Orig. No. 154

In the Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
COMMONWEALTH OF MASSACHUSETTS,
Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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New Hampshire here objects to Massachusetts's temporary regulation maintaining the pre-pandemic status quo for sourcing non-resident employees' income from their work for Massachusetts businesses during Massachusetts's COVID-19 state of emergency. As this Court has long recognized, its original jurisdiction should not encompass such "a collectivity of private suits . . . for taxes withheld from private parties." *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (per curiam). To accept such mine-run tax disputes, which the affected taxpayers themselves may pursue through the established administrative and judicial remedies, "would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939). The Court should deny leave to file the complaint for the further reasons that it fails to satisfy Article III's standing requirements and does not state a viable dormant Commerce Clause or due process claim.

STATEMENT

1. On March 10, 2020, in response to a novel and highly contagious respiratory virus that has infected millions, overwhelmed public health systems, and now killed hundreds of thousands of people in the United States, the Governor of Massachusetts declared a

state of emergency in the Commonwealth.[1] On March 23, 2020, he ordered all non-essential businesses to cease in-person operations for two weeks, but encouraged them to continue operating remotely if feasible.[2] That order was extended on March 31, April 28, and May 15.[3] The Commonwealth thereafter began a phased reopening that continues to this day.[4] Massachusetts's neighboring states, too, took measures to curb transmission of the virus, including limiting businesses' in-person operations and encouraging employers to allow employees to work remotely.[5]

A sudden transition to work-from-home amidst this emergency not only upended businesses' operations and their employees' daily lives, but also posed innumerable logistical and legal quandaries, including in state taxation. For example, would a business heretofore operating solely in Rhode Island, that had always withheld Rhode Island taxes for its employees no matter where they resided, suddenly be

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[1] Governor Charles D. Baker, *Declaration of a State of Emergency to Respond to COVID-19* (Mar. 10, 2020), tinyurl.com/y3m4bsnt.

[2] Governor Charles D. Baker, COVID-19 Order No. 13 (Mar. 23, 2020), tinyurl.com/rog8pj7.

[3] Office of Governor Charlie Baker & Lt. Governor Karyn Polito, *COVID-19: Essential Services* (2020), tinyurl.com/tkqn3px (collecting orders).

[4] *See* Mass. Dep't of Health, *COVID-19 Updates and Information* (2020), tinyurl.com/yy7coqc6.

[5] *See, e.g.*, N.H. Emerg. Order No. 17 (Mar. 26, 2020), tinyurl.com/yyku2fkw; R.I. Exec. Order No. 20-14 (Mar. 28, 2020), tinyurl.com/y22baznm.

required to withhold Massachusetts taxes for employees newly working from home across the border in Massachusetts? *Cf.* Mass. Gen. Laws ch. 62B, § 2. Should a Massachusetts business employing non-residents cease withholding Massachusetts tax for those employees if the employees were suddenly working from home outside the Commonwealth? *Cf. id*.

On April 21, 2020, Massachusetts's Department of Revenue issued guidance to address these and other questions arising from the COVID-19 emergency. *See Technical Information Release 20-5: Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic* (Apr. 21, 2020) ("Apr. TIR"), tinyurl.com/ycq8bpwb (describing emergency regulation regarding personal income taxes as well as guidance on other tax issues). In short, the Department maintained the pre-pandemic status quo for tax filing obligations and thereby sought to avoid uncertainty and spare employers additional compliance burdens amidst the unprecedented circumstances, when record-keeping employees themselves might be scattered from the office, and remote-work schedules might shift by the day or week.

As the guidance explained, Massachusetts residents are generally taxed on all their income from all sources. Mass. Gen. Laws ch. 62, § 2; *see* Apr. TIR, Part II. For non-residents, if their Massachusetts-based gross income exceeds $8,000, *see* Mass. Gen. Laws ch. 62C, § 6, they are taxed on their gross income from sources within the Commonwealth, including "income derived from or effectively connected with . . . any trade or business, including any employment

carried on by the taxpayer in the commonwealth," Mass. Gen. Laws ch. 62, § 5A(a). If non-residents have income from sources both within Massachusetts and elsewhere, various apportionment formulas apply to determine how much of their income is sourced to Massachusetts. 830 Code Mass. Regs. 62.5A.1(5)(a)-(e), 62.5A.2 (addressing income based on, *e.g.*, miles traveled or commissions). For hourly or salaried workers, the formula determines Massachusetts-source income by using either the exact amount of pay received for services performed in Massachusetts, or, if such a determination is impossible, by taking the employee's gross income multiplied by the fraction of the employee's total working days spent working in Massachusetts. *Id*. at 62.5A.1(5)(a). Thus, a New Hampshire resident working in Boston two days per week and from home three days per week for a $50,000 salary has Massachusetts-source income of $20,000. *See id*.

The April 21 emergency regulation maintained the status quo for personal income tax withholding purposes. Non-resident employees who worked in Massachusetts before the state of emergency would continue to be taxed in the same proportion as during the immediate pre-pandemic period, regardless whether they continued commuting to the Commonwealth to do their work, or performed the same work remotely from home or another location, or varied their location by the day or week. *See* Apr. TIR, Part II. Accordingly, Massachusetts businesses could simply continue withholding as before, without need for continual changes due to fluctuating remote-work circumstances over the course of the declared emergency. *See id*.

The regulation similarly reduced disruption for out-of-state employers with Massachusetts-resident employees who were suddenly working from home due to the COVID-19 emergency. If a Massachusetts-resident employee continued to be required to pay income tax to that other state under a similar emergency-related sourcing rule, the employee would be eligible for a Massachusetts tax credit for taxes owed to the other state. *Id.* (citing Mass. Gen. Laws ch. 62, § 6(a)). The emergency rule made explicit that such an out-of-state employer was therefore "not obligated to withhold Massachusetts income tax for the employee to the extent that the employer remains required to withhold income tax with respect to the employee in such other state." *Id.*

The Department also maintained the status quo on a host of other fronts. Its guidance clarified, for example, that out-of-state companies would not newly be required to collect Massachusetts sales and use taxes solely based on the fact that "one or more employees that previously worked in another state . . . are working remotely from Massachusetts" due to the pandemic. *Id.*, Part III. Similarly, such employees' presence in Massachusetts would not subject a company to Massachusetts corporate excise tax, increase the Massachusetts apportionment of the tax, or deprive a corporation of the protections of the Interstate Income Act of 1959, 15 U.S.C. §§ 381-84. Apr. TIR, Part IV.

