No. 22O154

IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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June 7, 2021

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INTRODUCTION

The United States does not defend Massachusetts' sweeping tax rule as constitutional. It instead argues that this Court should decline to exercise original jurisdiction because the Tax Rule is merely a "temporary" response to a "once-in-a-century" crisis. U.S. Br. 22. But "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). If accepted, the United States' position would leave New Hampshire without recourse and thus allow Massachusetts to successfully (and unconstitutionally) extract hundreds of millions of dollars from New Hampshire residents.

The United States—which has no stake in this case—minimizes New Hampshire's sovereign interests and the Tax Rule's effects on the State's residents, economic strategy, and recruiting efforts. None of these interests, in the United States' view, are "sufficiently direct or serious to support this Court's original jurisdiction." U.S. Br. 9. But this is no trifling dispute over, say, a small surcharge levied on a handful of out-of-state taxpayers. *See, e.g.*, *Arizona v. California,* No. 22O150 (leave to file denied Feb. 24, 2020). Massachusetts has violated fundamental constitutional principles that restrain one state's ability to tax income earned in another, and it is doing so on an unprecedented scale—a point underscored by the numerous amici supporting New Hampshire.

If the United States is correct, then *no* interstate tax dispute could ever qualify for this Court's original jurisdiction. But the Court has upheld

parens patriae standing in an action protecting the rights of only a few hundred citizens, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609 (1982), and it has repeatedly exercised original jurisdiction over disputes involving narrower taxes with smaller impacts on a state's residents, *see Wyoming v. Oklahoma*, 502 U.S. 437, 445-46 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 733-34 (1981); *Connecticut v. New Hampshire*, No. 119 Orig., 1992 WL 12620398, at *21-38 (U.S. Dec. 30, 1992). These cases didn't overwhelm the Court's docket with trivial disputes. Nor will this one.

The United States' other concerns are equally misplaced. No alternative proceedings are pending elsewhere, New Hampshire cannot raise its claims in Massachusetts state court, and taxpayers can never be made whole through individual lawsuits. *See Maryland,* 451 U.S. at 739. Nor is there is a need for Massachusetts to further explain the meaning or scope of the Tax Rule. The rule "is not ambiguous"; it "is just broad." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2302 n.* (2019). New Hampshire's constitutional challenge to the Tax Rule presents a pure legal issue, and in the unlikely event that factual development is necessary, the Court can appoint a special master.

In the end, neither Massachusetts nor the United States can refute the seriousness of New Hampshire's claim, the magnitude of the Tax Rule's impact on New Hampshire residents, or the precedent supporting the exercise of original jurisdiction. This case satisfies the criteria for the exercise of original jurisdiction. The Motion should be granted.

ARGUMENT

I. The United States' Attempt to Downplay the Seriousness of This Dispute Fails.

As the United States recognizes, the "model case" for this Court's original jurisdiction is a "dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.'" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). And this is exactly that case. Nations have fought wars over more than just "boundaries" and "the manner of use of the waters of interstate lakes and rivers." U.S. Br. 7. Historically, there have been "three just Causes of War: Defence, *the Recovery of what's our own*, and Punishment." H. Grotius, *The Rights of War and* Peace, Book II, Chapter I, §II, ¶2 (1625) (emphasis added). At the time of the Founding, nations regularly "resorted to war to protect the economic interests of their citizens." J. Coverdale, *An Introduction to the Just War Tradition*, 36 Pace Int'l L. Rev. 221, 229-30 (2004). Indeed, the Founders fought a revolutionary war in part because another nation was "imposing Taxes on us without our Consent," Declaration of Independence ¶1—a historical fact of which Massachusetts should be keenly aware. The constitutionality of Massachusetts' tax on New Hampshire residents fits squarely within these "model" disputes.

