**No. _____, Original**

IN THE

# Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
*Plaintiff*,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Defendant*.

## MOTION FOR LEAVE TO FILE BILL OF COMPLAINT


Gordon J. MacDonald
*Attorney General*
Daniel E. Will
*Solicitor General*
Samuel R.V. Garland
*Assistant Attorney General*
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiff*
*State of New Hampshire*


October 19, 2020

Plaintiff, the State of New Hampshire, respectfully moves this Court for leave to file the attached Bill of Complaint. The grounds for this Motion are set forth in an accompanying brief.

Respectfully submitted,


Gordon J. MacDonald
*Attorney General*
Daniel E. Will
*Solicitor General*
Samuel R.V. Garland
*Assistant Attorney General*
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
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*Counsel of Record*
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J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiff*
*State of New Hampshire*


October 19, 2020

## BILL OF COMPLAINT

Plaintiff, the State of New Hampshire brings this action against Defendant the Commonwealth of Massachusetts, and for its causes of action asserts as follows:

## NATURE OF THE ACTION

1. The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty. For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. Not only does New Hampshire sit as an island among the New England States, but this choice differentiates New Hampshire from nearly every other State in the union. Indeed, just one other State—Alaska—has such a tax structure.

2. New Hampshire's sovereign policy choice has had profound effects. It has resulted in, on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this advantage that New Hampshire successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity.

3. In the middle of a global pandemic, Massachusetts has taken deliberate aim at the New

Hampshire Advantage by purporting to impose *Massachusetts* income tax on New Hampshire residents for income earned while working within New Hampshire. Upending decades of consistent practice, Massachusetts now taxes income earned entirely outside its borders. Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.

4. New Hampshire brings this case to rectify Massachusetts' unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire's to make.

5. On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed *outside Massachusetts* would be subject to the State's income tax. This emergency regulation applied retroactively to March 10, 2020. Massachusetts extended this regulation on a temporary basis in July and, most recently, adopted it as a final rule, effective October 16, 2020 (the "Tax Rule").

6. This extraterritorial assertion of taxing power is unconstitutional. Massachusetts claims the authority to tax New Hampshire residents who earn their incomes from activities they undertake solely within New Hampshire. For example, the *entire* salary of a New Hampshire resident who commuted to work

full time in Boston in February but has not set foot in the Commonwealth for more than eight months continues to be subject to the Massachusetts state income tax as if he were still working every day in Boston.

7. This Court has long recognized that States have limited power to tax nonresidents. Both the Commerce Clause and the Due Process Clause prohibit the States from "tax[ing] value earned outside [their] borders." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). A State's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, Massachusetts subjects Granite Staters to simple but unconstitutional confiscation.

8. This Court's exercise of its original jurisdiction is urgently needed. New Hampshire has fundamental sovereign interests at stake. Indeed, Massachusetts' extraterritorial Tax Rule imposes an income tax on citizens of a state who are not, and historically have not been, subject to one, and who have selected New Hampshire (at least in part) for that reason. New Hampshire has long relied on its sovereign policy choices to create the New Hampshire Advantage, which, in turn, attracts both businesses and workers to the State.

9. The Tax Rule is a direct attack on this New Hampshire Advantage. It disrespects New

Hampshire's sovereignty. It undermines an incentive for businesses to locate capital and jobs in New Hampshire, a motivation for families to relocate to New Hampshire's communities, and the State's ability to pay for public services by reducing economic growth. It weakens efforts to recruit individuals to work for the state government. It endangers public health in New Hampshire by penalizing workers for following public health guidance and working from home rather than from their offices. And it undermines New Hampshire's sovereign duty to protect the economic and commercial interests of its citizens.

10. While the Tax Rule has a set expiration date, there is significant reason to believe the underlying shift in policy will survive the current pandemic. To date, Massachusetts has twice extended the Tax Rule, first as a temporary measure and now as a final rule. Further, the pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court's ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic. *See, e.g.*, *Microsoft makes remote work option permanent*, BBC (Oct. 9, 2020), https://bbc.in/2H1fPpX. Thus, it is likely that Massachusetts will continue to impose the Tax Rule or some similar policy long after the pandemic abates.

11. New Hampshire has no choice but to bring this action in this Court. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This Court therefore is the *only* forum that can hear New Hampshire's claims. The Court should exercise its jurisdiction to hear this dispute and grant New Hampshire declaratory and injunctive relief against Massachusetts' unconstitutional attempt to tax New Hampshire residents.

## JURISDICTION

12. This Court has original and exclusive jurisdiction because the dispute is both a "Case[] . . . in which a State shall be Party" and a "controvers[y] between two or more States." U.S. Const., art. III, §2, cl. 2; 28 U.S.C. §1251(a).

## PARTIES

13. Plaintiff is the State of New Hampshire. The State of New Hampshire is a sovereign State, whose citizens enjoy all the rights, privileges, and immunities guaranteed by the U.S. Constitution and federal law.

14. Defendant is the Commonwealth of Massachusetts, which is also a sovereign State.

## FACTUAL ALLEGATIONS

### A. The Limited Power of States to Tax Nonresidents

15. The power to tax may be "essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2219-20 (2019) (citations omitted).

16. States impose taxes on their residents "to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens." *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a State and its citizens: the citizens agree to pay a percentage of their worth in exchange for the State's commitment to provide protection and services.

17. A State's power to tax its residents is far-reaching. A State like Massachusetts "may, and does, exert its taxing power over [residents'] income from all sources, whether within or without the State." *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) *abrogated on other grounds by Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

18. But a State's power to tax nonresidents is far more circumscribed. Under both the Commerce Clause and the Due Process Clause, a State has no authority to "tax value earned outside its borders."

*Allied-Signal, Inc. v. Director, Div. of* Taxation, 504 U.S. 768, 777 (1992).

19. A State's power to tax an individual's activities is justified only by the "'protection, opportunities and benefits' the State confers on those activities." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

20. Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, "fairly apportioned" and "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (requiring "income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State").

21. The tax policies of the various States reflect these constitutional constraints. Nearly every State that imposes a broad-based personal income tax on earned income requires nonresidents to pay tax only on income they earned "within the State." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶20.05[4](a) (3d ed. 2020).

22. States have various methods of determining when income is earned "within the State," but nearly all methods prevent taxation of nonresident income earned beyond their borders. *Id.* States' rules for determining the portion of a nonresident employee's compensation that is attributable to the State "generally reflect the relative amount of time that the nonresident employee spends

working in the state, or the amounts attributable to the specific services provided within the state." *Id.*; *see, e.g.,* W. Va. Code St. R. §110-21-32.2.1.2.e (taxing nonresidents based on "the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned").

23. Income earned by a nonresident who works *outside* of the State is not subject to taxation by any State other than the residence State. *See* Hellerstein, *supra*, at ¶ 20.05[4].

### B. Massachusetts' Prior Tax Policies

24. Massachusetts long respected these constitutional restraints. Under Massachusetts law, nonresidents with an annual "Massachusetts gross income" of more than $8,000 are required to pay state taxes on their income. *See* M.G.L. c. 62C, §6.

25. The "Massachusetts gross income" is determined "solely with respect to items of gross income from sources within the commonwealth of such person." M.G.L. c. 62 §5A(a).

26. Massachusetts currently taxes earned income at 5%. *See Income Tax Rate Drops to 5% on January 1, 2020*, Mass. Dep't of Rev. (Dec. 23, 2019), https://bit.ly/3cRwQ11.

27. Until recently, Massachusetts regulations made clear that nonresidents owed taxes only for the work they performed while physically within Massachusetts. Under the prior regime, "[w]hen a non-resident employee is able to establish

the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income." 830 CMR 62.5A.1(5)(a) (2008). When a precise determination was not possible, Massachusetts regulations required allocation of income between taxable Massachusetts sources and non-taxable out-of-state sources by using a fraction, "the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days." *Id.*

28. "Compensation rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax." Mass. Dep't of Revenue, Letter Ruling 84-57, *Withholding for Non-Resident Employees* (Aug 2., 1984), https://bit.ly/3j6bnDe.

29. This allocation rule respected New Hampshire's rights, as a coequal sovereign in our federal system, to enact its *own* tax policies upon which its residents may rely. It also protected New Hampshire residents from paying unconstitutional taxes on income earned outside of Massachusetts. In those ways, the policy harmonized Massachusetts' sovereign interests with the interests of nonresidents and its neighboring States.

