

No. 220154

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In The  
**Supreme Court of the United States**

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STATE OF NEW HAMPSHIRE,

*Plaintiff,*

v.

COMMONWEALTH OF MASSACHUSETTS,

*Defendant.*

—◆—  
**On Motion For Leave  
To File Bill Of Complaint**

—◆—  
**BRIEF OF AMICUS CURIAE  
SOUTHEASTERN LEGAL FOUNDATION  
IN SUPPORT OF MOVANT**

—◆—  
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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

Founded in 1976, Southeastern Legal Foundation (SLF) is a national constitutional public interest law firm and policy center on the front lines advocating for limited government, individual liberties, and the free enterprise system in the courts of law and public opinion. Its mission is to engage in litigation and public policy advocacy in support of these principles. To that end, SLF regularly appears in this Court as a party and an *amicus* to protect the rights and liberties safeguarded by the Constitution and to enforce the Constitution's limits on governmental authority. *See, e.g., Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).

The Commonwealth of Massachusetts has run roughshod over the Due Process Clause by imposing an income tax on New Hampshire residents employed by Massachusetts corporations. This is despite the fact that New Hampshire residents have not—and cannot—commute to the Commonwealth of Massachusetts for work during the COVID-19 pandemic.

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<sup>1</sup> Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amicus curiae*'s intent to file and consented to the filing of this brief.

Massachusetts’ extraterritorial tax law fails to satisfy the “minimum contacts” standard that limits state authority to tax out-of-state persons under the Due Process Clause. *See Shaffer v. Heitner*, 433 U.S. 186 (1977); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2093 (2018). Moreover, the law directly undermines the State of New Hampshire’s decision *not* to impose income taxes on its residents. Bill of Complaint (“New Hampshire Compl.”) ¶ 9. In doing so, Massachusetts “harm[s] the fabric of New Hampshire’s communities” and has imposed serious economic injuries on thousands of Massachusetts residents. *Id.* ¶¶ 48–65.

*Amicus* SLF has a strong interest in enforcing the Due Process Clause’s limitations on state tax authority and protecting New Hampshire residents from Massachusetts’ unconstitutional extraterritorial tax policy.

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## SUMMARY OF ARGUMENT

Every state in this nation has adopted various measures in response to the global COVID-19 pandemic. Many state governors, including Governor Baker of Massachusetts, have issued stay-at-home orders directing non-essential businesses to cease operating. Br. in Supp. of Mot. for Leave to File Bill of Compl. (“New Hampshire Br.”) at 10. As a result of Governor Baker’s stay-at-home order, Massachusetts effectively shuttered its borders to its New England neighbors, including

commuters who typically travel from other states to work within the Commonwealth.

Moreover, nearly every state in this nation has an income tax policy where nonresidents must pay tax on income earned through physical activity that occurs within the forum state's borders. Naturally, when states shut their borders in response to COVID-19, each ceased collecting taxes from nonresidents who previously commuted into the forum state. But not so for Massachusetts. In just one month, the Commonwealth shut its borders to out-of-state commuters *and* declared that it would still collect taxes from those commuters who were forced to stay at home.

As a result of this scheme, New Hampshire residents who typically commute to Massachusetts for work, but are banned from doing so due to COVID-19, face the risk of double taxation.<sup>2</sup> Worse, Massachusetts' policy has become New Hampshire's problem. New Hampshire must bear the burden of its citizens paying taxes to another state while they rely on and use up New Hampshire's resources.<sup>3</sup>

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<sup>2</sup> Currently, New Hampshire does not impose an income tax on its residents, a policy choice known as the "New Hampshire Advantage." But as Plaintiff points out, the decision to impose or not to impose an income tax is a choice for each state to make within its own borders. *See* New Hampshire Br. at 3.

<sup>3</sup> In fact, it is to Massachusetts' advantage *never* to open its borders, or at least to delay opening them for as long as possible. With the Commonwealth's borders shut, and the tax rule in effect, New Hampshire residents would continue paying a tax to

Putting policy aside, the problem with Massachusetts' tax rule is not its existence, but rather the Commonwealth's unconstitutional, extraterritorial reach through the tax. Specifically, Massachusetts attempts to confiscate income earned wholly outside its borders "under the pretext of taxation." New Hampshire Compl. ¶ 7 (quoting *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954)). At its core, this undermines New Hampshire's sovereignty over its own citizens.

