she died a domiciliary of Tennessee, where she was a domiciliary when she created the trust, the trust assets were taxable by Tennessee because of Code §§2036 and 2041. This Court recently revisited *Curry* in *Kaestner* and determined that "in the case of intangible assets held in a trust, we have previously asked whether a resident of the State imposing the tax had control, possession or enjoyment of the asset." 139 S.Ct at 2227. Ultimately, this Court concluded in *Kaestner* that if a "resident beneficiary has neither control nor possession of the intangible assets in the trust. She does not enjoy the use of the trust assets." *Id.* 2227 – 2228. Massachusetts made no such inquiry into whether Mrs. Chuckrow had control, possession or enjoyment of the trust assets. If they had, they would have determined that she did not.

In *Shaffer*, the trust was created in NY under the Will of the Decedent's husband, the trust securities were never held in Massachusetts, the Decedent did not create the trust, and the Decedent did not have a limited or general power to appoint the trust assets. The Decedent merely had an income interest that terminated upon her death. The trust assets over which she had absolutely no dominion, control, or enjoyment, had fully vested in her daughters upon her husband's death. There was no nexus between Massachusetts and the trust assets, an alteration of the economic or legal interests in the trust assets, nor a transfer upon the Decedent's death such that Massachusetts had taxing authority over the assets. See *Coolidge v. Long,* 282 U.S. 582 (1931); *Curry v. McCanless*, 307 U.S. 357 (1939).

During the time that the Decedent was domiciled in Massachusetts, the income generated by the QTIP Trust was taxable by Massachusetts, and the assets owned by her at her death were properly included in her Massachusetts' gross estate. However, Massachusetts conferred no benefit or governmental support with respect to the QTIP Property that would afford an adequate constitutional basis for imposing an estate tax on such QTIP Property, unlike in *Brooks* where Mrs. Brooks exercised a limited power of appointment granted to her in a will drafted and probated under the laws of the State of Connecticut.

Mr. Chuckrow was a NY domiciliary on his date of death. The intangible assets that he owned at his death which were transferred pursuant to his will to the QTIP Trust are deemed to have situs in the state of his domicile, NY. (see, e.g., *Blodgett v. Silberman*, 277 U.S. 1, 10 (1928); *Silberman v. Blodgett*, 134 A. 778 (Conn. 1926); *Bullen v. Wisconsin*, 240 U.S. 625, 631 (1916) (all standing for the proposition that intangible personal property is deemed to have situs where a decedent was domiciled). Accordingly, Massachusetts has no link or minimum connection to the actual transfer from Mr. Chuckrow to the QTIP Trust that occurred in NY at the time of Mr. Chuckrow's death. Massachusetts has decided they get to tax the underlying assets of a terminable income interest simply because the beneficiary of that income interest had died domiciled in their State. This is repugnant to Due Process and this Court's repeated rulings.

The succession of interests when the Decedent died did not depend on any permission or grant of the Commonwealth of Massachusetts. Furthermore,

Massachusetts did not defer Massachusetts estate tax on Mr. Chuckrow's death because Mr. Chuckrow had no nexus to Massachusetts and died domiciled in NY. Resultingly, there was no reason for Mr. Chuckrow to avail himself of the Massachusetts estate tax laws permitting the deferral of estate taxes to the death of the second spouse to die. Massachusetts may not now claim the benefit of Code §2044(c) which requires the trust to be included in the Federal Gross Estate of the Decedent solely because it has decided it does not have to look any further than the Federal Gross Estate of the decedent under M. G. L. c. 65C § 2A. The appeal to M. G. L. c. 65C § 2A is without merit, as it is based solely on the Decedent dying domiciled in Massachusetts and not because a taxable transfer occurred upon the Decedent's death.

Since Massachusetts has no nexus to the NY transfer that occurred on the death of Mr. Chuckrow, its attempt to impose an estate tax on the transfer violates this Court's holding in *Quill* and *Kaestner supra*, as well as the Due Process Clause of the Fourteenth Amendment to the Constitution. "If the state has afforded nothing for which it can ask return, its taxing statute offends against that Due Process of law it is our duty to enforce." *Treichler*, 338 U.S. at 257.

C. *Frick v. Pennsylvania,* 268 U.S. 473 (1925), on States' Constitutional taxing jurisdiction.

This Court's decision in *Frick* makes clear the limitations that Due Process places upon a state's power to impose an estate tax. A state may not tax (1) real or tangible personal property located in another state, and by this Court's reasoning, (2)

transfers of intangible personal property of a decedent domiciled in another state. This is because there is an insufficient nexus between the property and the state seeking to impose the tax.