### C. Massachusetts' Taxation of New Hampshire Residents Working in New Hampshire

30. That harmony recently came to an abrupt end. In March 2020, Massachusetts, like many States, declared a state of emergency in response to the COVID-19 pandemic. *See Governor's Declaration of Emergency*, Massachusetts Office of the Governor (Mar. 10, 2020), https://bit.ly/2GuugSM.

31. Pursuant to that declaration, Governor Baker ordered all businesses that did not provide "COVID-19 Essential Services" to cease in-person operations by March 24, 2020. *See Governor Charlie Baker Orders All Non-Essential Business to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks*, Massachusetts Office of the Governor (Mar. 23, 2020), https://bit.ly/30gWuY4.

32. Massachusetts businesses and their employees followed that order, and many employees transitioned to working from home indefinitely. In particular, tens of thousands of Granite Staters who formerly commuted to Massachusetts began working entirely from home in New Hampshire.

33. Instead of relying on Massachusetts' services during the workweek—police and fire protection, ambulance services, roads, and more—these individuals now consumed those same services within New Hampshire. Thus, if an emergency arose, these workers called New Hampshire's police and ambulance services, not Massachusetts'.

34. Because New Hampshire has made a fundamental policy decision, in its sole sovereign discretion, not to impose an income tax, it pays for these services through various other revenue sources.

35. As of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, accounting for more than 15 percent of New Hampshire workers. U.S. Bureau of the Census, *Longitudinal Employer Household Dynamics*, https://bit.ly/2HiSLCv.

36. Those workers generated billions of dollars of income and paid hundreds of millions of dollars in Massachusetts state taxes.

37. Under Massachusetts' longstanding allocation policy, Massachusetts taxed the portion of income that New Hampshire residents earned while physically working *in Massachusetts*. New Hampshire residents working for Massachusetts enterprises were not taxed on income earned while physically working *in New Hampshire*.

38. On April 21, 2020, Massachusetts published an emergency regulation taxing—for the first time—income *earned in New Hampshire*.

39. Having already required or encouraged most employees to work from home, the Commonwealth declared: "[F]or the duration of the Massachusetts COVID-19 state of emergency, all compensation received for personal services performed by a nonresident who, immediately prior to the Massachusetts COVID-19 state of emergency, was

an employee engaged in performing such services in Massachusetts, and who, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding." Mass. Dep't of Revenue, Technical Information Release 20-5, *Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (Apr. 21, 2020), https://bit.ly/3n2BrCp. Massachusetts imposed the emergency regulation retroactive to March 10, 2020. *Id.* By its terms, the regulation would expire on the date on which the Governor gave notice that the state of emergency was no longer in effect. *Id.*

40. Under Massachusetts law, emergency regulations are valid for only three months. *See* M.G.L. c. 30A, §2. Accordingly, on July 21, 2020, Massachusetts adopted a second emergency regulation imposing similar requirements. *See* Mass. Dep't of Revenue, Technical Information Release 20-10, *Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (July 21, 2020), https://bit.ly/3l6Q05Q.

41. That same day, Massachusetts also proposed a formal administrative rule ("Proposed Rule"), which would impose the same requirements over a longer period (until the earlier of December 31, 2020 or 90 days after the Governor ended the state of the emergency). *See* 830 C.M.R. 62.5A3:

Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue (July 21, 2020), https://bit.ly/2SXirY4.

42. The Proposed Rule declared: "[A]ll compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2." *Id.* at 830 CMR 62.5A.3(3).

43. The Proposed Rule defined "Pandemic-Related Circumstances" broadly to include, *inter alia*, "any . . . work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which [the rule] is in effect." *Id.* at 830 CMR 62.5A.3(2).

44. The Proposed Rule drew strong opposition during the comment period. More than 100 individuals, including nonresidents and legislators, testified at a hearing to review the Proposed Rule. Many criticized Massachusetts for "attempting to balance the budget on the backs of hard-working

Granite Staters." Greg Moore, *Testimony for Massachusetts Dep't of Revenue, Rulings & Regs. Bureau* (Aug. 27, 2020), https://bit.ly/3j9EqWg.

45. The New Hampshire Attorney General's office submitted comments opposing the Proposed Rule, pointing out that the Proposed Rule unconstitutionally imposed a tax on New Hampshire residents working entirely within New Hampshire and "infringe[d] upon the State of New Hampshire's fundamental interests as a sovereign." *See* N.H. Atty. Gen. Gordon MacDonald, *Comments on Proposed Regulation 830 CMR 62.5A.3*, 3 (Aug. 21, 2020).

46. The New Hampshire Department of Business and Economic Affairs submitted similar comments criticizing the Proposed Rule. *See* New Hampshire Department of Business and Economic Affairs, *Re: Proposed Regulation Relative to Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*, 2 (Aug. 21, 2020) (noting that the proposed rule "does not reflect the realities of how work is being accomplished" during these difficult times).

47. Despite these objections, on October 16, 2020, Massachusetts published and approved the final rule ("Tax Rule"), largely as proposed. *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue, (Oct. 16, 2020), https://bit.ly/31fgB9r. The Tax Rule took effect immediately.

### D. New Hampshire's Strong Interest in Challenging the Tax Rule.

48. New Hampshire has a strong interest in eliminating the Tax Rule, for multiple reasons.

49. *First*, the Tax Rule infringes on New Hampshire's sovereign right to control its own tax and economic policies and undermines the strategy New Hampshire has deliberately employed to provide current and prospective businesses and residents with the New Hampshire Advantage.

50. New Hampshire has never imposed an income tax on its residents.[1] *See* N.H. Dep't of Revenue, *Taxpayer Assistance—Overview of New Hampshire Taxes*, https://bit.ly/2ET6i2T.

51. This longstanding policy choice is a fundamental part of the New Hampshire Advantage central to New Hampshire's sovereign identity, which distinguishes New Hampshire regionally and nationally.

52. By unlawfully levying an income tax on a sizable percentage of New Hampshire residents—on income earned *in New Hampshire*—Massachusetts has overridden New Hampshire's sovereign discretion over its tax policy to unilaterally impose the precise tax on New Hampshire residents that New Hampshire

[1] New Hampshire does impose a tax on interest and dividend income, *see* N.H. Rev. Stat. Ann. ch. 77 (2016), but does not impose an income tax on residents or nonresidents' individual earned income.

itself has consistently rejected. The Tax Rule directly contradicts New Hampshire's tax policies and effectively negates the express financial incentive (tax savings) that fuels New Hampshire's successful competition for capital and labor resources.

53. A State's decision about whether and how it collects revenue is "an action undertaken in its sovereign capacity." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). In that sovereign capacity, New Hampshire has set its own revenue collection policies for the benefit of its citizens. Moreover, New Hampshire has a sovereign duty to protect the "economic and commercial interests" of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609 (1982). This, too, it accomplishes through its sovereign policy choices.

54. The New Hampshire Advantage is not merely an abstract concept. New Hampshire's sovereign policy choices have helped boost per capita income, decrease unemployment, and create a competitive advantage that motivates businesses and individuals to choose New Hampshire as their homes.

55. New Hampshire has the seventh-highest median household income of any State at $74,057 per household. U.S. Bureau of the Census, *Median Household Income by State*, https://bit.ly/34XJd8t. This median household income is significantly higher than Maine, Rhode Island, Vermont, and the national average, and is comparable to Connecticut and Massachusetts, which also rank in the top ten. *Id.*

56. Importantly, New Hampshire's competitive and successful tax policies have not adversely impacted its ability to provide important public services to its citizens. For example, New Hampshire's public education systems have been ranked the sixth highest quality in the nation by Education Week, *see* Education Week, *Quality Counts 2020, State Grades on Chance for Success: 2020 Map and Rankings*, (Jan. 21, 2020), https://bit.ly/3lNyiVm, and New Hampshire ranks in the top ten highest spending per pupil among all states, *see* U.S. Bureau of the Census, *2018 Public Elementary-Secondary Education Finance Data*, Table 11 (Apr. 14, 2020), https://bit.ly/2SZsifV.

57. Similarly, in both 2018 and 2019, New Hampshire had the second-lowest average unemployment rate in New England and, respectively, the second-lowest and third-lowest unemployment rates nationally. *See* U.S. Bureau of Labor Statistics, *Regional and State Unemployment – 2019 Annual Averages*, Table 1 (Mar. 4, 2020), https://bit.ly/3lJa1jy. In both years, New Hampshire's average employment rate was significantly lower than the national average. *See id.*

58. New Hampshire's sovereign policy choices, and the advantageous economic landscape they create, are essential to New Hampshire's economic vitality. Numerous top companies from diverse business sectors call New Hampshire home. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Top Companies*, https://bit.ly/34QTwes. New Hampshire's

tax policies are also central to its efforts to motivate businesses to relocate to or expand within the State. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Why New Hampshire*, https://bit.ly/3lFTRHy.