And finally, the Department advised that the status quo would continue for Massachusetts's new Paid Family and Medical Leave program, which requires employers to contribute on a per-employee

basis to a trust fund to pay for the program. *See* Mass. Gen. Laws ch. 175M, § 6. No such contributions would be newly required for a Massachusetts resident who previously worked outside Massachusetts but was temporarily working from home due to another state's declared emergency. Apr. TIR, Part V. But non-resident employees for whom such contributions were already required based on their work in Massachusetts would remain covered by the program during the emergency. *See id.*

On July 21, 2020, the Department of Revenue issued revised guidance providing certain additional details, including about the reasons for telecommuting that would qualify as pandemic-related. *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), tinyurl.com/y5hre3c2. The same day, the Department commenced notice-and-comment proceedings on a regulation codifying the emergency income tax rule, to be effective until the earlier of December 31, 2020 or 90 days after the Governor declared the emergency over. 830 Code Mass. Regs. 62.5A.3 (as proposed July 21, 2020), tinyurl.com/y4gxmwmo.

Following comment and a hearing on the proposal, the Department published a final regulation on October 16, 2020. 830 Code Mass. Regs. 62.5A.3 (Oct. 16, 2020), tinyurl.com/y4kmbkud. The regulation applied to services performed from the start of Massachusetts's declared COVID-19 state of emergency on March 10, 2020, until the earlier of either December 31, 2020 or 90 days after the

Governor gave notice of the emergency's end. *Id.* at 62.5A.3(1)(d).

With the COVID-19 emergency continuing, on December 8, 2020, the Department issued an emergency regulation extending the rule until 90 days after the Governor gives notice of the emergency's end. *Technical Information Release 20-15: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic* (Dec. 8, 2020), tinyurl.com/y47dxdns; 830 Code Mass. Regs. 62.5A.3(1)(d) (emergency regulation), tinyurl.com/yxzfq3z8.[6] The Department also initiated notice-and-comment proceedings on a proposed regulation likewise extending the rule. 803 Code Mass. Regs. 62.5A.3 (as proposed Dec. 8, 2020), tinyurl.com/y3s5fkjm. The rule is otherwise unchanged. *See id.*

2. Massachusetts's temporary rule provides that "all 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." 830 Code Mass. Regs. 62.5A.3(3)(a). The rule defines "Pandemic-Related Circumstances" to include "(a) a government order issued in response to the

[6] All citations hereinafter to 830 Code Mass. Regs. 62.5A.3 are to this emergency regulation now in effect.

COVID-19 pandemic, (b) a remote work policy adopted by an employer in compliance with federal or state government guidance or public health recommendations relating to the COVID-19 pandemic, (c) the worker's compliance with quarantine, isolation directions relating to a COVID-19 diagnosis or suspected diagnosis, or advice of a physician relating to COVID-19 exposure, or (d) 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." *Id.* at 62.5A.3(2).

For taxpayers who previously apportioned their income based on the number of days they worked in the Commonwealth prior to the COVID-19 emergency, the final temporary rule makes explicit that such apportioning shall continue. 830 Code Mass. Regs. 62.5A.3(3)(b). The rule gives such taxpayers a choice of yardsticks for apportioning their income during the emergency: based on either "(1) the percentage of the employee's work days spent in Massachusetts during the period January 1 through February 29, 2020," or "(2) if the employee worked for the same employer in 2019, the apportionment percentage properly used to determine the portion of employee wages constituting Massachusetts source income on the employee's 2019 return." *Id.*

As in the earlier emergency regulation, the temporary final rule reiterates that an out-of-state employer of a Massachusetts resident who is newly

telecommuting from Massachusetts due to the pandemic is not obligated to withhold Massachusetts income tax for that employee "to the extent the employer remains required to withhold income tax with respect to the employee in such other state." 830 Code Mass. Regs. 62.5A.3(4). Withholding Massachusetts tax is unnecessary, the rule notes, because such employees would continue to be eligible for a Massachusetts credit for income taxes paid to the other state. *Id.* (citing Mass. Gen. Laws ch. 62, § 6(a)).

3. Every person against whom Massachusetts income tax is assessed may file an abatement request with Massachusetts's Commissioner of Revenue. Mass. Gen. Laws ch. 62C, § 37. The Commissioner, upon review, "shall abate the tax, in whole or in part," if he "finds that the tax is excessive in amount or illegal." *Id.* Any "person aggrieved" by the Commissioner's disposition may file an appeal to the Appellate Tax Board, an independent adjudicatory board empowered to conduct evidentiary review and order abatement of any improperly assessed tax. *Id.* at § 39. A party aggrieved by a Board decision may appeal directly to Massachusetts's Appeals Court, Mass. Gen. Laws ch. 58A, § 13, and may also seek direct or further appellate review in Massachusetts's Supreme Judicial Court, Mass. R. App. P. 11, 27.1. Review of any federal questions then may be sought in this Court.

4. Despite the availability of these administrative and judicial remedies for any taxpayer aggrieved by Massachusetts's temporary rule, the State of New Hampshire filed the instant motion for leave to file a bill of complaint on October 19, 2020.

