No. 22O154

In The
Supreme Court of the United States

NEW HAMPSHIRE,

Plaintiff,

v.

MASSACHUSETTS,

Defendant.

On Motion For Leave To File Bill Of Complaint

**BRIEF OF AMICUS CURIAE
THE BUCKEYE INSTITUTE IN SUPPORT OF
PLAINTIFF'S MOTION FOR LEAVE
TO FILE BILL OF COMPLAINT**

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INTERESTS OF THE AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.[1] The staff at The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

The Buckeye Institute is dedicated to promoting free-market policy solutions and protecting individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. The Buckeye Institute therefore takes a particular interest in tax policy and frequently advocates for a fairer and less burdensome tax system.

The Buckeye Institute is currently a party in a similar case questioning whether Ohio municipalities have authority under the Due Process Clause to

[1] Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief's preparation or submission. The parties were timely notified.

impose income tax on income earned by nonresidents working remotely outside of the city limits. The principle that The Buckeye Institute has advanced in that litigation is the same principle at issue here. Specifically, that Due Process prohibits a government entity from taxing persons or activities over whom it exercises neither in personam nor in rem jurisdiction.

SUMMARY OF ARGUMENT

The State of New Hampshire's original action against the Commonwealth of Massachusetts raises constitutional issues that lie at the core of our federal system and well-established principles of Due Process. If Massachusetts' Tax Rule is permitted to stand, it opens the door for other States to seek to balance their budgets on the backs of nonresidents, which would inevitably impede the free flow of labor and capital across State borders, impermissibly burdening interstate commerce and discouraging mutually beneficial remote work arrangements between companies and their employees.

The State of Ohio has for decades promoted itself as "The Heart of it All." This moniker arises not only from the state's distinctive shape and physical geographical location, but also from its centrality to the nation's commercial thoroughfares. Ohio's economy—as well as the economies of its neighboring States—has flourished as employees have enjoyed the benefit of opportunities outside its borders and employers have reaped the benefit of an expanded applicant pool without having to surmount artificial governmental barriers.

Since the pandemic began, many Ohioans employed in neighboring States have worked from their homes in Ohio. In some cases, these arrangements were voluntary agreements between the employee and employer. In others, it was the result of a government edict. Regardless, many employees have come to enjoy the flexibility of working from their homes and employers have in many cases realized unexpected cost savings and efficiencies through lower cost for office infrastructure and improved employee morale and retention.

The Tax Rule promulgated by the Commonwealth of Massachusetts and challenged by the State of New Hampshire threatens these continuing cross-border employment arrangements and the mutual economic vitality they bring. If allowed to stand, other States will likely impose similar rules, in turn discouraging employees from working remotely in other States. The ironic result will be a retrenchment into the economic parochialism that stymied pre-constitutional American commerce, just as 21st century technology and new ways of thinking are opening opportunities for workers and employers. It is thus important that the Court address the constitutional questions posed by New Hampshire's Bill of Complaint. The Court should therefore grant New Hampshire's Motion for Leave to File a Bill of Complaint.

ARGUMENT

I. New Hampshire's Bill of Complaint Presents an Issue of Great Importance

A. The Pandemic Accelerated a Shift that was Already in Motion

1. Even before the COVID-19 pandemic, a significant minority of Americans worked from home at least some of the time. According to the Bureau of Labor Statistics American Time Use Survey, "in 2019 24 percent of employed persons did some or all of their work at home on days they worked." U.S. Dep't of Labor, News Release, *American Time Use Survey-2019 Results* (2020), https://www.bls.gov/news.release/pdf/atus.pdf.

Simultaneously, another workplace trend was also developing—super commuters, or workers who commute hundreds of miles several times a week frequently across state lines. Mitchell L. Moss & Carson Qing, *The Emergence of the "Super-Commuter,"* N.Y.U. Wagner Sch. Pub. Serv. (2012), https://wagner.nyu.edu/files/rudincenter/supercommuter_report.pdf. The rise of super commuters was in addition to employees whose proximity to State borders allowed them to work in one State and live in another. For example, in 2011, the most recent years for which data is available, the U.S. Census Bureau estimated that nearly 100,000 Ohioans worked in an adjacent state. Brian McKenzie, U.S. Dep't of Commerce, *Out-of-State and Long Commutes: 2011*, *American Community Survey Reports* (2013), https://www.census.gov/library/publications/2013/acs/acs-20.html.