The State of New Hampshire is one of just two states that does not impose an income tax or sales tax on its residents. New Hampshire Br. at 1. This "New Hampshire Advantage" has benefitted New Hampshire residents by boosting the state's economy and markets while lowering its unemployment rate. *Id.* Now, taking advantage of the global COVID-19 pandemic, Massachusetts attempts to take the income of New Hampshire citizens who have been confined to their homes and have had *no* contacts with the Commonwealth for the duration of the pandemic. As such, the tax rule violates the Due Process Clause because Massachusetts fails to show that it has jurisdiction over New Hampshire residents living and working entirely in New Hampshire.

As explained more fully in the New Hampshire Brief, this extraterritorial tax law violates both the Due Process Clause and the Commerce Clause. *Id.* at 23–30. *Amicus* SLF agrees with the State of New

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Massachusetts' benefit without using any of Massachusetts' resources. *See id.* at 29–30.

Hampshire that the Court should take up this case to “rectify Massachusetts’ unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire’s to make.” *Id.* at 2. *Amicus* write separately to further explain why Massachusetts’ extraterritorial tax rule violates the Due Process Clause.

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## ARGUMENT

**I. The “minimum contacts” standard for evaluating personal jurisdiction is an appropriate test for determining whether an extraterritorially imposed income tax violates the Due Process Clause.**

“The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a . . . judgment against a nonresident defendant.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). The Clause requires that the out-of-state defendant “be subject to the personal jurisdiction of the court.” *Id.* (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945)). It “has long been settled” that “a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist ‘minimum contacts’ between the defendant and the forum State.” *Id.* (quoting *Int’l Shoe*, 326 U.S. at 316). Minimum contacts exist only where the defendant has “purposefully avail[ed] itself of the privilege[s] of conducting activities within the forum,” see *Hanson v. Denkla*, 357 U.S. 235, 253 (1958), and thus “should reasonably

anticipate being haled into court there,” see *World-Wide Volkswagen*, 444 U.S. at 297. This “minimum contacts” standard performs two “related” functions: “It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *Id.* at 291–92.

Just as the Due Process Clause limits the reach of States’ authority over nonresident defendants in their courts, the Clause also has long been understood to impose limits on states’ authority to impose taxes outside their borders. Indeed, “[n]o principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.” *N.Y., L.E. & W. R.R. Co. v. Pennsylvania*, 153 U.S. 628, 646 (1894) (citations omitted). Accordingly, if one state “should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority . . . , such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition.” *St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 430 (1870). Put simply, “the imposition of [such] a tax would be *ultra vires* and void.” *Id.* In limiting state extraterritorial tax authority, the Due Process Clause “requires some definite link, some *minimum connection*, between a state and the person, property or transaction it seeks to tax.”

*Miller Bros.*, 347 U.S. at 344–45 (emphasis added); see also *Wayfair*, 138 S. Ct. at 2093 (quoting *Miller*).

As this Court has explained, the “minimum connection” required between a taxing State and the subject of its taxing authority parallels the “minimum contacts” requirement the Due Process Clause places on states under the doctrine of personal jurisdiction. See *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992) (describing these two components of the Due Process Clause as employing “[c]omparable reasoning”), *overruled on other grounds by Wayfair*, 138 S. Ct. 2080. Not surprisingly, then, the Court routinely relies on its Due Process personal jurisdiction precedents in cases concerning extraterritorial state taxation. See, e.g., *Quill Corp.*, 504 U.S. at 307–08 (discussing *Int’l Shoe*, 326 U.S. 310, *Shaffer*, 433 U.S. 186, and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)); *Wayfair*, 138 S. Ct. at 2093 (discussing *Burger King*, 471 U.S. 462). And as New Hampshire sets forth, Massachusetts lacks *any* contacts—let alone sufficient contacts—with New Hampshire residents that would reasonably subject them to an extraterritorial tax. See *New Hampshire Br.* at 28–30.