The United States is correct that a foreign tax affecting only a handful of state residents likely wouldn't be "a serious violation of [the State's] sovereignty warranting the exercise of this Court's original jurisdiction." U.S. Br. 8. But the Tax Rule is

not so limited. Massachusetts' unlawful tax has taken (and is continuing to take) hundreds of millions of dollars from more than 100,000 New Hampshire residents. Unlike prior cases involving taxes of significantly limited scope, *see, e.g., Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939), the Court regularly hears tax disputes of even lesser magnitude and importance than this one, *see* N.H. Br. 23.

The United States dismisses New Hampshire's sovereign interests.[1] But New Hampshire doesn't merely "prefer" that its residents not pay personal income taxes. U.S. Br. 8. The "New Hampshire Advantage" is the State's "defining feature" and is "central to New Hampshire's identity." N.H. Br. 1. "In its 232-year history, no matter the political party, New Hampshire has never subjected its residents to a personal income tax on earned income." N.H. Reply Br. 2. This unalterable policy is how New Hampshire "successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity." N.H. Br. 1. The Court should have no "quandary," U.S. Br. 8-9, distinguishing this important case from any future cases raising mine-run tax disputes between States.[2]

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[1] Notably, the United States does not challenge New Hampshire's *standing* to bring this action; it simply contends (wrongly) that the case does not meet the discretionary criteria the Court has used in deciding to exercise its statutory jurisdiction. *See* U.S. Br. 7-11.

[2] The United States itself has been vigorously challenging a "digital services tax" imposed by France on American

Indeed, this Court has recognized that a state's sovereign interests "in protecting its citizens from substantial economic injury" can justify original jurisdiction. *Maryland*, 451 U.S. at 739. But because "the issue of appropriateness in an original action between States must be determined on a case-by-case basis," *id.* at 743, it is the *magnitude* of the aggregate injury that makes the difference, *see* N.H. Br. 23. The Court has repeatedly resolved tax disputes of lesser effect than this one among States under its original jurisdiction. *See Wyoming*, 502 U.S. at 436-37; *Maryland*, 451 U.S. at 733-34; *Connecticut*, 1992 WL 12620398, at *21-38. Unlike those cases, Massachusetts has not confined its extraterritorial tax to one sector of the economy. The Tax Rule targets 15% of New Hampshire's entire workforce and confiscates hundreds of millions of their dollars. N.H. Br. 9-10. The United States cannot credibly deny the importance of this issue to New Hampshire or the Tax Rule's enormous and far-reaching impact on its residents.[3]

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companies. *See Section 301 Investigation: Report on France's Digital Services Tax*, U.S. Trade Rep. (Dec. 2, 2019), https://bit.ly/3g3n91q. Invoking the same argument that New Hampshire does here, the United States has complained that the French tax contravenes "prevailing international tax principles" because it applies to "revenues unconnected to a presence in France." *Id.* at 4. The United States has promised to respond "appropriate[ly] to address [this] serious matter." *Id.* at 77.

[3] The United States' dismissal of the Tax Rule's effects on the State's recruiting and economic development is misplaced for

Echoing Massachusetts, the United States repeatedly insists that the Tax Rule is "temporary," U.S. Br. 1, 3, 10, 16, 22, because the rule may expire as early as September 2021. But Massachusetts has made such promises before; that hasn't stopped it from extending the "temporary" Tax Rule *three* times after its expiration date. N.H. Br. 8-13 & 23 n.2; BIO 7. And even if Massachusetts lets the Tax Rule expire, New Hampshire residents will still be owed a refund of the unlawful taxes Massachusetts collected, which is among the remedies it seeks in this Court. *See* N.H. Bill of Complaint, Prayer for Relief. That is why neither the Commonwealth nor the United States argues that this case would become moot once the Tax Rule expires. *See* N.H. Br. 23 n.2.

Declining original jurisdiction would also set a dangerous precedent. It would tell States—many of which already are pushing the boundaries of extraterritorial taxation—that they can act unlawfully toward one another as long as their actions are a "temporary" response to a "once-in-a-century" crisis. U.S. Br. 22. Massachusetts unlawfully imposed an income tax on New Hampshire residents because it feared dramatic budget shortfalls. That it happened during a crisis is no excuse. *See Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 68. The "serious" harms its actions caused are more than sufficient to support this Court's jurisdiction.