2. What remote workers and super commuters have in common is relative affluence. Work-from-home professionals make 28% more on average than traditional workers and commuters, earning a median income of $55,000 per year. Super commuters, on the other hand, make 20.9% more on average, earning a median salary of $52,000. Aly J. Yale, *Remote Workers and 'Super' Commuters Are More Likely to Own a Home*, Forbes (Mar. 14, 2019), https://www.forbes.com/sites/alyyale/2019/03/14/work-from-home-americans-super-commuters-are-more-likely-to-own-a-home/?sh=349bdd8d1ee5. In total, 8.6% of Americans who work from home make six-figure salaries. By comparison, only 4.6% of the general population earn above $100,000 per year. *Id.*

The Time Use Survey also showed that workers with an advanced degree "were more likely to work at home than were persons with lower levels of educational attainment—42 percent of those with an advanced degree performed some work at home on days worked, compared with 16 percent of those with a high school diploma and no college." U.S. Dep't of Labor, *supra.*

B. Work From Home Arrangements Are Here to Stay

1. When the pandemic struck and working from home became the "new normal," these trends converged. According to a Brookings Institute report published in April of 2020, roughly half of all adult Americans with jobs were working from home during

the pandemic. Katherine Guyot & Elizabeth Sawhill, *Telecommuting will Likely Continue Long After the Pandemic*, Brookings (April 6, 2020), https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic. This new reality represents more than double the percentage of workers who engaged in some telecommuting in 2018. *Id*

The U.S. economy now substantially relies upon a significant segment of the workforce working from home. As of June 2020, 42% of the labor force was working from home full-time. Nicholas Bloom, *How Working from Home Works Out*, Stan. Inst. Econ. Pol'y Res. (June 2020), https://siepr.stanford.edu/research/publications/how-working-home-works-out.

For many companies and their employees, work-from-home arrangements have become a silver lining to the pandemic. In many cases, working from home has proven to be popular with employees and profitable to companies. According to Global Workplace Analytics study, "a typical employer can save about $11,000 year for every person who works remotely half of the time." Uri Berliner, *Get A Comfortable Chair: Permanent Work From Home is Coming*, NPR (June 22, 2020), https://www.npr.org/2020/06/22/870029658/get-a-comfortable-chair-permanent-work-from-home-is-coming. Similarly, workers can save between $2,500 and $4,000 a year working remotely half the time. *Id.* In fact, even before the pandemic, work-from-home arrangements were so popular with employees that a 2019 survey showed that 37% of tech professionals—among the highest-paid workers—would take a 10% pay cut in exchange for the opportunity to work remotely. *Id.*

As technology and connectivity continue to improve and employees and employers adapt to remote working, it is likely that such arrangements will comprise the new economic normal. Indeed, nearly 20% of chief financial officers surveyed by Brookings said they planned to permanently retain remote work for at least 20% of their workers. Guyot & Sawhill, *supra.* In fact, Nationwide Insurance, a major employer in Ohio and nationally, has made remote work permanent and plans on transitioning to a 98% work-from-home model. *Id*. On the employee side of the equation, half of employees surveyed indicated that they would prefer to work remotely permanently. Anshu Siripuapu, *The Economic Effects of Working From Home*, In Brief, Council on Foreign Relations (July 16, 2020), https://www.cfr.org/in-brief/economic-effects-working-home. Indeed, telecommuting allows employers to expand their hiring pools beyond their immediate area, allows employees the convenience and flexibility of living where they prefer.

Because the majority of employees working remotely are high earners, and States' appetites for tax revenue is unlikely to decrease, the issue of a State's authority to tax remote worker raises important constitutional questions that will have a significant impact on how the post-pandemic economy operates.

C. Ohio's Experience in Extraterritorial Taxation

1. Ohio sits at a twin cross-roads, where the Mid-Atlantic meets the Midwest, and where the North meets the South. Ohio borders five other states: Pennsylvania, West Virginia, Kentucky, Indiana, and Michigan. Many of Ohio's major economic centers border other states. For example, Cincinnati sits on the Ohio River bordering Kentucky. Cincinnati has five car bridges across the Ohio River highway from downtown Cincinnati. In addition, two interstate bridges connect Cincinnati's suburbs to Northern Kentucky. The commute from the Cincinnati suburbs to Covington, Kentucky takes roughly 20 minutes. Likewise, Toledo sits on the Michigan border, approximately an hour from Detroit. Youngstown, Ohio is 20 minutes from the Pennsylvania border and less than an hour from Pittsburgh.