In *Frick*, the State of Pennsylvania sought to impose a tax on the transfer of real and personal property of a Pennsylvania decedent whether such property was located in Pennsylvania or elsewhere. *Frick*, 268 U.S. at 487-488. However, the language of the statute was not sufficient to sustain the tax. This Court, in *Frick* recognized that the statute of the taxing jurisdiction may not be drafted to accomplish indirectly that which the taxing jurisdiction has no Constitutional authority to do directly, and held that Pennsylvania's statute violated the 14th Amendment insofar as it taxed the transfer of assets having situs in other states. *Id.* at 494-495. *Frick* limited a state's jurisdictional right to impose an estate tax to only those assets of a decedent having situs in the state. *Id.* at 489, 490. *Frick* also held that efforts to circumvent that jurisdictional limitation would not be countenanced. *Id.* at 494, 495. Massachusetts' reliance on the Federal Gross Estate as being the starting point for estate taxation without allowing for adjustments for all transfers that occurred in another jurisdiction and assets having situs outside of Massachusetts and to which Massachusetts has no nexus operates to circumvent this Court's holding in *Frick* and the jurisdictional limitation imposed upon Massachusetts by the Fourteenth Amendment and is therefore unconstitutional.

When *Frick* was decided, the only property that could have situs outside of the taxing (domiciliary) state was real and tangible personal property located outside of the taxing state. Since

Frick was decided, §§2056(b)(7) and 2044 of the Code were enacted giving the executors of a decedent's estate the ability to elect to treat a qualifying trust as marital deduction property thereby deferring the tax on the transfer that occurred on the death of the first spouse to die. As a result of the enactment of the QTIP election, if the surviving spouse moves to another state after the death of his or her spouse, the estate of the surviving spouse will have QTIP Property that is includable in his or her Federal Gross Estate but not in the gross estate of the state of his or her new domicile. By relying on the Federal Gross Estate as the basis for the imposition of the Massachusetts estate tax without adjusting for non-Massachusetts situs property and transfers that occurred in another jurisdiction by Mr. Chuckrow's estate, Massachusetts is doing indirectly what is forbidden to be done directly. This is an attempt to skirt the Constitutional limitations imposed upon the state by the Due Process Clause of the Fourteenth Amendment and is acting in contravention of the holding of this Court in *Frick*. Yet, that is precisely what the SJC in *Shaffer* has decided Massachusetts has authority to do.

D. Massachusetts Must Make a Pragmatic Inquiry Into What Exactly the Decedent Controls and Possesses

The Petitioner agrees that Massachusetts may impose an estate tax upon intangibles held by a decedent domiciled within its borders and transferred by such Decedent. However, the analysis must go beyond the ability of Massachusetts to impose an estate tax and its ability to impose that estate tax upon intangibles held by a Massachusetts domiciliary upon their death. This is because the

estate tax is a tax on the privilege of transferring assets upon one's death thereby exercising the privilege "of a testator to make a will or testamentary instrument" granted by Massachusetts. See *Orr v. Gillman*, 183 U.S. 278, 283 (1902); see also, *Opinion of the Justices*, 196 Mass. at 618 (transfer of intangible property is the exercise of a privilege); *In re Hambleton*, 181 Wash.2d 802, 810 (2014)("estate taxes are excise taxes.").

> [A] tax is an 'excise' or 'transfer' tax if the government is taxing 'a particular use or enjoyment of property or shifting from one to another of any power or privilege incidental to ownership or enjoyment of property.'

Hambleton, 181 Wash.2d at 811, quoting, *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945). Therefore,

> when a State seeks to base its tax on the in-state residence of a trust beneficiary, the Due Process Clause demands a pragmatic inquiry into what exactly the beneficiary controls or possesses and how that interest relates to the object of the State's tax.

North Carolina Department of Revenue v. The Kimberley Rice Kaestner 1992 Family Trust, 139 S.Ct. 2213, 2221- 22 (2019).