59. The tax policies at the core of the New Hampshire Advantage have likewise succeeded in encouraging individuals and families to move to the State. Tens of thousands of people move to New Hampshire each year. Lori Wright, Univ. of New Hampshire, New Hampshire Agricultural Experiment Station, *Migration is Biggest Driver of Population Change in New Hampshire* (Nov. 19, 2019), https://bit.ly/33KHK63. In 2018, more than 20,000 people moved to New Hampshire from Massachusetts alone. U.S. Bureau of the Census, *State to State Migration Flows*, Table 1 (July 20, 2020), https://bit.ly/3dwuzZL.

60. A significant number of those new residents continue to work for Massachusetts-based employers, and many explicitly cite New Hampshire's tax laws as a reason why they moved. *See* Kenneth Johnson, *Why People Move to and Stay in New Hampshire*, Univ. of New Hampshire, Carsey School of Public Policy (Summer 2020), https://bit.ly/33pF3GB.

61. Indeed, tax experts agree that New Hampshire's tax policies have been key to "attracting new businesses and . . . generating economic and employment growth." Jared Walczak, *2020 State Business Tax Climate Index* at 8, Tax Foundation (Oct.

21, 2019), https://bit.ly/3dkZszV; *see also* Joe Horvath, *Why New Hampshire Attracts More Wealth and Commerce Than Maine*, Maine Policy Institute (June 22, 2016), https://bit.ly/33R2oBr ("Maine and New Hampshire are similar states," yet "New Hampshire . . . is outperforming Maine" because of "better economic policy").

62. By reaching across its borders into the wallets of New Hampshire residents, Massachusetts takes direct aim at New Hampshire's policy choices as a sovereign, and the New Hampshire Advantage that has resulted from those choices. Through the Tax Rule, Massachusetts effectively imposes its income tax in a State in which no comparable tax exists.

63. Massachusetts' actions undermine New Hampshire's efforts to maintain attractive economic conditions that motivate new businesses and workers to relocate to the State and existing businesses to expand within the State.

64. The Tax Rule also exacerbates the burden on New Hampshire's public services. The COVID-19 pandemic has increased demand for New Hampshire's government services generally, and work-from-home policies mean that tens of thousands of individuals are now exclusively relying on *New Hampshire*'s public services—including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more—rather than Massachusetts'. Yet the Tax Rule ensures that those individuals continue to support public services in *Massachusetts* that they no longer use.

65. Massachusetts' actions harm the fabric of New Hampshire's communities. In recent years, young people and their families have flocked to New Hampshire to take advantage of the State's favorable policies and high quality of life. This migration is "important to New Hampshire's demographic future." Johnson, *supra*. These new residents bring tremendous energy and a wealth of new ideas to the State and further the State's longstanding culture of innovation in the economic and education sectors. The Tax Rule's attack on New Hampshire's migration incentives puts all these gains at risk.

66. In short, Massachusetts has taken aim at a defining feature of New Hampshire's sovereign identity through unconstitutional means. For this reason alone, New Hampshire has an existential interest, as a sovereign, in eliminating the Tax Rule.

67. *Second*, and relatedly, the Tax Rule harms New Hampshire's ability to recruit individuals to work for its state government.

68. More than 17,000 people work for the State of New Hampshire. Every day, New Hampshire state employees ensure public safety through police, fire, and rescue services, maintain public transportation, operate state courts, run New Hampshire's university system, and much more.

69. Many of the employees who New Hampshire recruits have spouses or other family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New Hampshire). If these families will be

forced to pay Massachusetts income taxes regardless where their work is performed, many will choose to live in Massachusetts.

70. New Hampshire has an interest, as a sovereign, in continuing to recruit and retain these individuals and their families.

71. *Finally*, the Tax Rule endangers public health in New Hampshire.

72. In March 2020, through his executive order, Governor Baker sent millions of workers home. As a result, tens of thousands of New Hampshire residents who had been traveling to Massachusetts to work were required to perform their duties from New Hampshire. And even now, when governments have rolled back many pandemic-related restrictions, working from home remains best practice for thousands of New Hampshire residents. For these residents, this shift in location is not merely a matter of preference or convenience, but rather required or encouraged by the government or their employers to protect the public health.

73. If these residents had *chosen* to work at home prior to the pandemic, any income they earned while working in New Hampshire would not be taxed as Massachusetts income.

74. Under the Tax Rule, however, income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income.

75. And while the Tax Rule purportedly applies solely to remote work resulting from "Pandemic-Related Circumstances," that term is defined so broadly that seemingly *any person* who transitions to working from home for *any reason* while the Tax Rule is in effect remains subject to Massachusetts income tax for work performed in New Hampshire. *See* Tax Rule, 830 CMR 62.5A.3(2) (defining "Pandemic-Related Circumstances" to include "any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which 830 CMR 62.5A.3 is in effect").

76. In other words, the Tax Rule both penalizes individuals who are working from home at the direct request of the Massachusetts Governor and, more generally, disincentivizes *all* individuals from pursuing alternative work arrangements at a time when health officials continue to stress the importance of social distancing and other restrictions on in-person interactions.

77. Massachusetts has suggested that the Tax Rule is merely designed to maintain the status quo until the pandemic abates. This suggestion is belied by the definition of "Pandemic-Related Circumstances" in the Tax Rule, which inevitably sweeps up workers who are remote for reasons entirely unrelated to the pandemic. Thus, while Massachusetts paints the Tax Rule as a stopgap

measure designed to bridge a finite period of uncertainty, it in fact reflects an aggressive attempt to impose Massachusetts income tax within the borders of a coequal sovereign. The pandemic in no way alters this fact.

78. Yet, the pandemic continues to take its toll on Granite Staters. More than 9,000 New Hampshire residents have contracted the virus and more than 450 have died from it. *See* N.H. Dep't of Health & Human Servs., *COVID-19*, https://bit.ly/36s2jG4.

79. New Hampshire has a direct interest in protecting its citizens from the continued spread of the virus by incentivizing residents to work from home. *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (a core "function" of the State is to "guard the public health" of its citizens); *see also North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) ("This Court has entertained [claims] by one state to enjoin . . . another" when the latter state's actions are "dangerous to the health of the inhabitants of the former.").

80. The Tax Rule undermines that interest by penalizing New Hampshire residents for following public health requirements and recommendations and incentivizing New Hampshire residents to travel across state borders.

81. New Hampshire has a strong interest in challenging the Tax Rule for this reason as well.

82. These serious harms to New Hampshire demonstrate the need for this Court's original

jurisdiction. This action "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction.'" *Wyoming v. Oklahoma*, 502 U.S. at 451 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)) (exercising original jurisdiction over challenge to Oklahoma law under the Commerce Clause).

83. Indeed, this Court has not hesitated to entertain original actions over challenges by States to another State's taxes. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398 (U.S. 1992) (exercising original jurisdiction over a suit brought by Massachusetts and other states to challenge a New Hampshire tax); *Maryland v. Louisiana*, 451 U.S. at 756 (exercising original jurisdiction over a State challenge to a Louisiana tax). This case is equally important.[2]

[2] Although the Tax Rule expires on December 31, 2020, that will not moot this case. The legitimacy of the 2020 tax would still be at issue. Moreover, Massachusetts has already extended the rule twice over the vocal opposition of New Hampshire officials and residents, and it will surely do so again. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (case not moot when issue is "capable of repetition, yet evading review"). Further, the mere existence of this aggressive incursion into New Hampshire's sovereign jurisdiction, if allowed to stand, will cast a shadow over the New Hampshire Advantage in the future.

## CAUSES OF ACTION

### COUNT I:
### THE COMMERCE CLAUSE

84. Plaintiff incorporates all its prior allegations.

85. The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3.

86. But the clause also has been read as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

87. This construction serves the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id*. at 179-80.

88. A State's taxation of nonresidents will survive scrutiny under the Commerce Clause only if it meets four requirements. The State's tax must be (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned"; (3) non-discriminatory—*i.e.*, it must not "discriminate against interstate commerce"; and (4) "fairly related to the

services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

89. If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398, at *21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).