Cross-border employment has long enriched Ohio's economy by providing more employment options and opportunities for residents living near borders, and a wider talent pool for companies. This arrangement also lets employees make choices that reflect their preferences, family situations, and values. While some employees prefer to live close to urban centers, others might prefer a more rural setting. Proximity to family, the price of housing, and local amenities also play a part in these decisions. And while in the pre-COVID-19 economy employees had to weigh the benefits of living far from the office against the cost and hassle of commuting, the new acceptance of working remotely has removed that cost and hassle.

2. Currently, Ohio has reciprocity agreements with its neighboring States regarding the treatment of income tax. The pandemic, however, has strained State budgets, and it is likely that other States may yield to the same temptation to which Massachusetts succumbed in seeking to tax nonresident remote workers for work that was performed out of state—thereby removing any fiscal relation or substantial nexus between the taxing jurisdiction and the individual being taxed. Employees facing potential double taxation might be all but forced to move out of Ohio and into the State where they work in order to avoid paying income tax to both states on the same income. Similarly, Ohio companies would have a more difficult time hiring from adjacent states because out-of-state workers could face double taxation.

D. Ohio's H.B. 197 Unconstitutionally Imposes Extraterritorial Municipal Income Tax

Ohio's legislature recently took an unfortunate step down such a path. On March 28, 2020, Governor DeWine signed into law H.B. 197, a measure designed to address various aspects of the COVID-19 crisis. In that legislation, the Ohio General Assembly provided that for municipal income taxation purposes, employees working from home during the health emergency and for thirty days thereafter would be retroactively deemed to be working at their typical work location. In other words, while Ohio has not adopted a state income tax rule like Massachusetts' that subjects nonresidents to Ohio state income tax on work performed outside of Ohio, it has taken the no less objectionable step of allowing municipalities to tax the income of those workers who neither live nor work within the taxing jurisdiction of that municipality—including individuals who are living and working outside of Ohio altogether.

The Buckeye Institute brought suit in Ohio to have this legislation declared unconstitutional. The matter is pending in state court. By granting New Hampshire's Motion for Leave to File a Bill of Complaint, this Court can address the cross-state municipal taxation issues occasioned by the Ohio legislation and prevent further confusion over the allowable limits of jurisdictions to tax nonresidents in the post-pandemic economy.

II. The Constitution Prohibits the Type of Extraterritorial Taxation Imposed by the Tax Rule

The Tax Rule arose in the context of the COVID-19 pandemic and the seismic shifts in employment practices caused by it. State budget assumptions that had been premised on a predictable amount of state income tax revenue flowing from out-of-state workers who commuted into and performed work within the State were suddenly thrown into doubt. Massachusetts' (and to a lesser degree, Ohio's) response to the pandemic's exigencies was to attempt to capture that same revenue and maintain the fiscal status quo regardless of the new reality of the work not being performed nor the income earned within those jurisdictions anymore.

Trying to maintain a predictable revenue stream in uncertain times is understandable. Lawmakers could well argue that simply continuing employer withholding of out-of-state employees' state income tax during the pandemic was a convenient solution for both employers and employees.

Yet, the constitution requires that taxation conform to the realities of geography. The fact that "a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 2599 (2011) (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)). But constitutional limits on government power apply even—perhaps especially—during times of crisis. The danger in allowing extraordinary arrangements to stand is that they often outlast the crisis they were designed to address. Here, the Tax Rule deviates from the fundamental principles of the Commerce Clause by allowing one State to discriminate against interstate commerce.

A. The Tax Rule Impermissibly Discriminates Against Interstate Commerce

1. This Court has explained that the Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the

new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979)).

And while the Framers drafted the Commerce Clause as an affirmative grant of authority to Congress, this Court has "long held that in some instances it imposes limitations on the States absent congressional action." *Id.* In other words, 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 command safeguards the nation's overall economic well-being by "preventing a State from retreating into economic isolation. . . ." *Id.* at 179-80.

2. This Court has identified "two primary principles that mark the boundaries of a State's authority to regulate interstate commerce." First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Id.* (citing *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (internal quotation marks omitted)). Second, state laws that "regulat[e] even-handedly to effectuate a legitimate local public interest . . . will be upheld unless the burden imposed on such

commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Southern Pacific*, supra at 779.

New Hampshire's Bill of Complaint is the correct vehicle to challenge the Tax Rule because, as this Court has observed, "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce." *Southern Pacific*, 325 U.S. 761, 770.