The proposed complaint alleges two claims against Massachusetts. First, it alleges that Massachusetts's temporary rule violates the dormant Commerce Clause, because it purportedly taxes New Hampshire residents on income "lacking any connection with Massachusetts," over which "New Hampshire has the authority and prerogative to tax," Bill of Complaint ("Compl.") ¶¶ 91, 93; creates a "possibility of double taxation," Compl. ¶ 93; and taxes New Hampshire residents "as though they are travelling to and working in Massachusetts—even if they never set foot in the State," Compl. ¶ 100. Second, the complaint alleges that the regulation violates the Due Process Clause of the Fourteenth Amendment for lack of any "definite link" or "minimum connection" between Massachusetts and the taxed income. Compl. ¶ 107 (quotation omitted).

New Hampshire does not allege that the temporary rule applies to the State itself or otherwise inflicts any specified monetary harm on the State in the form of lost tax revenue or otherwise. *See, e.g.*, Compl. ¶ 9. Rather, New Hampshire alleges, the temporary rule "disrespects New Hampshire's sovereignty" and its sovereign choice not to impose its own income tax on its residents. *Id.* Moreover, the complaint contends, the temporary rule "undermines an incentive for businesses to locate capital and jobs in New Hampshire" and thereby "reduc[es] economic growth" by unspecified amounts, "weakens efforts to recruit individuals to work for [its own] state government," and somehow "penaliz[es] workers for following public health guidance." *Id.*

ARGUMENT

I. This case is not appropriate for the Court's original jurisdiction.

This Court has long recognized that its "delicate and grave" original jurisdiction should be exercised only "when the necessity [i]s absolute and the matter itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court "make[s] case-by-case judgments as to the practical necessity of an original forum in this Court," including in cases involving the Court's exclusive jurisdiction. *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). Such discretion is necessary because, "[a]s our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971) (noting "the frequency" of "clash[es] over the application of state laws concerning taxes" in particular). Entertaining all such cross-border disputes "would unavoidably . . . reduc[e] the attention [the Court] could give to those matters of federal law and national import" as to which it is "the primary overseer[]" through its "role as the final federal appellate court." *Id.* at 498-99.

This case falls outside the category of "appropriate cases" for exercise of this Court's original jurisdiction under the two main criteria the Court considers in exercising its discretion. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). First, "look[ing] to 'the nature of the interest of the complaining State,'" *id.* (quoting *Massachusetts*, 308 U.S. at 18), the case lacks a claim of sufficient "seriousness and dignity," *id.* (quoting

Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)). At bottom, New Hampshire is "merely litigating as a volunteer the personal claims of its citizens" who are employed in Massachusetts, *Pennsylvania*, 426 U.S. at 665, and the claimed "threatened invasion" of its own rights is not "of serious magnitude and . . . established by clear and convincing evidence," *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981) (quoting *New York v. New Jersey*, 256 U.S. 296, 309 (1921)). Second, there is another forum "where the issues tendered may be litigated, and where appropriate relief may be had." *Milwaukee*, 406 U.S. at 93. The questions presented here can and should be litigated through the established processes for review of state taxation questions, subject to this Court's usual appellate review of all federal questions.[7]

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[7] This Court should decline New Hampshire's invitation to reconsider this discretionary approach to original jurisdiction, *see* Br. 32-34, for which New Hampshire provides no "special justification," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quotation omitted). The Court has declined a recent spate of such invitations, in disputes ranging from a state animal welfare law's alleged effect on egg prices elsewhere, Brief for Plaintiffs, *Missouri v. California*, No. 148 Orig., 13 n.1 (Dec. 4, 2017), to claimed failings of a state's scheme for taxing out-of-state LLCs' in-state activities, Brief for Plaintiff, *Arizona v. California*, No. 150 Orig., 36 (Feb. 28, 2019), to an opioid manufacturer's and its board's roles in fueling the opioid crisis, Brief for Plaintiff, *Arizona v. Sackler*, No. 151 Orig., 15-19 (July 31, 2019). "It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies." *Arizona v. New Mexico*, 425 U.S. 794, 798 (1976) (quoting *Wyandotte*, 401 U.S. at 497).

A. Massachusetts has not invaded New Hampshire's sovereign or quasi-sovereign interests.

This putative case concerns only a temporary emergency rule maintaining the status quo on sourcing income for non-resident employees who are suddenly telecommuting to their Massachusetts jobs from elsewhere amidst the COVID-19 pandemic. Such a tax complaint, in essence brought on behalf of a discrete subset of residents rather than to redress an injury to the State itself, is precisely the type the Court has long held unsuitable to its original jurisdiction.

The Constitution confers original jurisdiction on this Court "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923); *see* U.S. Const. art. III, § 2, cl. 2. "'Before this [C]ourt can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *North Dakota*, 263 U.S. at 374 (quoting *New York*, 256 U.S. at 309); *see also Mississippi*, 506 U.S. at 77 (describing the "model" dispute as one "of such seriousness that it would amount to *casus belli* if the States were fully sovereign" (quotation omitted)); *see, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657, 721-31 (1838) (boundary dispute).

In examining whether such a serious threatened invasion of a state's rights exists, the Court has long held that "'the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.'" *Kansas v. Colorado*, 533 U.S. 1, 8 (2001) (quoting *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938)); *see also*, *e.g.*, *Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911). Although States' "'quasi-sovereign' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain,'" may support exercise of original jurisdiction, "this principle does not go so far as to permit resort to [the Court's] jurisdiction in the name of a State but in reality for the benefit of particular individuals." *Oklahoma ex rel. Johnson*, 304 U.S. at 393-94 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Otherwise, "if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, [the Court's] docket would be inundated," and "the critical distinction, articulated in Art. III, S. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate." *Pennsylvania*, 426 U.S. at 665-66.