90. The Tax Rule fails all four prongs.

91. It fails the first prong because when a New Hampshire resident is performing work entirely within New Hampshire, Massachusetts lacks the requisite minimum connection with either the worker or her activity. *Allied-Signal, Inc.*, 504 U.S. at 777–78. "Substantial nexus" requires that "there must be a connection to the *activity itself*, rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (emphasis added). The Tax Rule, in contrast, imposes a tax based solely on the location of the employer regardless of the work being done and where. Indeed, that is its very point: to recapture income on activity that *used to be* performed in Massachusetts. Because the Tax Rule purports to tax nonresidents on income earned from activity lacking any connection with Massachusetts, no "substantial nexus" exists.

92. The Tax Rule also fails the second prong of *Complete Auto*'s test, which requires that a tax must be "fairly apportioned." This "ensure[s] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), *abrogated on other grounds by Wynne*, 135 S. Ct. at

1798. This prong is not satisfied "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Oklahoma Tax Comm'n*, 514 U.S. at 184. The test, in other words, rejects the possibility of double taxation.

93. Through the Tax Rule, Massachusetts imposes a tax on activity that is occurring *in New Hampshire*. New Hampshire has the authority and prerogative to tax that income. That New Hampshire has decided not to exercise this authority over its own citizens is not a license for Massachusetts to do so; the mere possibility of double taxation is forbidden under the Commerce Clause. *See, e.g., Evco v. Jones*, 409 U.S. 91, 94 (1972) (state tax on the proceeds of out-of-state sales violated the Commerce Clause where it created a "risk of a double tax burden").

94. Simply put, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id.*

95. For similar reasons, the Tax Rule fails *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. In *Wynne*, this Court struck down a comparable Maryland tax scheme that "had the potential to result in discriminatory double taxation of income earned

out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." 135 S. Ct. at 1795. The Court supported its conclusion with reference to similar invalidations in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939), *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653 (1948), noting that "[i]n all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity." *Wynne*, 135 S. Ct. at 1795.

96. In *Wynne*, this Court applied the Commerce Clause's "internal consistency" test to strike down the burdensome tax scheme. The Court stated that "[t]his test, which helps courts identify tax schemes that discriminate against interstate commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1802 (quoting *Oklahoma Tax Comm'n*, 514 U.S. at 179).

97. The complex Massachusetts tax scheme under the Tax Rule fails the internal consistency test. If every state imposed a regime like the Tax Rule, a taxpayer who confined her activity to one State would pay a single tax on her income to the State where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across state lines to earn her income would pay a double tax on

such income, one to her State of residence and another to the State in which she earned the income. As a result, "interstate commerce would be taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed a rule similar to the Tax Rule, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to move between States or accept flexible working assignments. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

98. Finally, the Tax Rule fails *Complete Auto*'s fourth prong, which requires the state tax to be "fairly related to the services provided by the State." 430 U.S. at 279.

99. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citation omitted).

100. Under the Tax Rule, New Hampshire residents are taxed as though they are travelling to and working in Massachusetts—even if they never set foot in the State.

101. The Tax Rule thus is not in "proper proportion" to New Hampshire residents' "activities within [Massachusetts] and, therefore, to their consequent enjoyment of the opportunities and

protections which the State has afforded in connection with those activities." *Id.* (citation omitted).

102. Because Massachusetts' tax is not "assessed in proportion to a taxpayer's activities or presence in a State," the Tax Rule unconstitutionally requires New Hampshire residents to "shoulder[] [more than their] fair share." *Id.* at 627.

103. The Tax Rule accordingly violates the Commerce Clause.

**COUNT II:**
**THE DUE PROCESS CLAUSE**

104. Plaintiff incorporates all its prior allegations.

105. Due process "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.*, 139 S. Ct. at 2219.

106. The Court has long recognized that the Due Process Clause prohibits a State from "tax[ing] value earned outside its borders." *Allied-Signal Inc.*, 504 U.S. at 778 (1992). That is because the "seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co.*, 347 U.S. at 342.

107. To survive a challenge under the Due Process Clause, there must be "'some definite link, some minimum connection, between a [S]tate and the person, property or transaction it seeks to tax.'" *Allied-*

*Signal Inc.*, 504 U.S. at 777 (quoting *Miller Brothers Co.*, 347 U.S. at 344-45).

108. In the case of a tax on an activity, "there must be a connection to the *activity itself*, rather than a connection only to the *actor*, the State seeks to tax." *Id.* at 778 (emphasis added).

109. In addition, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Moorman Mfg. Co.*, 437 U.S. at 273 (citation omitted). If the connection is too attenuated, the state tax will violate the Due Process Clause. *See id.*

110. The Tax Rule violates these fundamental requirements of due process. It requires no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer. Put differently, the Tax Rule bears no "fiscal relation to [the] protection, opportunities and benefits given by the state." *Wisconsin*, 311 U.S. at 444.

111. New Hampshire residents earning a living from home offices in New Hampshire are not protected by Massachusetts police, fire, and rescue services, do not seek education or housing opportunities provided by Massachusetts, and do not enjoy the benefits of Massachusetts roads, public transportation, or utilities. They do not "earn" income "in Massachusetts" any more than an outsourced customer service operator in a foreign country "earns" income "in the United States" by working for a U.S.-based employer.

112. The Tax Rule accordingly violates the Due Process Clause of the Fourteenth Amendment.

## PRAYER FOR RELIEF

WHEREFORE, New Hampshire requests that the Court order the following relief:

a) Declare that the Tax Rule violates the Commerce Clause and the Due Process Clause;

b) Preliminarily and permanently enjoin Massachusetts from enforcing the Tax Rule;

c) Enter an injunction requiring Massachusetts to refund all funds, including interest, collected from nonresidents pursuant to the Tax Rule;

d) Award costs and reasonable attorney's fees; and

e) Grant any other relief available at law or equity.

Respectfully submitted,

Gordon J. MacDonald
*Attorney General*
Daniel E. Will
*Solicitor General*
Samuel R.V. Garland
*Assistant Attorney General*
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiff*
*State of New Hampshire*

October 19, 2020

**No. _____, Original**

IN THE

# Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
*Plaintiff*,

*v.*

COMMONWEALTH OF MASSACHUSETTS,
*Defendant.*

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


Gordon J. MacDonald
*Attorney General*
Daniel E. Will
*Solicitor General*
Samuel R.V. Garland
*Assistant Attorney General*
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiff*
*State of New Hampshire*


October 19, 2020

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## INTRODUCTION

The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty. For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. Not only does New Hampshire sit as an island among the New England States, but this choice differentiates New Hampshire from nearly every other State in the union. Indeed, just one other State—Alaska—has such a tax structure.

New Hampshire's sovereign policy choice has had profound effects. It has resulted in, on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this advantage that New Hampshire successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity.

In the middle of a global pandemic, Massachusetts has taken deliberate aim at the New Hampshire Advantage by purporting to impose *Massachusetts* income tax on New Hampshire residents for income earned while working within New Hampshire. Upending decades of consistent practice, Massachusetts now taxes income earned entirely outside its borders. Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that

New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.

New Hampshire brings this case to rectify Massachusetts' unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire's to make.

On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed *outside Massachusetts* would be subject to the State's income tax. This emergency regulation applied retroactively to March 10, 2020. Massachusetts extended this regulation on a temporary basis in July and, most recently, adopted it as a final rule, effective October 16, 2020 (the "Tax Rule").

This extraterritorial assertion of taxing power is unconstitutional. Massachusetts claims the authority to tax New Hampshire residents who earn their incomes from activities they undertake solely within New Hampshire. For example, the *entire* salary of a New Hampshire resident who commuted to work full time in Boston in February but has not set foot in the Commonwealth for more than eight months continues to be subject to the Massachusetts state income tax as if he were still working every day in Boston.

This Court has long recognized that States have limited power to tax nonresidents. Both the Commerce Clause and the Due Process Clause prohibit the States from "tax[ing] value earned outside [their] borders."

*Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). A State's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, Massachusetts subjects Granite Staters to simple but unconstitutional confiscation.