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the same reasons Massachusetts' arguments fail. N.H. Reply 5, 13.

II. The Mere Possibility That Others May Challenge the Tax Rule Does Not Justify Declining Jurisdiction.

Again echoing Massachusetts, the United States recommends that the Court decline jurisdiction because an individual resident might someday challenge the Tax Rule in Massachusetts state court. But this argument fails on multiple levels. To begin, the United States greatly overestimates the likelihood that individual taxpayers will file such cases. Individuals "cannot be expected to litigate the validity of the [Tax Rule] given that the amounts paid by each [taxpayer]" likely would not justify the litigation costs. *Maryland*, 451 U.S. at 739. Indeed, neither Massachusetts nor the United States can identify a single pending case challenging the Tax Rule.

Even if the Tax Rule were challenged in state court, the case likely would never "benefit other taxpayers who decline to sue." U.S. Br. 15. As Massachusetts acknowledges, its courts would have a strong incentive to resolve any disputes that are filed on non-constitutional grounds. BIO 25 n.9. And even if the constitutional issue reached this Court and the individual prevailed, the decision would benefit few (if any) New Hampshire residents. That is because the statute of limitations almost certainly would run before other New Hampshire residents could respond to a favorable ruling and file their own suit. *See* M.G.L. c.62C, §37. In short, the *only* party that would "benefit" from this approach is Massachusetts.

The United States wrongly insists that the mere "availability" of an alternative forum justifies

denying original jurisdiction. U.S. Br. 13-14. Where, as here, the State has no other forum for bringing suit, the Court requires a "*pending action* to which adjudication could be deferred." *Wyoming*, 502 U.S. at 451-52 (emphasis added). The mere "availability" of an alternative forum matters "only where there is jurisdiction over the *named parties*" in another court. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972) (emphasis added). In those cases, the Court can decline to hear the dispute because its original jurisdiction isn't "necessary for the State's protection." *Massachusetts*, 308 U.S. at 18. The State could simply file suit in another court. But when the State has no other options, the fact that an unidentified party *might* bring a lawsuit that *might* protect the State's interest is not enough. The Court requires "assurances . . . that [the State's] interests under the Constitution will find a forum for appropriate hearing and full relief." *Wyoming*, 502 U.S. at 452.

The United States' federalism concerns (at 11-12) are equally "lacking in merit." *Maryland*, 451 U.S. at 745 n.21. "[T]he Tax Injunction Act . . . by its terms only applies to injunctions issued by federal district courts"; the law "is inapplicable in original actions." *Id*. Nor do similar "principles," U.S. Br. 12, apply here. The "principal reason" the Founders created the Court's original jurisdiction over disputes between States was to "secure impartiality in decisions and preserve tranquility among the states." 4 J. Elliot, Debates on the Federal Constitution 159 (1876). The Founders knew that "impartiality" would be "impossible . . . when a party affected is to be [the] judge." *Id*. Principles of "equity, comity, and

federalism," U.S. Br. 12, thus are served by *resolving* this dispute in the *only* court with jurisdiction over disputes between states.

III. There Is No Need for Factual Development in Massachusetts Proceedings.

The United States contends that this dispute would "benefit from a more developed factual record" because it is *possible* that a narrowed rule could constitutionally impose *some* taxes on *some* New Hampshire residents. *See* U.S. Br. 17-19. But the United States' hypotheticals ignore the plain sweep of the Tax Rule. Massachusetts is assessing a tax on the compensation of *any* "non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency, was an employee engaged in performing such services in Massachusetts[.]" 830 Mass. Code Regs. 62.5A.3(3)(a). A State cannot impose a tax of such far-reaching scope simply because it might be properly applied in a handful of hypothetical circumstances. *See, e.g., Maryland*, 451 U.S. at 734 (describing facial challenge to tax); *Connecticut*, 1992 WL 12620398 at *26-38 (same). But if Massachusetts wants to tax non-resident employees who "exclusively work on computers" located in Massachusetts or who "conduct[] transactions that occur in . . . Massachusetts," U.S. Br. 18, it should enact a rule that does that.