Here, Massachusetts made no such pragmatic inquiry into whether or not Mrs. Chuckrow had dominion, control or possession of the trust assets. Rather, the SJC ended their inquiry in determining that under M. G. L. c. 65C § 2A the Massachusetts Gross Estate equals the Federal Gross Estate. Here, Mrs. Chuckrow had no right or ability to transfer the QTIP assets upon her death, especially in light of the

incontrovertible fact that she was not granted a power of appointment over the QTIP assets. See *Orr v. Gilman*, 183 U.S. 278 (1902) ("it cannot be denied that, in reality and substance, it is the execution of the power that gives the grantee the property passing under it"). In *Orr*, this Court found:

> the right to take property by devise is not an inherent or natural right, but a privilege accorded by the state, which it may tax. . . [and] the rights of a testator to make a will or testamentary instrument is equally a privilege, and equally subject to the taxing power of the state. When [a testator] devises property to the appointees under the will [of another], he necessarily subjected it to the charge that the state might impose on the privilege accorded to [the other] of making a will.

Therefore, without a limited or general power of appointment Mrs. Chuckrow cannot be deemed to have transferred the assets at her death. It was exclusively Mr. Chuckrow's transfer of his assets at his death granted by the privileges of NY that transferred the assets to the remainder beneficiaries and the assets fully vested in the remainder beneficiaries upon Mr. Chuckrow's death. By definition a terminable interest is:

> an interest in property that passes from a predeceasing spouse to a surviving spouse that will end on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur. Upon termination of the surviving spouse's interest, the remainder interest passes to beneficiaries (other than the surviving spouse

> or her estate) selected by the predeceasing spouse, and thereby avoids inclusion in the surviving spouse's estate. (Emphasis added).

Estate of Kite, T.C. Me. 2013-43 * 11; see also, *Estate of Sommers*, 149 T.C. 209, 223 (2017)("a terminable interest such as a life estate . . . will not be included in the estate of the second spouse upon death"). An example is a life estate given by a deceased spouse to a surviving spouse which is not includable in the surviving spouse's estate since a life estate is non-transferrable, ends on death, and the life tenant does not control the disposition of the remainder interest.

Massachusetts' failure to look beyond the Federal Gross Estate to determine that Mrs. Chuckrow merely had the equivalent of a life estate in the income interest of the QTIP assets violates the Due Process Clause of the Fourteenth Amendment of the Constitution.

III. The issues presented herein have never been decided by this Court and have broad importance to citizens of all 50 States.

A. States and taxpayers need guidance and clarification of states' taxing powers.

Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New York, Rhode Island, Vermont, and Washington, D.C. all have a sponge tax based upon the federal estate tax credit found in I.R.C. §2011 as it existed on January 1, 2001 prior to the enactment of the Economic

Growth and Tax Relief Reconciliation Act.[2] The statutes in these states rely solely upon the definition of the Federal Gross Estate in calculating their estate tax. This schema ignores this Court's decisions requiring a transfer within the boundaries of and under the laws of the state for there to be a sufficient nexus to the state to levy the tax. Instead, these states rely upon a fictional transfer set forth in the Code to declare a transfer occurred expanding their taxing power to tax the underlying assets of a terminable income interest for no other reason than the second-to-die spouse died domiciled in their State and they want to collect the tax revenue. This simplified approach used by ten states and Washington, D.C. is constitutionally infirm. As discussed *supra.* this is a not a constitutional or rational basis for taxing the underlying assets of a terminable income interest because the assets of a QTIP trust vest in the remainder beneficiaries upon the death of the first spouse to die, in this instance, Mr. Chuckrow, and the only transfer occurred upon his death and not the death of his surviving spouse.

Surviving spouses who are terminable income beneficiaries of QTIP Trusts and who have no power to change or alter the economic or legal relationships of the assets need clarity as to the constitutional restraints that exist, if any, on the ability of a state to impose its estate tax on QTIP Trusts created in another state. It is not uncommon for a person who has lost a spouse to wish to move closer to other family members who may reside in another state. Surviving spouses have a right to know if they move to another state, whether or not a State has taxing

[2] Relevant portion of Economic Growth and Tax Relief Reconciliation Act of 2001 is reproduced at App. 155 – 222.

authority over a terminable income interest upon their death despite their lack of control over the trust assets.