This Court's exercise of its original jurisdiction is urgently needed. New Hampshire has fundamental sovereign interests at stake. Indeed, Massachusetts' extraterritorial Tax Rule imposes an income tax on citizens of a state who are not, and historically have not been, subject to one, and who have selected New Hampshire (at least in part) for that reason. New Hampshire has long relied on its sovereign policy choices to create the New Hampshire Advantage, which, in turn, attracts both businesses and workers to the State. The Tax Rule is a direct attack on this New Hampshire Advantage. It disrespects New Hampshire's sovereignty. It undermines an incentive for businesses to locate capital and jobs in New Hampshire, a motivation for families to relocate to New Hampshire's communities, and the State's ability to pay for public services. It weakens efforts to recruit individuals to work for the state government. It endangers public health in New Hampshire by penalizing workers for following public health guidance and working from home rather than from their offices. And it undermines New Hampshire's sovereign duty to protect the economic and commercial interests of its citizens.

While the Tax Rule has a set expiration date, there is significant reason to believe the underlying shift in policy will survive the current pandemic. To date, Massachusetts has twice extended the Tax Rule, first as a temporary measure and now as a final rule. Further, the pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court's ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic. *See, e.g.*, *Microsoft makes remote work option permanent*, BBC (Oct. 9, 2020), https://bbc.in/2H1fPpX. Thus, it is likely that Massachusetts will continue to impose the Tax Rule or some similar policy long after the pandemic abates.

New Hampshire has no choice but to bring this action in this Court. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This Court therefore is the *only* forum that can hear New Hampshire's claims. The Court should exercise its jurisdiction to hear this dispute and grant New Hampshire declaratory and injunctive relief against Massachusetts' unconstitutional attempt to tax New Hampshire residents.

Alternatively, the Court should consider reexamining its modern understanding that its original jurisdiction is discretionary. Article III establishes this Court's original jurisdiction in

mandatory terms: "In all cases . . . in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction." Moreover, because Congress has given this Court "exclusive" jurisdiction over disputes between States, refusing to hear such disputes is not only textually suspect, but also inequitable. The Court should grant the motion for leave to file the bill of complaint.

## STATEMENT OF THE CASE

### A. The Limited Power of States to Tax Nonresidents

The power to tax may be "essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2219-20 (2019) (citations omitted). States impose taxes on their residents "to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens." *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a State and its citizens: the citizens agree to pay a percentage of their worth in exchange for the State's commitment to provide protection and services.

A State's power to tax its residents is far-reaching. A State like Massachusetts "may, and does, exert its taxing power over [residents'] income from all sources, whether within or without the State." *Shaffer v. Carter*, 252 U.S. 37, 57 (1920), *abrogated on other*

*grounds by Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015). But a State's power to tax nonresidents is far more circumscribed. Under both the Commerce Clause and the Due Process Clause, a State has no authority to "tax value earned outside its borders." *Allied-Signal, Inc. v. Director, Div. of* Taxation, 504 U.S. 768, 777 (1992). A State's power to tax an individual's activities is justified only by the "'protection, opportunities and benefits' the State confers on those activities." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, "fairly apportioned" and "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (requiring "income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State").

The tax policies of the various States reflect these constitutional constraints. Nearly every State that imposes a broad-based personal income tax on earned income requires nonresidents to pay tax only on income they earned "within the State." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶20.05[4](a) (3d ed. 2020). States have various methods of determining when income is earned "within the State," but nearly all methods prevent taxation of nonresident income earned beyond their borders. *Id.* States' rules for determining the portion of a nonresident employee's compensation that is attributable to the State "generally reflect the relative

amount of time that the nonresident employee spends working in the state, or the amounts attributable to the specific services provided within the state." *Id.*; *see, e.g.,* W. Va. Code St. R. §110-21-32.2.1.2.e (taxing nonresidents based on "the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned"). Income earned by a nonresident who works *outside* of the State is not subject to taxation by any State other than the residence State. *See* Hellerstein, *supra*, at ¶ 20.05[4].

### B. Massachusetts' Prior Tax Policies

Massachusetts long respected these constitutional restraints. Under Massachusetts law, nonresidents with an annual "Massachusetts gross income" of more than $8,000 are required to pay state taxes on their income. *See* M.G.L. c. 62C, §6. The "Massachusetts gross income" is determined "solely with respect to items of gross income from sources within the commonwealth of such person." M.G.L. c. 62 §5A(a). Massachusetts currently taxes earned income at 5%. *See Income Tax Rate Drops to 5% on January 1, 2020*, Mass. Dep't of Rev. (Dec. 23, 2019), https://bit.ly/3cRwQ11.

Until recently, Massachusetts regulations made clear that nonresidents owed taxes only for the work they performed while physically within Massachusetts. Under the prior regime, "[w]hen a non-resident employee is able to establish the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income." 830 CMR 62.5A.1(5)(a)

(2008). When a precise determination was not possible, Massachusetts regulations required allocation of income between taxable Massachusetts sources and non-taxable out-of-state sources by using a fraction, "the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days." *Id.* "Compensation rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax." Mass. Dep't of Revenue, Letter Ruling 84-57, *Withholding for Non-Resident Employees* (Aug 2., 1984), https://bit.ly/3j6bnDe.

This allocation rule respected New Hampshire's rights, as a coequal sovereign in our federal system, to enact its *own* tax policies upon which its residents may rely. It also protected New Hampshire residents from paying unconstitutional taxes on income earned outside of Massachusetts. In those ways, the policy harmonized Massachusetts' sovereign interests with the interests of nonresidents and its neighboring States.

### C. Massachusetts' Taxation of New Hampshire Residents Working in New Hampshire

That harmony recently came to an abrupt end. In March 2020, Massachusetts, like many States, declared a state of emergency in response to the COVID-19 pandemic. *See Governor's Declaration of Emergency*, Massachusetts Office of the Governor (Mar. 10, 2020), https://bit.ly/2GuugSM. Pursuant to

that declaration, Governor Baker ordered all businesses that did not provide "COVID-19 Essential Services" to cease in-person operations by March 24, 2020. *See Governor Charlie Baker Orders All Non-Essential Business to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks*, Massachusetts Office of the Governor (Mar. 23, 2020), https://bit.ly/30gWuY4.

Massachusetts businesses and their employees followed that order, and many employees transitioned to working from home indefinitely. In particular, tens of thousands of Granite Staters who formerly commuted to Massachusetts began working from home in New Hampshire. Instead of relying on Massachusetts' services during the workweek—police and fire protection, ambulance services, roads, and more—these individuals now consumed those same services within New Hampshire. Thus, if an emergency arose, these workers called New Hampshire's police and ambulance services, not Massachusetts'. Because New Hampshire has made a fundamental policy decision, in its sole sovereign discretion, not to impose an income tax, it pays for these services through various other revenue sources.

As of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, accounting for more than 15 percent of New Hampshire workers. U.S. Bureau of the Census, *Longitudinal Employer Household Dynamics*, https://bit.ly/2HiSLCv. Those workers generated billions of dollars of income and paid hundreds of

millions of dollars in Massachusetts state taxes. Under Massachusetts' longstanding allocation policy, Massachusetts taxed the portion of income that New Hampshire residents earned while physically working *in Massachusetts*. New Hampshire residents working for Massachusetts enterprises were not taxed on income earned while physically working *in New Hampshire*.

On April 21, 2020, Massachusetts published an emergency regulation taxing—for the first time—income *earned in New Hampshire*. Having already required or encouraged most employees to work from home, the Commonwealth declared:

> [F]or the duration of the Massachusetts COVID-19 state of emergency, all compensation received for personal services performed by a nonresident who, immediately prior to the Massachusetts COVID-19 state of emergency, was an employee engaged in performing such services in Massachusetts, and who, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding.

Mass. Dep't of Revenue, Technical Information Release 20-5, *Massachusetts Tax Implications of an*

*Employee Working Remotely due to the COVID-19 Pandemic* (Apr. 21, 2020), https://bit.ly/3n2BrCp. Massachusetts imposed the emergency regulation retroactive to March 10, 2020. *Id*. By its terms, the regulation would expire on the date on which the Governor gave notice that the state of emergency was no longer in effect. *Id.*

Under Massachusetts law, emergency regulations are valid for only three months. *See* M.G.L. c. 30A, §2. Accordingly, on July 21, 2020, Massachusetts adopted a second emergency regulation imposing similar requirements. *See* Mass. Dep't of Revenue, Technical Information Release 20-10, *Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (July 21, 2020), https://bit.ly/3l6Q05Q.

That same day, Massachusetts proposed a formal administrative rule ("Proposed Rule"), which would impose the same requirements over a longer period (until the earlier of December 31, 2020 or 90 days after the Governor ended the state of the emergency). *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue (July 21, 2020), https://bit.ly/2SxirY4. The Proposed Rule declared:

> [A]ll compensation received for services performed by a non-resident who, immediately prior to the Massachusetts COVID-19 state of emergency was an

> employee engaged in performing such services in Massachusetts, and who is performing services from a location outside Massachusetts due to a Pandemic-Related Circumstance will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2.