Applying these principles, the Court has repeatedly turned away cases like the one here. Most similarly, in *Pennsylvania v. New Jersey*, the Court declined to accept jurisdiction of cases brought to recover commuter taxes assessed against the plaintiff-States' residents by New Jersey and New Hampshire. 426 U.S. at 661-66. New Hampshire's tax had recently

been held unconstitutional, *Austin v. New Hampshire*, 420 U.S. 656 (1975), and both challenged taxes were alleged to have imposed pecuniary losses on the plaintiff-States themselves in the form of tax credits for residents' income taxes paid to other states. *Pennsylvania*, 426 U.S. at 661-63. But the commuter taxes had not directly "inflicted any injury upon the plaintiff States" themselves, and "[n]othing required [them] to extend a tax credit to their residents for income taxes paid to" other states. *Id.* at 664. And the Court rejected Pennsylvania's attempt to cast the lawsuit as a *parens patriae* suit on behalf of its residents generally, because "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Id.* at 665.

The Court also declined to exercise original jurisdiction over a purported clash between sovereigns in *Massachusetts v. Missouri*, where both States claimed the right to tax a Massachusetts domiciliary's estate. 308 U.S. at 14-15. The Court found no conflict between the States themselves, however, because, among other reasons, the property at issue was "amply sufficient to answer the claims of both States," and the States' differing choices about how to tax the estate were not "mutually exclusive." *Id.* at 15-16. In the absence of an actual conflict between the States themselves, Massachusetts was not entitled to "invoke [the Court's] jurisdiction for the benefit of" its own residents. *Id.* at 17. *See also, e.g.*, *Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976) (per curiam) (declining to exercise jurisdiction over dispute regarding energy tax alleged to discriminate against

interstate commerce, in part because the tax's "legal incidence [wa]s on the utilities").

Likewise here, Massachusetts "is not injuring" New Hampshire itself. *Massachusetts*, 308 U.S. at 15. Contrary to New Hampshire's contentions, Massachusetts's temporary rule simply does not threaten New Hampshire's unquestioned sovereign authority to determine its *own* income tax policy. While New Hampshire complains that Massachusetts is "reaching across its borders" to tax New Hampshire residents newly telecommuting to their jobs in Massachusetts, Br. 18, Massachusetts has *always* taxed the Massachusetts-source income of non-residents who work at Massachusetts businesses, *see supra* at 3-4, just as other states in turn tax Massachusetts residents' income from those states, *see, e.g.*, Conn. Gen. Stat. § 12-700(b). New Hampshire cites no authority whatsoever for the proposition that routine taxation by one state of cross-border activity by the residents of another constitutes "an aggressive incursion into [another state's] sovereign jurisdiction" warranting this Court's jurisdiction. Br. 24 n.2; *see also* Br. 15 (citing only *Wyoming v. Oklahoma*, 502 U.S. 437, 541 (1992), for the unremarkable proposition that "[a] State's decision about whether and how it collects revenue is 'an action undertaken in its sovereign capacity'"). Rather, "[e]ach State has enacted its legislation according to its conception of its own interests" with respect to income taxation, and the two States' choices are not "mutually exclusive." *Massachusetts*, 308 U.S. at 15-17.

To be sure, taxes on cross-border personal income have been held unconstitutional—including for discriminating against interstate commerce, *see, e.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1792 (2015)—but no such case strikes down a tax or invokes this Court's original jurisdiction on grounds that one state taxing another's residents somehow attacks the latter's very sovereignty. And for good reason: Granting States inherent standing as sovereigns to contest every allegedly unconstitutional or otherwise unlawful tax on a subset of their residents "would interpose" this Court as the "virtually continuing monitor[] of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (quotations omitted) (declining to recognize Article III standing for state taxpayers "simply by virtue of their status as taxpayers").

New Hampshire's other claimed harms to its sovereign and quasi-sovereign interests are neither "of serious magnitude" nor "established by clear and convincing evidence." *Maryland*, 451 U.S. at 736 n.11 (quoting *New York*, 256 U.S. at 309). New Hampshire speculates—without claiming knowledge of a single actual instance—about possible harms to its efforts to attract new businesses or residents to relocate to the State, Compl. ¶¶ 54-63, 65, or recruit prospective state employees, Compl. ¶¶ 67-69. New Hampshire posits that such new recruits—although by definition not themselves subject to the temporary regulation—might have "family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New

Hampshire)," and might "choose to live in Massachusetts" as a result of this temporary rule, Compl. ¶ 69. Even aside from the plain defects in this chain of speculation as a factual matter, *see infra* at 27-28, the mere abstract possibility that one state's temporary tax measure during a declared emergency might temporarily and indirectly disadvantage another state's recruitment efforts to an unspecified degree falls far short of the grave injury required. *Cf. Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 443-44, 450-51 (1945) (finding "matters of grave public concern" to Georgia's entire economy and citizens from alleged conspiracy to disadvantage its ports via discriminatory freight rates 39% higher than elsewhere).

Indeed, New Hampshire's speculation regarding its recruitment efforts does not even rise to the level of the "makeweight" proprietary claims that this Court has refused to accept as a basis for exercising its original jurisdiction. Such past claims at least involved *some* demonstrated injury to the States themselves, albeit minor. *See, e.g.*, *id.* at 450-51 (accepting case, but dismissing as "makeweight" Georgia's claims as proprietor of "a railroad and as the owner and operator of various public institutions"); *Tennessee Copper*, 206 U.S. at 237 (accepting pollution case affecting broad area of Georgia, but declining to consider "makeweight" proprietary claim based on small area of land owned by Georgia itself). Here, by

contrast, New Hampshire has not alleged even a single occurrence of harm to its recruitment efforts.[8]

So too founders New Hampshire's claim that Massachusetts's temporary rule will harm public health because it somehow "penalizes individuals who are working from home" and "disincentivizes *all* individuals from pursuing alternative work arrangements." Compl. ¶ 76. Massachusetts's temporary rule does not put a thumb on the scale in favor of, or against, working from home. It simply taxes non-residents' Massachusetts employment income in the same proportion as during the immediate pre-pandemic period, whether they continue traveling into the Commonwealth to do their work throughout the emergency, or do the same work remotely from home or another location, or vary their location by the day or week depending on the circumstances. *See* 830 Code Mass. Regs. 62.5A.3(3). Because their tax burden will thus be the same regardless of whether they follow public health recommendations, Massachusetts's temporary measure does not slant their decision either way; it instead simply reduces disruption and uncertainty during this evolving crisis.