The United States also claims that the Court needs a litany of "authoritative construction[s]" of the Tax Rule because the rule raises "a number of questions whose answers are not obvious on the face of the text." U.S. Br. 17, 19-20. But the United States

finds confusion where there is none. Neither Massachusetts nor New Hampshire has had difficulty interpreting the Tax Rule's broad reach. BIO 1-10; N.H. Br. 8-13. For example, the Tax Rule makes clear that the "period [that] qualifies as 'immediately prior' to the pandemic state of emergency," U.S. Br. 19, is the first two months of 2020, *see* 830 Code Mass. Regs. 62.5A.3(3)(b). Moreover, Massachusetts (perhaps unbeknownst to the United States) already has promulgated specific guidance addressing many of the United States' questions about the Tax Rule, *see* U.S. Br. 19-20, including the meaning of "prior to the pandemic state of emergency," and how the Rule treats telecommuters who began employment for a Massachusetts-based firm after the pandemic, *see* Mass. Dep't. of Revenue Directive 21-1 at Ex. 3 & n.1 (Apr. 30, 2021).

The United States' insistence on the need for further factual development in state court—in proceedings that, again, do not yet exist—also ignores this Court's ability to manage its *original* jurisdiction docket. Given the breadth of the Tax Rule and the extent to which it departs from basic concepts of due process and states' taxing authority, it is highly unlikely that much (if any) factual development is needed. *See* Southeastern Legal Found. Amicus Br. 7-11; Zelinsky Amicus Br. 4-17; Buckley Inst. Amicus Br. 10-19; National Taxpayers Union Amicus Br. 9-17; New Jersey, et al., Amicus Br. 22-24. But even if some factual development is necessary, this Court can do so by appointing a Special Master "to take evidence and make recommendations." *Florida v. Georgia*, 138 S. Ct. 2502, 2508 (2018). Indeed, it has done so before

in cases of interstate tax disputes. *Maryland*, 451 U.S. at 728; *Connecticut*, 1992 WL 12620398, at *2.

Finally, it is again worth noting that the United States—unlike Massachusetts—never defends the constitutionality of the Tax Rule. The most the United States can muster is that the Tax Rule *might* be constitutional if discovery reveals that the Tax Rule "roughly reflect[s] an appropriate apportionment for the great majority of nonresident taxpayers." U.S. Br. 22. The United States' implication is that the Tax Rule is not constitutional at least in its full breadth, and its position underscores the point that numerous amici—including New Jersey, Connecticut, Iowa and Hawaii—have made: Massachusetts' rule pushes extraterritorial taxation far beyond the constitutional limits. *See* New Jersey, et al., Amicus Br. 22-24. With work-from-home arrangements becoming the new normal, this case provides a proper vehicle to address this critically important issue. Indeed, "time is of the essence to resolve these issues" because more States "can be expected to follow suit to fill in deficits by taxing nonvoters." Richard D. Pomp, *New Hampshire v. Massachusetts: Taxation Without Representation?*, Journal of State Taxation 20 (Summer 2021).

IV. The Court Should Revisit Its Discretionary Approach to Its Original Jurisdiction.

The United States makes no effort to defend the Court's discretionary approach to its original jurisdiction on textual grounds. U.S. Br. 6-7. That is because the Court's precedent is directly "at odds with the statutory text" of Article III and 28 U.S.C.

§1251(a). *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting). The United States points to the Court's "structur[e]" and "histor[y]," U.S. Br. 6-7, but these considerations are really just "policy judgments" that conflict with "the policy choices that Congress [already] made." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting).

The Court's approach to its original jurisdiction should be reexamined. N.H. Br. 32-34; Ohio, et al., Amicus Br. 1-18. But "at a minimum, [the Court] should note probable jurisdiction and receive briefing and argument on the question." *Texas v. California*, 141 S. Ct. 1469, 1474 (2021) (Alito, J., dissenting).

CONCLUSION

The Court should grant the Motion for Leave to File a Bill of Complaint.

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