Applying the Dormant Commerce Clause to state tax schemes, a state tax survives a Commerce Clause challenge only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see Quill Corp. v. North Dakota By and Through Heitkamp*, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), *overruled by S. Dakota v. Wayfair, Inc.*, 504 U.S. 298 (2018). Here, the Tax Rule, and any similar attempt by one State to tax a nonresident's income earned outside the State's borders, fails to satisfy any of the four elements needed to survive New Hampshire's challenge.

3. First, the taxing state has no substantial nexus to work that is performed entirely out-of-state by a nonresident. *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 777-78 (1992). "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.

The Tax Rule relies solely on the employer's location to establish any sort of jurisdictional basis. The Tax Rule thus admits to no limiting principle. If an employer's presence in a State is sufficient to confer taxing power upon any of its employees (and presumably any vendor or independent contractor) regardless of where the work is performed, the substantial nexus test would be toothless. There is no precedent to supporting the taxing of work performed outside of the State simply because similar work was performed in the State at some point in the past. The Constitution does not permit a State to "just pretend" that the work to be taxed was performed in within its borders.

4. Next, the Tax Rule fails the *Complete Auto* test's second prong because the tax is not "fairly apportioned." The fair apportionment requirement "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 27. The Tax Rule does not even attempt to apportion the value of nonresident's work performed outside of Massachusetts. It absurdly deems that 100% of the out-of-state work was, for taxation purposes, performed within the State.

While this 100% apportionment would seem to require no further analysis, the test promulgated by this Court in *Oklahoma Tax Comm'n* is instructive. There, the Court held that a State exceeds its fair share of the value taxed when there is possibility of double taxation. *Oklahoma Tax Comm'n*, 514 U.S. at 184. Although a New Hampshire resident currently would not face double taxation of her income, New Hampshire could change its policy to address COVID-19 related expenditures by taxing that income at any time. More immediately—and regardless of New Hampshire's current income tax structure—residents of any of the forty-three States that do already impose an income tax on their residents would be subject to potential double taxation on work performed remotely for a Massachusetts employer.

This plain risk of double taxation means that the Tax Rule fails to meet *Complete Auto*'s second prong. *See Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). As New Hampshire, citing *Trinova*, argues in its Motion, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Id.* Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id.*

5. For similar reasons, the Tax Rule fails *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. This Court has invalidated similar tax scheme because they "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." *Comp. of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). In *Wynne*, this Court applied the Commerce Clause's "internal consistency"

test to strike down Maryland's taxation of certain individuals and S corporations that earned pass-through income in other States and paid tax on that income in those States.

The internal consistency test "'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. Plainly, if every State taxed out-of-state work like Massachusetts, a taxpayer who lived and worked in the same state would owe income tax to the residential State, while her neighbor who worked remotely for a company across the State's border would be subject (assuming no offsetting credits) to double taxation on her income performed in the same location, resulting in interstate commerce being "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.

6. 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." *Complete Auto*, 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). Here, Massachusetts is taxing taxpayers who have no physical presence in the State and whose work is being performed entirely in New Hampshire. Indeed, an Executive Order issued by the Governor of Massachusetts prohibited non-essential employees from working in their "brick and mortar" offices during a statewide shutdown. Governor's COVID-19 Order No. 13 (March 23, 2020), https://mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order. These remote workers receive no benefit from the portion of their income collected by Massachusetts.

B. The Due Process Clause Prohibits Extraterritorial Taxation

1. Although the technology that has enabled the recent surge in remote work to companies and their employees is new, the jurisdictional requirements of Due Process are timeless and well-established. A century ago, this Court held that "[g]overnmental jurisdiction in matters of taxation * * * depends upon the power to enforce the mandate of the state by action taken within its borders, either in personam or in rem." *Shaffer v. Carter*, 252 U.S. 37, 49 (1920). Technological advances do not eliminate the need for jurisdiction over the taxpayer or jurisdiction over the thing being taxed.

Thus, under the Due Process Clause, a State taxing nonresidents "generally may tax only income earned within the" state, not income nonresidents earn outside the taxing state's boundaries. *Okla. Tax Comm'n*, 515 U.S. at 463 n. 11; *Shaffer*, 252 U.S. at 57 ("As to nonresidents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (state "has jurisdiction to impose a tax of this kind upon the incomes of nonresidents arising from any business, trade, profession, or occupation carried on within its borders . . .").

2. Under these settled precedents Massachusetts has no jurisdictional basis to tax nonresidents for work performed entirely in other States, which is clear when one considers that the power to tax is essentially contractual. *See Commonwealth Edison Co.*, 453 U.S. at 625 (quoting State at *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1990) ("[t]he simple but controlling question is whether the state has given anything for which it can ask return.").