And this case does not involve the type of state injury at issue in the three original cases on which New Hampshire principally relies. Br. 23. First, *Wyoming v. Oklahoma* concerned an Oklahoma law

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[8] For reasons discussed below, New Hampshire's further assertion of an "exacerbate[d]" burden on its own public services due to its residents' payment of taxes to Massachusetts, Compl. ¶ 64, is likewise of no weight at all. *See infra* at 29 n.11.

that newly required Oklahoma coal-fired generating plants to use at least 10% Oklahoma coal as opposed to their prior near-complete reliance on Wyoming coal, and thereby inflicted on Wyoming itself a documented, "undisputed," "direct injury in the form of a loss of specific tax revenues" from Wyoming's coal severance taxes. 502 U.S. at 444-45, 448. New Hampshire alleges no such "direct injury" to its fisc here.

Maryland v. Louisiana is also inapposite. There, a Louisiana tax on gas extracted from beneath the Gulf of Mexico, structured to fall almost entirely on out-of-state companies and their customers, discriminatorily exacted hundreds of millions of dollars in taxes annually from companies and consumers in more than 30 states, including the plaintiff-States themselves as "substantial consumers of natural gas." 451 U.S. at 729-34 & n.7, 736-37 & n.12, 743-44. It was "clear" that the plaintiff-States' own costs had "increased as direct result of" the disputed tax, "directly affect[ing them] in a substantial and real way," *id.* at 737; jurisdiction on *parens patriae* grounds was appropriate as well because the tax "affect[ed] the general population of [the plaintiff] State[s] in a substantial way," *id.* at 737-39; and the United States had even intervened as a plaintiff on behalf of its distinct federal interests in administering the area beneath the Gulf of Mexico, *id.* at 744-45. Massachusetts's temporary rule inflicts no such substantial injuries, either on the State itself or on its "general population," and does not implicate broader federal interests warranting this Court's original jurisdiction. *See Pennsylvania*, 426 U.S. at 665-66; *see also* Brief for the United States as Amicus Curiae, *Arizona v. California*, No. 150 Orig., at 6-16 (Dec. 9,

2019) (invitation brief opposing, for reasons likewise applicable here, Arizona's motion for leave to file a complaint against California regarding California's taxation of non-resident LLCs).

Finally, New Hampshire's reliance on a dispute over its taxation of its nuclear plant is similarly unavailing. *See* Final Report of the Special Master, *Connecticut v. New Hampshire*, No. 119 Orig., 1992 WL 12620398 (U.S. Dec. 30, 1992). There, the Special Master found jurisdiction over the suit appropriate where the plaintiff-States had demonstrated that New Hampshire's allegedly discriminatory tax had been passed on to both the plaintiff-States themselves and their citizens generally as consumers of the plant's electricity. *Id.* at *16-17. Again, New Hampshire alleges no such injury directly affecting the pocketbooks of either the State itself or its general population.

In sum, Massachusetts's tax measure temporarily maintaining the status quo for sourcing non-residents' income from work for Massachusetts businesses does not present a matter of "grave public concern" warranting this Court's exercise of original jurisdiction. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (accepting dispute over state law threatening to cut off gas service to millions of people).

B. The issues presented by this case are better suited for resolution through the ordinary processes for challenging state taxes, subject to this Court's review of federal questions.

The Court should deny New Hampshire's motion for leave to file its complaint for the further reason that this is not a case where "an adequate remedy can only be found" in an original action. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Rather, established administrative and judicial remedies available to aggrieved taxpayers provide "an appropriate forum in which the Issues tendered here may be litigated," *Arizona*, 425 U.S. at 797—indeed, a more appropriate forum.

Where litigation in the lower federal or state courts is an alternative means for adjudicating a dispute, this Court has often declined jurisdiction—even in cases that, unlike this one, "plainly present[ed] important questions of vital national importance." *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112-14 (1972) (declining to accept case in part because of "the availability of the federal district court as an alternative forum"); *see also, e.g.*, *Arizona*, 425 U.S. at 796-97 (declining jurisdiction over constitutional challenge to electrical energy tax, where taxed Arizona utilities had filed suit in New Mexico state court). These decisions reflect the Court's recognition that it must refrain from exercising the full "breadth of the constitutional grant of this Court's original jurisdiction" when not "necessary" to do so, "lest [the Court's] ability to administer [its] appellate docket be impaired." *Gen. Motors*, 406 U.S. at 113 (quotation

omitted); *see also Texas*, 462 U.S. at 570 (exercise of original jurisdiction should be "with an eye to promoting the most effective functioning of this Court within the overall federal system").

These considerations weigh in favor of declining jurisdiction here. New Hampshire residents affected by the temporary rule may seek abatement, and, if unsuccessful before both Massachusetts's Commissioner of Revenue and the Appellate Tax Board, are entitled to file an appeal directly in Massachusetts's Appeals Court. Mass. Gen. Laws ch. 62C, § 37; ch. 58A, § 13. Massachusetts's appellate courts routinely decide constitutional challenges brought via abatement proceedings. *See, e.g.*, *Geoffrey, Inc. v. Comm. of Revenue*, 899 N.E. 2d 87, 92-93 (Mass. 2009). And, where the claim of illegality rests on a federal constitutional provision, the case may ultimately reach this Court on certiorari review. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Wynne*, 135 S. Ct. at 1787.