*Id.* at 830 CMR 62.5A.3(3). The Proposed Rule defined "Pandemic-Related Circumstances" broadly to include, *inter alia*, "any . . . work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which [the rule] is in effect." *Id.* at 830 CMR 62.5A.3(2).

The Proposed Rule drew strong opposition during the comment period. More than 100 individuals, including nonresidents and legislators, testified at a hearing to review the Proposed Rule. Many criticized Massachusetts for "attempting to balance the budget on the backs of hard-working Granite Staters." Greg Moore, *Testimony for Massachusetts Dep't of Revenue, Rulings & Regs. Bureau* (Aug. 27, 2020), https://bit.ly/3j9EqWg.

The New Hampshire Attorney General's office submitted comments opposing the Proposed Rule, pointing out that the Proposed Rule

unconstitutionally imposed a tax on New Hampshire residents working entirely within New Hampshire and "infringe[d] upon the State of New Hampshire's fundamental interests as a sovereign." *See* N.H. Atty. Gen. Gordon MacDonald, *Comments on Proposed Regulation 830 CMR 62.5A.3*, 3 (Aug. 21, 2020). The New Hampshire Department of Business and Economic Affairs submitted similar comments criticizing the Proposed Rule. *See* New Hampshire Department of Business and Economic Affairs, *Re: Proposed Regulation Relative to Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*, 2 (Aug. 21, 2020) (noting that the proposed rule "does not reflect the realities of how work is being accomplished" during these difficult times).

Despite these objections, on October 16, 2020, Massachusetts published and approved the final rule ("Tax Rule") largely as proposed. *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue, (Oct. 16, 2020), https://bit.ly/31fgB9r. The Tax Rule took effect immediately.

## ARGUMENT

Article III of the U.S. Constitution provides that "[i]n all Cases . . . in which a state shall be a Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. In addition, under 28 U.S.C. §1251(a), "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. §1251(a). A plaintiff

seeking to bring an original action in this Court must first file a motion for leave to file a bill of complaint. *See* S. Ct. R. 17.

The Court should grant New Hampshire's motion for leave to file a bill of complaint because New Hampshire's bill of complaint raises issues of serious importance and no alternative forum exists for resolving its claims. In the alternative, the Court should grant leave to file a bill of complaint because Article III requires the Court to exercise its original jurisdiction over disputes between two States.

## I. The Bill of Complaint Presents Issues of Serious Importance that Warrant the Court's Original Jurisdiction.

This Court examines two factors when deciding whether to exercise its original jurisdiction. First, the Court looks to "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Second, the Court explores "the availability of an alternative forum in which the issue tendered can be resolved." *Id*. Both factors support exercising jurisdiction here.

### A. New Hampshire's Strong Interest and the Seriousness and Dignity of Its Claims Warrant the Exercise of the Court's Original Jurisdiction.

1. New Hampshire has a strong interest in eliminating the Tax Rule, for multiple reasons. *First*, the Tax Rule infringes on New Hampshire's sovereign right to control its own tax and economic policies and

undermines the strategy New Hampshire has deliberately employed to provide current and prospective businesses and residents with the New Hampshire Advantage. New Hampshire has never imposed an income tax on its residents.[1] *See* N.H. Dep't of Revenue, *Taxpayer Assistance—Overview of New Hampshire Taxes*, https://bit.ly/2ET6i2T. This longstanding policy choice is a fundamental part of the New Hampshire Advantage central to its sovereign identity, which distinguishes New Hampshire regionally and nationally.

By unlawfully levying an income tax on a sizable percentage of New Hampshire residents—on income earned *in New Hampshire*—Massachusetts has overridden New Hampshire's sovereign discretion over its tax policy to unilaterally impose the precise tax on New Hampshire residents that New Hampshire itself has consistently rejected. The Tax Rule directly contradicts New Hampshire's tax policies and effectively negates the express financial incentive (tax savings) that fuels New Hampshire's successful competition for capital and labor resources. A State's decision about whether and how it collects revenue is "an action undertaken in its sovereign capacity." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). In that sovereign capacity, New Hampshire has set its own revenue collection policies for the benefit of its citizens. Moreover, New Hampshire has a sovereign

[1] New Hampshire does impose a tax on interest and dividend income, *see* N.H. Rev. Stat. Ann. ch, 77 (2016), but does not impose an income tax on residents or nonresidents' individual earned income.

duty to protect the "economic and commercial interests" of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609 (1982). This, too, it accomplishes through its sovereign policy choices.

The New Hampshire Advantage is not merely an abstract concept. New Hampshire's sovereign policy choices have helped boost per capita income, decrease unemployment, and create a competitive advantage that motivates businesses and individuals to choose New Hampshire as their homes. New Hampshire has the seventh-highest median household income of any State at $74,057 per household. U.S. Bureau of the Census, *Median Household Income by State*, https://bit.ly/34XJd8t. This median household income is significantly higher than Maine, Rhode Island, Vermont, and the national average, and is comparable to Connecticut and Massachusetts, which also rank in the top ten. *Id.*

Importantly, New Hampshire's competitive and successful tax policies have not adversely impacted its ability to provide important public services to its citizens. For example, New Hampshire's public education systems have been ranked the sixth highest quality in the nation by Education Week, *see* Education Week, *Quality Counts 2020, State Grades on Chance for Success: 2020 Map and Rankings*, (Jan. 21, 2020), https://bit.ly/3lNyiVm, and New Hampshire ranks in the top ten highest spending per pupil among all states, *see* U.S. Bureau of the Census, *2018 Public Elementary-Secondary Education Finance Data*, Table 11 (Apr. 14, 2020), https://bit.ly/2SZsifV.

Similarly, in both 2018 and 2019, New Hampshire had the second-lowest average unemployment rate in New England and, respectively, the second-lowest and third-lowest unemployment rates nationally. *See* U.S. Bureau of Labor Statistics, *Regional and State Unemployment – 2019 Annual Averages*, Table 1 (Mar. 4, 2020), https://bit.ly/3lJa1jy. In both years, New Hampshire's average employment rate was significantly lower than the national average. *See id.*

New Hampshire's sovereign policy choices, and the advantageous economic landscape they create, are essential to New Hampshire's economic vitality. Numerous top companies from diverse business sectors call New Hampshire home. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Top Companies*, https://bit.ly/34QTwes. New Hampshire's tax policies are also central to its efforts to motivate businesses to relocate to or expand within the State. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Why New Hampshire*, https://bit.ly/3lFTRHy.

The tax policies at the core of the New Hampshire Advantage have likewise succeeded in encouraging individuals and families to move to the State. Tens of thousands of people move to New Hampshire each year. Lori Wright, Univ. of New Hampshire, New Hampshire Agricultural Experiment Station, *Migration is Biggest Driver of Population Change in New Hampshire* (Nov. 19, 2019), https://bit.ly/33KHK63. In 2018, more than 20,000

people moved to New Hampshire from Massachusetts alone. U.S. Bureau of the Census, *State to State Migration Flows*, Table 1 (July 20, 2020), https://bit.ly/3dwuzZL.

A significant number of those new residents continue to work for Massachusetts-based employers, and many explicitly cite New Hampshire's tax laws as a reason why they moved. *See* Kenneth Johnson, *Why People Move to and Stay in New Hampshire*, Univ. of New Hampshire, Carsey School of Public Policy (Summer 2020), https://bit.ly/33pF3GB. Indeed, tax experts agree that New Hampshire's tax policies have been key to "attracting new businesses and . . . generating economic and employment growth." Jared Walczak, *2020 State Business Tax Climate Index* at 8, Tax Foundation (Oct. 21, 2019), https://bit.ly/3dkZszV; *see also* Joe Horvath, *Why New Hampshire Attracts More Wealth and Commerce Than Maine*, Maine Policy Institute (June 22, 2016), https://bit.ly/33R2oBr ("Maine and New Hampshire are similar states," yet "New Hampshire . . . is outperforming Maine" because of "better economic policy").

By reaching across its borders into the wallets of New Hampshire residents, Massachusetts takes direct aim at New Hampshire's policy choices as a sovereign, and the New Hampshire Advantage that has resulted from those choices. Through the Tax Rule, Massachusetts effectively imposes its income tax in a State in which no comparable tax exists. Massachusetts' actions undermine New Hampshire's efforts to maintain attractive economic conditions that motivate new businesses and workers to relocate to

the State and existing businesses to expand within the State.