State residents pay taxes "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). Likewise, nonresidents who are physically performing work within a State receive some benefit from the services they enjoy while working therein.

Under the Due Process Clause, a state may not arbitrarily tax value earned outside its borders. *See Allied-Signal*, 504 U.S. at 777. The tax imposed must "bear[ ] fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney Co., supra* at 444, 61 S. Ct. 246.

Thus, as the *Complete Auto* Court held, a state tax on nonresidents must be "fairly related to the services provided by the State." *Complete Auto Transit, Inc.*, 430 U.S. at 279; *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"). Here, Massachusetts provides no services to nonresidents working outside of its borders and thus, has no legitimate claim over their income. *See Allied-Signal*, 504 U.S. at 777. The Tax Rule thus crosses the line from taxation to "mere unjustified confiscation." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 204 L. Ed. 2d 621 (2019) (citations omitted).

III. The Massachusetts Tax Rule Threatens to Harm the National Economy.

1. State government's appetites for spending rarely shrink with the passage of time. If permitted to stand, Massachusetts' Tax Rule will be quickly replicated by other States seeking to capture tax revenue from employees who no longer work within their borders.

A national race to claim this tax revenue—which state politicians could realize without having to raise taxes or cut services for in-state residents (i.e., voters)—would have grave consequences for the national economy. It would "renew the barriers to interstate trade which it was the object of the commerce clause to remove." *W. Live Stock v. Bureau of Revenue*, 305 U.S. 250, 256 (1938).

The Tax Rule's impact on the party States is obvious: It will discourage New Hampshire residents from working remotely in Massachusetts. New Hampshire residents will be more likely to find jobs in New Hampshire or work remotely in a State other than Massachusetts to avoid the 5% Massachusetts surcharge. Employers in Massachusetts, who might otherwise attract talented workers from New Hampshire, will be required to pay more to attract these workers to offset the additional tax burden. The result is a "pressure on an interstate business to conduct more of its activities" intra-state in contravention of the Commerce Clause. *Amerada Hess Corp. v. Dir., Div. of Tax.*, 490 U.S. 66, 77-78 (1989).

For States like Ohio, with multiple border communities, a race to tax out-of-state work will also result in fewer opportunities and choices for workers. This outcome is plainly inimical to the Commerce Clause and fundamental notions of Due Process. And it also introduces burdens and inefficiencies into the national economy as it recovers from the pandemic.

2. In addition, much has been written about the economic disparity between urban centers and America's smaller towns. *See*, *e.g.*, Clara Hendrickson, Mark Muro & William Galston, *Countering the*

Geography of Discontent: Strategies for Left-Behind Places, Brookings (November 2018), https://www.brookings.edu/research/countering-the-geography-of-discontent-strategies-for-left-behind-places. Enabling high earners to live in smaller towns or rural areas while working remotely for an employer in a major metropolitan area helps bridge this gap. *See* Zachary Mannheimer, *Google's work from home extension could be a boon for rural America*, The Hill (August 1, 2020), https://thehill.com/opinion/technology/510123-googles-work-from-home-extension-could-be-a-boon-for-rural-america. According to a Harris Poll survey, the ability to work remotely will encourage workers who are "looking for increased space, more affordable and less dense places to live, work, and play" to move. *Id*. This shift would mean increased tax revenue for the places where the work is actually performed. Accordingly, the Tax Rule not only penalizes workers but also the communities where they live.

The pandemic has disrupted the U.S. economy. Yet, out of that disruption has come innovation. The remote work revolution is the type of economic dynamism that the Commerce Clause exists to protect. Allowing the Tax Rule to stand stifles that innovation and impedes employees and employers who are working to create a new mutually beneficial employment model. States like Ohio, which have long enjoyed the prosperity that comes from cross border employment, stand to benefit from this innovation, so long as unconstitutional taxes do not impede interstate commerce.

States will have to adapt to the changing nature of work, just as employees and employers have been forced to do in respect to both the changing nature of work and COVID-19 pandemic. While remote work has the potential to cause some States to lose income tax revenue from nonresidents who formerly worked within the State's borders, it also has the potential to increase tax revenues to smaller communities and more rural jurisdictions as workers gain greater geographical flexibility. But in adapting to these new fiscal realities, States must nonetheless always adhere to the Constitution. Massachusetts' Tax Rule fails to do so.

CONCLUSION

For reasons stated in the Motion for Leave to File a Bill of Complaint and this amicus curiae brief, this Court should grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

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