## **II. Under this Court’s “minimum contacts” precedent, Massachusetts’ extraterritorial tax scheme violates the Due Process Clause.**

As explained above, the “minimum contacts” standard requires that a nonresident have purposefully availed himself of the benefits and protections of another state, see *Hanson v. Denkla*, 357 U.S. 235, 253

(1958), such that he could anticipate being subject to that state’s authority, *see World-Wide Volkswagen*, 444 U.S. at 297. In the circumstances presented here—where individual taxpayers are banned from physically traveling to a state and have not availed themselves of that state’s resources in months—this Court has concluded that minimum contacts are lacking. *See Shaffer v. Heitner*, 433 U.S. 186 (1977). Massachusetts’ extraterritorial tax law thus violates the Due Process Clause.

In *Shaffer*, this Court addressed whether a Delaware court could exercise jurisdiction over nonresident defendants in a stockholder’s derivative action based on their “positions as officers and directors of a [Delaware] corporation.” *Id.* at 213. In other words, did the nonresidents establish “minimum contacts” with the state thereby subjecting themselves to the state’s jurisdiction simply because of their roles as officers and directors? The Court answered that question in the negative, with reasoning that applies here.

The Court explained that “accepting positions as officers and directors of a Delaware corporation” does not establish that the nonresidents “have ‘purposefully avail(ed themselves) of the privilege of conducting activities within the forum State.’” *Id.* at 215–16 (quoting *Hanson*, 357 U.S. at 253). Delaware’s assertion of authority over the nonresident officers and directors was “inconsistent with [the Due Process] limitation on state power” because those officers “had nothing to do with the State of Delaware” and “had no reason to

expect” to be subject to the state’s jurisdiction. *Id.* at 216–17.

If anything, the Court’s reasoning applies even more forcefully here, as the taxpayers in *Shaffer* were officers and directors within the highest levels of Delaware corporations, meaning they were likely very active in managing Delaware corporations. Indeed, the nonresident officers and directors in *Shaffer* had assumed specific “powers” and “responsibilities” within the corporation, *Shaffer*, 433 U.S. at 228 (Brennan, J., concurring in part and dissenting in part), such that at least some of them were considered “key employees” thereof. Appellee’s Answering Br., *Shaffer v. Heitner*, No. 75-1812, 1976 WL 181713, at \*2, 11, 13, 14, 15 (U.S. Dec. 17, 1976). Yet the Court held that Delaware could not tax employees within the highest levels of Delaware corporations, even when those individuals actively accepted and participated in decisionmaking roles. Surely, then, the Due Process Clause precludes Massachusetts from taxing nonresident employees who have been forced to work remotely through *no* decision of their own. *See* New Hampshire Br. at 8–9 (“Massachusetts businesses and their employees *followed* [Governor Baker’s stay-at-home] order, and many employees transitioned to working from home indefinitely.”) (emphasis added).

Importantly, *Shaffer* illustrates a larger point of the Court’s “minimum contacts” analysis: the Court has eschewed simple, check-the-box tests based upon the mere establishment of a legal relationship with an in-state entity. As the Court explained in *Burger King*,

it “long ago rejected the notion that personal jurisdiction might turn on mechanical tests, or on conceptualistic . . . theories of the place of contracting or of performance.” 471 U.S. at 478–79 (internal quotations and citations omitted). Instead, the Court has “emphasized the need for a highly realistic approach” that recognizes that the establishment of a legal relationship is “ordinarily but an intermediate step . . . with future consequences which themselves are the real object of the business transaction.” *Id.* at 479 (quotations and citations omitted). It is those “future consequences”—not the mere relationship itself—“that must be evaluated in determining whether the defendant purposefully established minimum contacts within the forum.” *Id.* Accordingly, just as a nonresident’s role as an officer or director of an in-state corporation fails to establish “minimum contacts,” a nonresident who contracts with an in-state entity lacks minimum contacts with the forum state. *See id.* at 478 (“If the question is whether an individual’s contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party’s home forum, we believe the answer clearly is that it cannot.”). The same must be true when a forum state bans a nonresident from traveling to that state, cutting off access to any and all resources of which the nonresident may have availed itself.

\* \* \*

As this Court has declared, “[S]eizure 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*, 347 U.S. at 342. Massachusetts’ extraterritorial tax rule is nothing more than an attempt to take income from New Hampshire citizens that do not live, work, or play in Massachusetts’ borders. The Court should grant the motion in order to police the Due Process Clause’s limitations on state extraterritorial taxing authority and safeguard the due process rights of non-resident taxpayers.

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### CONCLUSION

*Amicus curiae* respectfully request that the Court grant the motion for leave to file a bill of complaint.

Respectfully submitted,

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