The Tax Rule also exacerbates the burden on New Hampshire's public services. The COVID-19 pandemic has increased demand for New Hampshire's government services generally, and work-from-home policies mean that tens of thousands of individuals are now exclusively relying on *New Hampshire*'s public services—including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more—rather than Massachusetts'. Yet the Tax Rule ensures that those individuals continue to support public services in *Massachusetts* that they no longer use.

Massachusetts' actions harm the fabric of New Hampshire's communities. In recent years, young people and their families have flocked to New Hampshire to take advantage of the State's favorable policies and high quality of life. This migration is "important to New Hampshire's demographic future." Johnson, *supra*. These new residents bring tremendous energy and a wealth of new ideas to the State and further the State's longstanding culture of innovation in the economic and education sectors. The Tax Rule's attack on New Hampshire's migration incentives puts all these gains at risk.

In short, Massachusetts has taken aim at a defining feature of New Hampshire's sovereign identity through unconstitutional means. For this reason alone, New Hampshire has an existential interest, as a sovereign, in eliminating the Tax Rule.

*Second*, and relatedly, the Tax Rule harms New Hampshire's ability to recruit individuals to work for its state government. More than 17,000 people work for the State of New Hampshire. Every day, New Hampshire state employees ensure public safety through police, fire, and rescue services, maintain public transportation, operate state courts, run New Hampshire's university system, and much more. Many of the employees who New Hampshire recruits have spouses or other family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New Hampshire). If these families will be forced to pay Massachusetts income taxes regardless where their work is performed, many will choose to live in Massachusetts. New Hampshire has an interest, as a sovereign, in continuing to recruit and retain these individuals and their families.

*Finally*, the Tax Rule endangers public health in New Hampshire. In March 2020, through his executive order, Governor Baker sent millions of workers home. As a result, tens of thousands of New Hampshire residents who had been traveling to Massachusetts to work were required to perform their duties from New Hampshire. And even now, when governments have rolled back many pandemic-related restrictions, working from home remains best practice for thousands of New Hampshire residents. For these residents, this shift in location is not merely a matter of preference or convenience, but rather required or encouraged by the government or their employers to protect the public health.

If these residents had *chosen* to work at home prior to the pandemic, any income they earned while working in New Hampshire would not be taxed as Massachusetts income. Under the Tax Rule, however, income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income. And while the Tax Rule purportedly applies solely to remote work resulting from "Pandemic-Related Circumstances," that term is defined so broadly that *any person* who transitions to working from home for *any reason* while the Tax Rule is in effect remains subject to Massachusetts income tax for work performed in New Hampshire. *See* Tax Rule, 830 CMR 62.5A.3(2) (defining "Pandemic-Related Circumstances" to include "any other work arrangement in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which 830 CMR 62.5A.3 is in effect").

In other words, the Tax Rule both penalizes individuals who are working from home at the direct request of the Massachusetts Governor and, more generally, disincentivizes *all* individuals from pursuing alternative work arrangements at a time when health officials continue to stress the importance of social distancing and other restrictions on in-person interactions. Massachusetts has suggested that the Tax Rule is merely designed to maintain the status quo until the pandemic abates. This suggestion is belied by the definition of "Pandemic-Related Circumstances" in the Tax Rule, which inevitably

sweeps up workers who are remote for reasons entirely unrelated to the pandemic. Thus, while Massachusetts paints the Tax Rule as a stopgap measure designed to bridge a finite period of uncertainty, it in fact reflects an aggressive attempt to impose Massachusetts income tax within the borders of a coequal sovereign. The pandemic in no way alters this fact.

Yet, the pandemic continues to take its toll on Granite Staters. More than 9,000 New Hampshire residents have contracted the virus and more than 450 have died from it. *See* N.H. Dep't of Health & Human Servs., *COVID-19*, https://bit.ly/36s2jG4. New Hampshire has a direct interest in protecting its citizens from the continued spread of the virus by incentivizing residents to work from home. *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (a core "function" of the State is to "guard the public health" of its citizens); *see also North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) ("This Court has entertained [claims] by one state to enjoin . . . another" when the latter state's actions are "dangerous to the health of the inhabitants of the former.").

The Tax Rule undermines that interest by penalizing New Hampshire residents for following public health requirements and recommendations and incentivizing New Hampshire residents to travel across state borders. New Hampshire has a strong interest in challenging the Tax Rule for this reason as well.

These serious harms to New Hampshire demonstrate the need for this Court's original jurisdiction. This action "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction.'" *Wyoming v. Oklahoma*, 502 U.S. at 451 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)) (exercising original jurisdiction over challenge to Oklahoma law under the Commerce Clause). Indeed, this Court has not hesitated to entertain original actions over challenges by States to another State's taxes. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398 (U.S. 1992) (exercising original jurisdiction over a suit brought by Massachusetts and other states to challenge a New Hampshire tax); *Maryland v. Louisiana*, 451 U.S. at 756 (exercising original jurisdiction over a State challenge to a Louisiana tax). This case is equally important.[2]

2. New Hampshire's claims also are "serious" and directly tied to New Hampshire's fundamental interests as a sovereign. *Mississippi v. Louisiana*, 506 U.S. at 739. New Hampshire brings two claims—

[2] Although the Tax Rule expires on December 31, 2020, that will not moot this case. The legitimacy of the 2020 tax would still be at issue. Moreover, Massachusetts has already extended the rule twice over the vocal opposition of New Hampshire officials and residents, and it will surely do so again. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (case not moot when issue is "capable of repetition, yet evading review"). Further, the mere existence of this aggressive incursion into New Hampshire's sovereign jurisdiction, if allowed to stand, will cast a shadow over the New Hampshire Advantage in the future.

under the Commerce Clause and the Due Process Clause—and it is likely to prevail on both challenges.

The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. But the clause also has been read as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). This construction serves the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id.* at 179-80.

A State's taxation of nonresidents will survive scrutiny under the Commerce Clause only if it meets four requirements. The State's tax must be (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned"; (3) non-discriminatory—*i.e.*, it must not "discriminate against interstate commerce"; and (4) "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398, at *21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).

The Tax Rule fails all four prongs. It fails the first prong because when a New Hampshire resident is performing work entirely within New Hampshire, Massachusetts lacks the requisite minimum connection with either the worker or her activity. *Allied-Signal, Inc.*, 504 U.S. at 777-78. "Substantial nexus" requires that "there must be a connection to the *activity itself*, rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (emphasis added). The Tax Rule, in contrast, imposes a tax based solely on the location of the employer regardless of the work being done and where. Indeed, that is its very point: to recapture income on activity that *used to be* performed in Massachusetts. Because the Tax Rule purports to tax nonresidents on income earned from activity lacking any connection with Massachusetts, no "substantial nexus" exists.

The Tax Rule also fails the second prong of *Complete Auto*'s test, which requires that a tax must be "fairly apportioned." This "ensure[s] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260 (1989), *abrogated on other grounds by Wynne*, 135 S. Ct. at 1798. This prong is not satisfied "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Oklahoma Tax Comm'n*, 514 U.S. at 184. The test, in other words, rejects the possibility of double taxation.

Through the Tax Rule, Massachusetts imposes a tax on activity that is occurring *in New Hampshire*. New Hampshire has the authority and prerogative to tax that income. That New Hampshire has decided not to exercise this authority over its own citizens is not a license for Massachusetts to do so; the mere possibility of double taxation is forbidden under the Commerce Clause. *See, e.g., Evco v. Jones*, 409 U.S. 91, 94 (1972) (state tax on the proceeds of out-of-state sales violated the Commerce Clause where it created a "risk of a double tax burden"). Simply put, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id.*

For similar reasons, the Tax Rule fails *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. In *Wynne*, this Court struck down a comparable Maryland tax scheme that "had the potential to result in discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." 135 S. Ct. at 1795. The Court supported its conclusion with reference to similar invalidations in *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), noting that "[i]n all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate

over interstate economic activity." *Wynne*, 135 S. Ct. at 1795.