New Hampshire misses the mark with its contention that these remedies are insufficient, because even a successful abatement request "would not help . . . [its] residents who lack the means to bring such a suit," Br. 31. In the direct appellate review of Board decisions just discussed, Massachusetts's appellate courts decide questions of law for the entire Commonwealth, and New Hampshire's contention is false at the administrative level as well. While as-applied relief from the Board initially benefits only the petitioner who advanced the claim, such a finding serves as "applicable precedent," both for the Commissioner in assessing the challenged tax and for

the Board in evaluating subsequent abatement requests. *General Dynamics Corp. v. Bd. of Assessors of Quincy*, 444 N.E. 2d 1266, 1268 (Mass. 1983). Moreover, while there is no class-action mechanism for abatement proceedings, in certain circumstances Massachusetts courts have discretion to entertain an action brought by one or more taxpayers seeking a declaration that a tax provision is illegal. *See DeMoranville v. Comm'r of Revenue*, 927 N.E. 2d 448, 452 (Mass. 2010) (describing relevant factors for waiving exhaustion, including whether "the issue is important or novel or recurrent"; whether "the decision will have public significance, affecting the interests of many besides the immediate litigants"; and whether "the case reduces to a question of law without dispute as to the facts").

And these alternative forums are more "appropriate" for adjudicating the individual claims of New Hampshire taxpayers than the State's attempt at an aggregate action in this Court. *Arizona*, 425 U.S. at 797. Although Massachusetts's temporary rule readily withstands scrutiny under this Court's dormant Commerce Clause and due process precedents, *see infra* Part III, those precedents do leave some leeway for taxpayers to argue that the regulation is unconstitutional as applied to their particular circumstances, despite their physical presence working in Massachusetts in the immediate pre-pandemic period. *See infra* at 34-35. The Board is well suited to make these highly fact-specific determinations in considering individual taxpayers' abatement requests and to determine what portion of their income, if any, is properly sourced to Massachusetts. An aggregate action in this Court, by

contrast, cannot possibly encompass the full panoply of such fact-finding. *See Gen. Motors*, 406 U.S. at 114-16 (declining jurisdiction over air pollution case in part due to "localized," fact-specific "nature of the remedy" that might "be necessary, if a case for relief [were] made out").[9]

Thus, this Court should decline to exercise its original jurisdiction not only for lack of injury to the State of New Hampshire itself, but also because of "the availability of another forum . . . where the issues tendered may be litigated, and where appropriate relief may be had." *Arizona*, 425 U.S. at 796-97 (quoting *Milwaukee*, 406 U.S. at 93).

II. New Hampshire does not have standing.

New Hampshire's complaint is also ill-suited to this Court's docket for the further reason that it is not "properly justiciable" at all. *Louisiana*, 176 U.S. at 15.

As in any federal court, plaintiffs in this Court must establish standing. *Wyoming*, 502 U.S. at 447; *Maryland*, 451 U.S. at 735-36. They must have "suffered an injury in fact" that is "concrete and particularized" and "actual or imminent, not

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[9] In addition, only Massachusetts courts could possibly avoid the necessity of reaching the constitutional questions presented by ruling on any potential state-law grounds instead. *See, e.g.*, *Comm'r of Revenue v. Oliver*, 765 N.E.2d 742, 746 (Mass. 2002) (rejecting Commissioner's argument that non-resident's pension payments from his former Massachusetts employer were Massachusetts-source income, because the taxpayer did not work in Massachusetts during the years the pension payments were received and "tax statutes are to be strictly construed").

conjectural or hypothetical," and that is "fairly . . . trace[able] to" Massachusetts's conduct and redressable by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted). The Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact'"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). And, "at the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted).

Just as New Hampshire's complaint fails to present the sort of grave injury to the State itself required for exercise of this Court's original jurisdiction, so too do its allegations fall short on standing. New Hampshire does not allege that the State itself will lose tax revenue as a result of Massachusetts's temporary rule maintaining the status quo. *Cf. Wyoming*, 502 U.S. at 448-51. Rather, New Hampshire's principal claimed injury is purportedly to its very sovereignty: that taxing a New Hampshire resident's income under Massachusetts's sourcing rule harms New Hampshire itself by "overrid[ing] New Hampshire's sovereign discretion over its tax policy[.]" Compl. ¶ 52. As explained already, no such injury to New Hampshire's sovereignty actually exists: it still may, and does, set its own distinct tax policy to govern its residents and those who do business in the State. *See supra* at 14-17; *Massachusetts*, 308 U.S. at 15-16 (no "justiciable controversy between the States" where each sought to,

and each could, tax the same estate according to each State's respective rules).

New Hampshire's miscellaneous further alleged injuries bear little scrutiny. The assertions that Massachusetts's temporary rule will hinder New Hampshire in recruiting new state employees, Compl. ¶¶ 67-70, or attracting to the State other new residents or businesses important to its economic growth, Compl. ¶¶ 54-63, 65, cannot meet New Hampshire's "'substantially more difficult'" burden in establishing standing where its "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," and thus "hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*, 504 U.S. at 561-62 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

In particular, New Hampshire posits that a prospective recruit *may* have "family members who work for Massachusetts employers (and *may* seek to work from home at least part time if they move to New Hampshire)"; *may* therefore be subject to Massachusetts's temporary rule; and *may* therefore choose not to move to New Hampshire. Compl. ¶ 69 (emphasis added). But New Hampshire has not met its "burden . . . to adduce facts showing that those choices have been or will be made in such manner as to produce causation[.]" *Lujan*, 504 U.S. at 562. Despite the fact that this rule has been in existence for almost 8 months, New Hampshire does not claim to have knowledge of even a single instance in which a new recruit, new business, or new resident has chosen

not to move to New Hampshire due to Massachusetts's temporary rule's potential effects on spouses or other family members employed in Massachusetts. Moreover, this speculation makes little sense even on its own terms. Regardless of how family members may be taxed, the wages of the hypothetical new recruit would still become tax-free upon taking employment in New Hampshire as a resident of the State—thus retaining the very incentive New Hampshire celebrates.[10] New Hampshire's alleged harm thus rests on "unfettered choices made by independent actors not before" this Court, whose actions "the courts cannot presume . . . to predict." *Lujan*, 504 U.S. at 562 (quotation omitted). Such speculative harm is far from "*certainly impending*." *Clapper*, 568 U.S. at 409 (quotation omitted).