State legislatures need guidance as to whether such QTIP Trusts are subject to the imposition of state estate taxes. Such guidance will assist state legislatures in accurately estimating revenue and expenditures for proper state budgeting. The issues presented in this case will likely continue to arise. These states start with the Federal Gross Estate in computing their estate taxes which will include the value of QTIP Trusts. Whenever the beneficiary of a QTIP Trust moves to a state which imposes an estate tax, the same Due Process issue of the extent to which the state's taxing authority will arise, and states will continue to seek to include the value of the QTIP Trusts in the estate of the surviving spouse. This issue has arisen several times in the last decade and is rising with more frequency both in state and federal courts as states grapple with defining their taxing power as it relates to Federal QTIP elections

B. Rulings in Washington, Maryland, NY, Connecticut, and Massachusetts show a need for this Court to intervene to define when a transfer of intangible property occurs for the purposes of imposing a state estate tax.

In recent years courts in Washington, Maryland, Massachusetts, and Connecticut have grappled with defining when a transfer of intangible assets in a QTIP trust with an out-of-state situs occurs such that they can constitutionally impose an estate tax on said intangible assets. There are both

interstate and intrastate disagreements over whether or not an actual and constitutionally taxable transfer occurs upon the death of a second to die spouse, with no power of appointment, who is merely an income beneficiary of the underlying trust. In attempting to answer this question, the courts have had to reconcile this Court's rulings in *Coolidge* and *Fernandez* which have now led to the question of whether this Court's ruling in *Fernandez* limited or overruled this Court's decision in *Coolidge* that even when a grantor has retained a lifetime income interest in trust assets, the trust assets fully vested in the remainder beneficiaries at the time they were transferred to the trust where the grantors and lifetime income beneficiaries of the trust had no power to revoke, amend, alter or appoint the trust assets.

In 2012 the Washington Supreme Court correctly ruled that upon the death of the QTIP beneficiary there was no transfer subjecting the QTIP assets to estate taxes under the laws of the state of Washington. *In re Bracken*, 175 Wash.2d 549 (2012). In *Shaffer,* the Appellate Tax Board curiously relied upon this decision in deciding a taxable transfer occurred upon the death of Mrs. Chuckrow. In fact, a Commissioner on the Appellate Tax Board in a dissent made clear that the decision of the State of Washington was correct, and the Appellate Tax Board was incorrectly applying their ruling:

> The Supreme Court of the State of Washington addressed the issue of when a taxable transfer occurs In re Bracken, 175 Wash.2d 549 (2012). In Bracken, the court considered the Washington Department of Revenue's attempt to impose a tax on the

> estates of second to die spouses attributable to QTIP trusts that had been established by their spouses who had died first. In 2006, the Washington legislature enacted a stand-alone estate tax and authorized the creation of a Washington QTIP election. The first-to-die spouses died, and their executors made federal QTIP elections, before the enactment of the statute. ***The court found that Washington could not impose a tax on the federal QTIP trusts upon the deaths of the second-to-die spouses, in part because no taxable transfer occurred upon their deaths.*** *Id.* at 575-76. More particularly, the estate tax requires a transfer of property to impose a tax; the transfer of assets of a QTIP trust occur when the first spouse dies; and because no taxable transfer occurs at the surviving spouses' death the state could not impose an estate tax. ***The present appeal involves a similar lack of taxable transfer but in the context of impermissible extraterritorial taxation.***

Shaffer at *12 (Scharaffa, C. dissenting)(emphasis added). The Washington legislature responded to the *Bracken* decision by enacting legislation allowing the State of Washington to tax a Washington QTIP trust where a federal QTIP election was made but a Washington QTIP election was not made. This is constitutionally permissible because the trusts considered in *Bracken* were Washington trusts, where a federal, but not state, QTIP election was made on the death of the first-to-die spouse. Similarly, the Massachusetts legislature should address its overbroad estate tax statute but since it

has not, citizens are forced to seek the intervention of state and federal Courts.

In 2018, the NY County Surrogate's Court had to consider whether or not NY could tax a QTIP trust where the predeceased spouse died domiciled in NY in 2010 when there was a NY but not federal estate tax. *See In re Estate of Seiden,* N.Y.L.J. 101218 P23 col. 5 (N.Y. County Suff. Ct. 2018) App. 223 – 233. A NY-only QTIP election was made upon the death of the predeceased spouse. The surviving spouse did not move out of the state and died domiciled in NY. The court held that NY cannot tax the QTIP trust because under N.Y. Tax Law § 954(a) the NY gross estate is the Federal Gross Estate, and there was no QTIP trust for federal estate tax purposes. *Id.* at *5. Therefore, with no federal QTIP election, the value of the trust assets were not included in the NY gross estate. *Id.* NY could not impose their estate tax on the QTIP trust assets because there was no transfer upon the death of the surviving spouse.[3] While this may seem like an unfortunate and unintended result, this case supports the proposition that the termination of an income interest generated by a QTIP trust in and of itself, is not a sufficient transfer to cause estate tax inclusion.