In *Wynne*, this Court applied the Commerce Clause's "internal consistency" test to strike down the burdensome tax scheme. The Court stated that "[t]his test, which helps courts identify tax schemes that discriminate against interstate commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1802 (quoting *Oklahoma Tax Comm'n*, 514 U.S. at 179). The complex Massachusetts tax scheme under the Tax Rule fails the internal consistency test. If every state imposed a regime like the Tax Rule, a taxpayer who confined her activity to one State would pay a single tax on her income to the State where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across state lines to earn her income would pay a double tax on such income, one to her State of residence and another to the State in which she earned the income. As a result, "interstate commerce would be taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed a rule similar to the Tax Rule, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to move between States or accept flexible working assignments. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

Finally, the Tax Rule fails *Complete Auto*'s fourth prong, which requires the state tax to be "fairly related to the services provided by the State." 430 U.S. at 279. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citation omitted). Under the Tax Rule, New Hampshire residents are taxed as though they are travelling to and working in Massachusetts—even if they never set foot in the State. The Tax Rule thus is not in "proper proportion" to New Hampshire residents' "activities within [Massachusetts] and, therefore, to their consequent enjoyment of the opportunities and protections which the State has afforded in connection with those activities." *Id.* (citation omitted). Because Massachusetts' tax is not "assessed in proportion to a taxpayer's activities or presence in a State," the Tax Rule unconstitutionally requires New Hampshire residents to "shoulder[] [more than their] fair share." *Id.* at 627.

The Tax Rule violates the Due Process Clause for similar reasons. Due process "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.*, 139 S. Ct. at 2219. The Court has long recognized that the Due Process Clause prohibits a State from "tax[ing] value earned outside its borders." *Allied-Signal Inc.*, 504 U.S. at 778 (1992). That is because the "seizure of property by the State under pretext of taxation when there is no jurisdiction

or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co.*, 347 U.S. at 342.

To survive a challenge under the Due Process Clause, there must be "'some definite link, some minimum connection, between a [S]tate and the person, property or transaction it seeks to tax.'" *Allied-Signal Inc.*, 504 U.S. at 777 (quoting *Miller Brothers Co.*, 347 U.S. at 344-45). In the case of a tax on an activity, "there must be a connection to the *activity itself*, rather than a connection only to the *actor*, the State seeks to tax." *Id.* at 778 (emphasis added). In addition, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Moorman Mfg. Co.*, 437 U.S. at 273 (citation omitted). If the connection is too attenuated, the state tax will violate the Due Process Clause. *See id.*

The Tax Rule violates these fundamental requirements of due process. It requires no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer. Put differently, the Tax Rule simply bears no "fiscal relation to [the] protection, opportunities and benefits given by the state." *Wisconsin*, 311 U.S. at 444. New Hampshire residents earning a living from home offices in New Hampshire are not protected by Massachusetts police, fire, and rescue services, do not seek education or housing opportunities provided by Massachusetts, and do not enjoy the benefits of Massachusetts roads, public transportation, or utilities. They do not "earn" income "in

Massachusetts" any more than an outsourced customer service operator in a foreign country "earns" income "in the United States" by working for a U.S.-based employer. The Tax Rule violates the Due Process Clause too.

### B. No Alternative Forum Exists to Resolve These Issues.

The Court also should exercise its original jurisdiction over this case because there is no "alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This statutory command is inflexible. As the Court has explained, any argument that another court could hear a dispute between two States "founders on the uncompromising language of 28 U.S.C. §1251(a), which gives to this Court 'original and *exclusive* jurisdiction of all controversies between two or more States." *Mississippi v. Louisiana*, 506 U.S. at 77 (quoting 28 U.S.C. §1251(a)) (emphasis in original). Simply put, this Court is the *only* forum in which New Hampshire can bring its claims. *Id.*; *see also Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting) ("Federal law is unambiguous: If there is a controversy between two States, this Court—and only this Court—has jurisdiction over it.").

In addition, to New Hampshire's knowledge, there are no other cases in which this issue is currently being litigated. *Wyoming v. Oklahoma*, 502 U.S. at 451-52 (finding original jurisdiction because

"no pending action exists to which we could defer adjudication on this issue"). Nor is any federal district court likely to take up this issue. That is because the Tax Injunction Act generally prohibits "district courts" from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law." 28 U.S.C. §1341. This law, however, "by its terms only applies to injunctions issued by federal district courts" and thus is inapplicable to this original action. *Maryland v. Louisiana*, 451 U.S. at 745 n.21.

It is possible that an individual from New Hampshire might challenge the Tax Rule through the administrative remedies provided by Massachusetts. *See* M.G.L.c. 62C, §§37, 39. But this is not a sufficient alternative. Again, to New Hampshire's knowledge, no such suit has occurred, which weighs heavily in favor of this Court's original jurisdiction. *See Wyoming v. Oklahoma*, 502 U.S. at 451-52 (examining whether there were any "pending action" raising the issues). There also are clear disincentives to bringing such a challenge, as it would have to be litigated through the Massachusetts administrative process and in a Massachusetts court, and any taxpayer who might bring the claim would either have to refuse to pay the tax in question and risk incurring tax penalties or pay the tax and hope that it can be recouped at the end of the litigation. And even if an individual taxpayer did challenge the tax, this would not help the tens of thousands of New Hampshire residents who lack the means to bring such a suit.

More fundamentally, however, any such challenge would not redress New Hampshire's own

injuries. As explained, the Tax Rule is causing injuries specific to the State of New Hampshire—not just to individual taxpayers—and this Court is the *only* forum in which New Hampshire can bring its claims. This Court has original jurisdiction over disputes between the States precisely to avoid one State deciding these types of issues through its own courts. Indeed, "one of the most crying evils" of the Articles of Confederation was their failure to guarantee an adequate forum for peacefully resolving interstate disputes. *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838). The Founders deemed this Court's original jurisdiction over such disputes as "essential to the peace of the union." The Federalist No. 80, at 535 (A. Hamilton) (Cooke, ed., 1961). The Court should exercise its original jurisdiction over this interstate dispute.

## II. Alternatively, the Court Should Hear the Case Because the Court's Original Jurisdiction Over Interstate Disputes Is Mandatory.

In the alternative, the Court should grant leave to file the bill of complaint because the Court lacks discretion to decline review in cases within its original jurisdiction that arise between two or more States.

The Constitution establishes this Court's original jurisdiction in mandatory terms. Article III states that "[i]n all cases . . . in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction." U.S. Const., art. III, § 2, cl. 2 (emphasis added). As Chief Justice John Marshall long ago explained, the Supreme Court has "no more right to

decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Ever since, this Court "has cautioned" that "[j]urisdiction existing, . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

The Court's original jurisdiction over disputes between States is also "exclusive." 28 U.S.C. §1251(a). If this Court does not exercise jurisdiction over a controversy between two States, "then the complaining State has no judicial forum in which to seek relief." *Arizona v. California*, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting). "Denying leave to file in a case between two or more States is thus not only textually suspect, but also inequitable." *Id.*

This Court has relied on "policy considerations" for "transforming its mandatory, original jurisdiction into discretionary jurisdiction." *Nebraska v. Colorado*, 136 S. Ct. at 1035 (Thomas, J., dissenting). And it has invoked its "increasing duties with the appellate docket," *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), and its "structur[e] . . . as an appellate tribunal," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). But the Court has "failed to provide any analysis of the Constitution's text to justify [its] discretionary approach." *Arizona v. New Mexico*, 140 S. Ct. at 685 (Thomas, J., dissenting). A proper textual analysis of this question compels the

conclusion that this Court's original jurisdiction over these types of disputes is not discretionary.

*Stare decisis* does not support retaining this flawed approach. "The doctrine is at its weakest when [the Court] interpret[s] the Constitution . . . because only this Court or a constitutional amendment can alter [such] holdings." *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2177 (2019). The Court's treatment of original jurisdiction as discretionary has not created "reliance interests." *Id.* at 2179. And, moreover, the Court's caselaw lacks "consistency" with the Court's long-recognized requirements that courts have a virtually unflagging duty to exercise the jurisdiction granted to them. *Sprint Commc'ns, Inc.,* 571 U.S. at 77.

Because the Court's discretionary approach is "at odds with the statutory text" of 28 U.S.C. §1251(a) and is based on "policy judgments that are in conflict with the policy choices that Congress made," the doctrine "bears reconsideration." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting). The Court should grant the motion for leave to file the bill of complaint.

## CONCLUSION

For these reasons, New Hampshire respectfully requests that the Court grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

Gordon J. MacDonald
*Attorney General*
Daniel E. Will
*Solicitor General*
Samuel R.V. Garland
*Assistant Attorney General*
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
*Counsel of Record*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

*Counsel for Plaintiff*
*State of New Hampshire*

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