Finally, as already explained, New Hampshire's claimed injury to public health is no injury at all. By simply maintaining the pre-pandemic status quo, the temporary rule results in the same tax liability regardless of whether New Hampshire residents continue traveling to their workplaces or begin working remotely. It therefore neither "penalizes" nor "disincentivizes" making either choice, Compl. ¶ 76, and is instead neutral. *See supra* at 19. New Hampshire thus has not "clearly" alleged "facts demonstrating" an impending, concrete injury under

[10] The logic of New Hampshire's further assertion that Massachusetts's temporary rule will even dampen efforts to convince "existing businesses to expand within the State," Compl. ¶ 63, goes completely unexplained and is difficult to fathom.

this theory. *Spokeo*, 136 S. Ct. at 1547 (quotation omitted).[11]

In short, in attempting to litigate "a collectivity of private suits," *Pennsylvania*, 426 U.S. at 666, New Hampshire has failed to allege any cognizable injury to the State itself. The case is thus not justiciable at all.

III. New Hampshire's dormant Commerce Clause and due process claims lack merit.

New Hampshire has further failed even to state a claim on which relief could be granted—let alone a claim of sufficient "seriousness." *Milwaukee*, 406 U.S. at 93. The Constitution does not bar Massachusetts from adapting its income sourcing rules to respond to the temporary COVID-19 emergency, because the Constitution does not "imprison[] the taxing power of the states" within a single rigid formula for attributing income to a geographic source. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). The

[11] New Hampshire similarly baselessly asserts that the temporary rule "exacerbates the burden on New Hampshire's public services" amidst the pandemic by "ensur[ing] that those individuals continue to support public services in *Massachusetts* that they no longer use," Compl. ¶ 64. A New Hampshire resident's continued payment of income taxes to Massachusetts while temporarily telecommuting has no effect on New Hampshire's public services, because such payments neither cause a greater burden on public services on top of those imposed by the pandemic itself, nor diminish New Hampshire's (non-wage-based) tax revenue to fund such services. These allegations therefore do not establish harm "fairly . . . trace[able] to" Massachusetts's temporary rule. *Lujan*, 504 U.S. at 560.

Court has long recognized that states have wide latitude to select different formulas and has consistently refused to mandate any one formula as a matter of constitutional law, under either the dormant Commerce Clause or the Due Process Clause. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-80 (1978). Massachusetts's approach falls well within this latitude, because it neither causes discriminatory double taxation (or indeed any double taxation), *cf. Wynne*, 135 S. Ct. at 1803-04, nor is unfair or irrational in light of the substantial "'protection, opportunities and benefits'" provided by Massachusetts to all Massachusetts employees, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 778 (1992) (quoting *Wisconsin*, 311 U.S. at 444), including those suddenly newly working remotely for the pendency of an emergency.

The "protection, opportunities, and benefits" available to Massachusetts employees—whether performing their work at their Massachusetts workplace or temporarily at their home office in New Hampshire—go far beyond the local police and fire protection emphasized by New Hampshire, Compl. ¶ 33. Massachusetts supports major urban centers that offer employment opportunities and wages on a scale not generally available elsewhere. *See* Compl. ¶ 55 (acknowledging Massachusetts's high median income). Massachusetts also provides protections benefiting employees regardless of their state of residence, such as its high minimum wage,[12] its

[12] *See* U.S. Dep't of Labor, Wage & Hour Division, *Consolidated Minimum Wage Table* (Oct. 1, 2020),

Earned Sick Time and Paid Family and Medical Leave laws,[13] and the most generous unemployment benefits in the Nation.[14] And non-resident employees also enjoy greater job security as a result of the public services provided by Massachusetts that support and promote the businesses in which those non-residents are employed, including Massachusetts's legal system, its roads and infrastructure, and its police and fire protection of Massachusetts workplaces. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (noting the "usually forgotten advantages conferred by the State's maintenance of a civilized society"); *Wayfair*, 138 S. Ct. at 2096 (describing ways in which "creating a dream home" requires state and local governments).

In light of these substantial benefits, taxation under the temporary regulation readily passes muster under the dormant Commerce Clause because it (1) "is applied to an activity with a substantial nexus with the taxing State," (2) is "fairly apportioned," (3) "does not discriminate against interstate commerce," and (4) "is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The first requirement, "substantial nexus," is "closely related to the due process requirement that there be some definite link, some minimum

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tinyurl.com/y2l28ckn (currently $12.75 per hour, as compared with, for example, New Hampshire's $7.25).

[13] Mass. Gen. Laws ch. 149, § 148C; ch. 175M §§ 1 *et seq*.

[14] *See* U.S. Dep't of Labor, *Comparison of State Unemployment Laws 2019*, at 3-11 (2019), tinyurl.com/y37f9o5p.

connection, between a state and the person, property or transaction it seeks to tax." *Wayfair*, 138 S. Ct. at 2093 (quotations and citations omitted). The employee's choice to work for a Massachusetts employer—including, as required by the regulation, "performing such services in Massachusetts" until "immediately prior to the Massachusetts COVID-19 state of emergency," 830 Code Mass. Regs. 62.5A.3(3)(a)—creates a connection that is much more than minimal. *Cf. Wayfair*, 138 S. Ct. at 2092-96 (abrogating physical presence requirement for obligation to collect sales tax).

Second, the tax is "fairly apportioned," because it is both internally and externally consistent. *Jefferson Lines*, 514 U.S. at 185. The tax is internally consistent because, as required, it is structured so that if every state were to impose an identical tax, no multiple taxation would result. *See id.*; *Wynne*, 135 S. Ct. at 1802. Specifically, if every state sourced employment income during this emergency using the pre-pandemic period as the yardstick, there would be no double taxation created and instead simply universal maintenance of the status quo. New Hampshire's complaint that, under the test, telecommuting employees would pay a double tax (one to the state of residence and another to the state of the employer), Br. 27, is mistaken for two reasons. First, the crux of the temporary rule is that it sources employment income to only one location: the state where the employee worked until the pandemic emergency began, *not* the state(s) where the employee was physically located during the emergency. And second, it overlooks that Massachusetts prevents the hypothesized double taxation on residents by offering

them a credit for income taxes paid to other jurisdictions. 830 Code Mass. Regs. 62.5A.3(4) (citing Mass. Gen. Laws ch. 62, § 6(a)); *see Wynne*, 135 S. Ct. at 1805 ("Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States").