In *Comptroller of the Treasury v. Taylor*, 213 A.3d 629 (Md. 2019), the predeceased spouse died domiciled in Michigan and created a trust for which

[3] In a November 20, 2019 Technical Memorandum issued by the New York State Department of Taxation and Financing ("DTF") regarding NY Tax Legislation Enacted in 2019, in discussing legislation related to QTIP Trusts, the DTF correctly describes the predeceased spouse as the ***"transferring spouse."*** Technical Memorandum TSB-M-19(1)E (November 20, 2019) App. 766 – 767.

both federal and Michigan QTIP elections were made. The surviving spouse moved to MD and died domiciled in MD. The Court of Special Appeals held that MD could not tax the QTIP trust upon the surviving spouse's death, citing Md. Code. Ann. Tax-General § 7-309:

> for purposes of calculating Maryland estate tax, a decedent shall be deemed to have had a qualified income interest for life under section 2044(a)(2) of the Internal Revenue Code with regard to any property for which a marital deduction qualified terminable interest property election was made for the decedent's predeceased spouse on a timely filed Maryland estate tax return. . . .

Comptroller of Treasury v. Taylor, 238 Md. App. 139, 148, 189 A.3d 799, 804 (Md. Ct. Spec. App. 2018).

The Court of Appeals of Maryland reversed and determined that the termination of the QTIP in and of itself represented a transfer of the QTIP trust, thus providing the basis for state estate taxation, relying on the concurring and dissenting opinions in *Bracken* and noting that they did not reach the constitutional issues being presented to this Court because they were not properly preserved by the parties to that matter. In reaching their conclusion they determined that when a surviving spouse dies, a second transfer of the entire property is deemed to occur while citing the legislative history of I.R.C. §2056(b)(7) which as discussed *supra* creates a fictional transfer and does not create a property interest. *Taylor* at 636. The *Taylor* court bases its decision upon this I.R.C. fiction which does not create a property interest to transfer by stating:

> [t]he value of QTIP that qualifies for the marital deduction as a result of the election is included in the surviving spouse's estate when the surviving spouse dies.

Id. This fiction is a function of interconnected federal I.R.C. sections only which, as established *supra*, does not create property rights.

The dissent in *Taylor* addressed the constitutional issues that were not preserved and found:

> nothing in the federal scheme justifies imposing a state-level estate tax on a QTIP trust absent a corresponding state-level election. . . [because] the criterion for the taxable occasion is . . . when the estate passed to and vested in the beneficiary . . . [which] absent indication to the contrary, trusts vest at the time of testator's death.

Taylor, 465 Md. at 112-13, quoting *Safe Deposit & Trust Co. v. Bouse*, 181 Md. 351, 355 (1943) and *Taylor*, 465 Md. at 150, citing *Wagner v. State*, 102 A.3d 900, 907 (2014); accord *Bracken*, 175 Wash.2d at 566 ("Property is transferred from a trustor when a trust is created, not when an income interest in the trust expires"); *Coolidge*, 282 U.S. at 605-06.

Ultimately, after considering MD's arguments that the Fourteenth Amendment allows it to tax the transfer of its domiciliary's intangible assets (the same exact arguments made by Massachusetts), the dissent found that:

> [MD] estate tax on a trust that is not located in [MD] and has not been afforded the protection of MD law contravenes the Fourteenth Amendment.

Taylor, 465 Md. at 116.

States have recognized the constitutional implications of their decisions to tax transfers that previously occurred in another State. Nonetheless, the States refuse to look beyond the plain meaning of their statutes and continue to apply direct taxes on underlying assets rather than excise taxes on actual transfers as permitted.

CONCLUSION

This case presents important questions of law that are of broad concern and that only this Court can settle. In particular, whether or not this Court's ruling in *Fernandez* overruled or limited its decision in *Coolidge*. If it has not, then the decision in *Coolidge* controls in this matter and Massachusetts has unconstitutionally exercised their taxing power under the Fourteenth Amendment to the Constitution. For the foregoing reasons, the Petitioner respectfully requests that this Court grant their Petition.

Respectfully Submitted,

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