The tax is also externally consistent because it is well within the "wide latitude" accorded to States to adopt different formulas for taxing the many activities that cross state lines and thus implicate "division-of-income problems." *Moorman*, 437 U.S. at 274, 278. Amidst a crisis necessitating an abrupt transition to performing many activities remotely, temporarily continuing to tax income from activity that was performed in-state for Massachusetts employers in the immediate pre-pandemic period, and that continues to be performed for those Massachusetts employers during the pandemic either in Massachusetts or remotely or an evolving combination of the two, does not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. Nor is there any significant "risk of multiple taxation" that might suggest overreaching, because most states offer their residents credits against income taxes paid to other states. *Goldberg v. Sweet*, 488 U.S. 252, 262-63 (1989) ("limited possibility of multiple taxation" was "not sufficient to invalidate" tax, and actual double taxation would be avoided by credits). Indeed, since New Hampshire itself does not tax such income, no actual double taxation exists here at all. *See Moorman*, 437 U.S. at 280 (declining to strike down tax based on "speculative concerns with multiple taxation"). And in any event, "eliminating all

overlapping taxation would require this Court to establish not only a single constitutionally mandated method of taxation, but also rules regarding the application of that method in particular cases"—such as in a pandemic emergency—which the Court has consistently refused to do. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983); *see also Moorman*, 437 U.S. at 277-80.

While the States thus can and do differ in their approaches to fairly apportioning telecommuters' income both before and during the pandemic, they remain subject to as-applied challenges if the tax is "out of all appropriate proportions to the business transacted" in the state or otherwise produces a "grossly distorted result." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 380 (1991) (quoting *Moorman*, 437 U.S. at 274; further quotations omitted). *See, e.g.*, *Matter of Zelinsky v. Tax Appeals Trib.*, 801 N.E.2d 840, 846-49 (N.Y. 2003) (upholding New York's "convenience of the employer" approach as applied to non-resident professor). Any such showing necessarily requires *application* of the tax to individual facts. *See, e.g.*, *Moorman*, 437 U.S. at 274, 280-81 (noting that otherwise-constitutional apportionment formula may be unconstitutional as applied to a specific taxpayer, but finding no such flaw on the record presented). Accordingly, the proper forum for taxpayers to attempt such a showing would be abatement proceedings, where the requisite factual record can be developed, followed if necessary by litigation in the lower courts to air the issues fully. And in the present moment, with both COVID-19 emergency tax-relief measures and remote-work circumstances evolving across the States, the fact-

dependence of these issues is all the more acute, and this original action all the more inappropriate a vehicle for considering them in the first instance. *See* American Institute of CPAs, *State Tax Filing Guidance for Coronavirus Pandemic* (last updated Dec. 7, 2020), tinyurl.com/sz2e5rw (collecting States' COVID-19 tax measures by date).

The temporary regulation also readily satisfies *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. 430 U.S. at 279. The regulation taxes non-residents and residents equally, *cf. City of New York v. State*, 730 N.E.2d 920, 930 (N.Y. 2000) (invalidating discriminatory tax imposed on out-of-state commuters but not in-state commuters), and, as described above, does not cause any double taxation under the internal consistency test for "identify[ing] tax schemes that discriminate against interstate commerce," *Wynne*, 135 S. Ct. at 1802.

Fourth and finally, the tax is "fairly related to the services provided" by Massachusetts. *Complete Auto*, 430 U.S. at 279. This inquiry is "closely connected" to the requirement of a substantial nexus between the taxpayer's activities and the taxing state, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981), and simply further requires that "the measure of the tax be reasonably related to the taxpayer's presence or activities in the State," *Jefferson Lines*, 514 U.S. at 200. That requirement is met here because the tax is measured as a percentage of the income from the taxpayer's employment with a Massachusetts employer in proportion to the taxpayer's presence in Massachusetts in the

immediate pre-pandemic period. No more is required. *See, e.g.*, *id.* at 199-200 (upholding sales tax on bus service measured by value of service, even though bus traveled outside Oklahoma, explaining that State is not "limited to offsetting the public costs created by the taxed activity"); *Commonwealth Edison*, 453 U.S. at 626-29.

New Hampshire's due process claim is equally unfounded, because it is premised on the fallacy that the regulation requires "no connection" between Massachusetts and the non-resident taxpayer other than the employer's Massachusetts address, Br. 29. In fact, the regulation requires a significant connection: non-residents must have worked for their Massachusetts employer in person in Massachusetts in the immediate pre-pandemic period and, indeed, are taxed only in direct proportion to the days worked in person versus remotely in that period. 830 Code Mass. Regs. 62.5A.3(3). This connection is more than sufficient to satisfy the Due Process Clause's two requirements in service of answering "'[t]he simple but controlling question . . . whether the state has given anything for which it can ask return.'" *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2220 (2019) (quoting *Wisconsin*, 311 U.S. at 444). First, the taxpayer's pre-existing and continuing Massachusetts employment satisfies the requirement that there "be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* (quotations omitted). Second, income attributed to Massachusetts under the temporary rule is indeed "rationally related to values connected with the taxing State," because of the substantial "protection, opportunities and

benefits" afforded by Massachusetts to all Massachusetts employees, resident and non-resident alike. *Id.* at 2219-20 (quotations omitted); *see supra* at 30-31. Non-resident employees do not cease to enjoy these Massachusetts advantages—ranging from the employee protections that Massachusetts provides, to the very jobs non-residents hold that Massachusetts has created—when they are working from the safety of home during this temporary emergency.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for leave to file a bill of complaint.

Respectfully submitted,

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