No. 22O154, Original

In the Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
PLAINTIFF,
v.
COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT.

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

AMICUS CURIAE BRIEF FOR STATES OF NEW JERSEY, CONNECTICUT, HAWAII, AND IOWA IN SUPPORT OF PLAINTIFF

GURBIR S. GREWAL
Attorney General of New Jersey

JEREMY M. FEIGENBAUM*
State Solicitor
AMY CHUNG
JAMIE M. ZUG
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov
**Counsel of Record*

Counsel for New Jersey
(additional counsel listed at end of brief)

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INTEREST OF AMICI CURIAE[1]

Amici are four States directly impacted by the resolution of the issues presented. Five other States, in addition to Massachusetts, levy taxes on nonresidents for income they earn working at home in their States of residence. Many of amici States' residents thus pay taxes to those six States that are inconsistent with the Constitution. And that impacts amici States as well. Because amici States provide a credit to residents for taxes paid to other States—to mitigate the risk of double taxation—these six States' taxes impact amici's public fiscs. Amici are thus sacrificing *billions* of dollars in tax revenue on account of these unconstitutional state laws—and this Court is the only forum that can remedy their harms.

SUMMARY OF THE ARGUMENT

I. This Court should grant leave to file the complaint because the claims New Hampshire presents are serious and of national importance, and there are no sufficient alternative fora to hear them.

A. The question presented in this case is of nationwide and pressing importance. In addition to Massachusetts, five other States reach beyond their borders to directly tax out-of-state residents for the income they earn working remotely from their States of residence ("Home States"). The question whether such

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice was provided to both New Hampshire and Massachusetts.

direct income taxes are valid under the Constitution thus affects not only New Hampshire and Massachusetts but the other States who levy such taxes, every State whose residents pay them, and all employees who work from home—even part-time—for businesses in those six States.

Not only does the issue directly impact so many States, but it is of staggering consequence to their fiscal well-being. New Hampshire's complaint describes the injuries it experiences from Massachusetts's approach, stemming from the Granite State's longstanding opposition to levying income taxes on its residents. But the impact on those States that *do* tax the income of residents, like amici, is no less severe. Indeed, to avoid problems of double taxation, many States that levy income taxes grant credits in whole or in part to their residents for taxes paid to other States. Whether Massachusetts or other States can levy taxes directly on the income of nonresidents working from home affects billions of dollars in state tax revenue that amici States would otherwise receive.

Notably, the issue will remain consequential in the future. While Massachusetts argues that its decision to tax out-of-state residents arises from the ongoing COVID-19 emergency and is "temporary," Br. in Opp. 7-10, 13, 16, 18, the same cannot be said of the other laws in effect. Not only will these laws remain on the books, but their impact will continue to be great after the emergency concludes. Labor economists and experts anticipate that after the pandemic ends, the increase in work-from-home arrangements will persist. It follows that far more taxpayers will be affected

by laws that directly tax the income of nonresidents working from home, and that billions of dollars in tax revenue will continue to be at stake for the States.

B. There is also no sufficient alternative forum in which to hear this case. While Massachusetts argues that New Hampshire taxpayers could challenge the assessment of their taxes in state administrative tribunals and then on appeal, Br. in Opp. 9, 23-24, 34, that option is insufficient. Most importantly, States have independent interests in the resolution of this matter that are distinct from the interests of individual taxpayers—based on the harm either to their sovereign decision not to levy an income tax (as in New Hampshire) or to their revenues (amici States). And because States have no other forum in which to bring this case, these independent interests justify exercising original jurisdiction. *See Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). Moreover, tax rules require certainty, and the exercise of original jurisdiction provides the most efficient manner of resolving this issue.

II. On the merits, the challenged state taxes violate the Constitution because they are not fairly apportioned. The "central purpose" of the fair apportionment requirement is "to ensure that each State taxes only its fair share" of a tax base. *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 184 (1995) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989)). But States do not tax their "fair share" when they directly tax the income that nonresidents generated outside their borders by working from home.

ARGUMENT

I. THIS COURT SHOULD GRANT LEAVE TO FILE THIS BILL OF COMPLAINT.

In determining whether to exercise its original jurisdiction, the Court considers both "the seriousness and dignity of the claim" and the lack of "another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Wyoming v. Oklahoma*, 502 U.S., at 451 (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)). That analysis requires the Court to exercise original jurisdiction over New Hampshire's complaint.

A. THE IMPORTANCE OF THE CLAIM REQUIRES EXERCISING ORIGINAL JURISDICTION.

New Hampshire's brief describes in detail the strength of its constitutional claim and the impact of Massachusetts's law on its sovereign interests. Amici States write to emphasize that this issue is of nationwide importance; implicates billions of dollars in tax revenue for state treasuries; and will continue to be of great consequence in the future.

1. Although New Hampshire's Complaint challenges the constitutionality of Massachusetts's 830 Code. Mass. Reg. 62.5A.3 (the "Tax Rule"), the issue presented has implications for States and taxpayers nationwide. Indeed, five additional States—Arkansas, Delaware, Nebraska, New York, and Pennsylvania—

likewise tax out-of-state residents for the income they earn working from home in their Home States. Ark. Code Ann. §§ 26-51-202, 26-51-435, Ark. Dep't of Fin. & Admin. Legal Op. No. 20200203; 30 Del. Code. § 1124(b)(1)(b); 316 Neb. Admin. Code § 22-003.01C(1); N.Y. Tax Law §§ 601(e)(1), 631(a)(1), 631(b)(1)(B), 20 N.Y.C.R.R. § 132.18(a); 72 Pa. Stat. § 7308, 61 Pa. Admin. Code § 109.8. And a sixth, amicus Connecticut, taxes income of nonresidents working from home only where that taxpayer's Home State applies a similar tax. *See* Conn. Gen. Stat. § 12-711(b)(2)(C).[2] These are not taxes on in-state employers or on interstate businesses measured by payroll. Instead, these are direct taxes on individuals using Home State services while working in the privacy and safety of their homes.

New York's statute provides a good example of how such state laws operate. For decades, New York has applied its so-called "convenience of the employer test" to tax all nonresidents who work for a New York employer, even if they work from home, unless "necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer." 20 N.Y.C.R.R. § 132.18(a). In other words, if an employee is required to work in another State

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[2] Connecticut's tax was enacted on May 31, 2018, to correct any imbalance created by other States' unilateral imposition of an income tax on residents who, while working for out-of-state employers, perform services in Connecticut for "convenience," as opposed to necessity. *See* Office of Leg. Research, Pub. Act Summary, PA 18-49 § 20, https://tinyurl.com/y7dqfl9t. So if no other State taxed the income of out-of-state residents, Connecticut's tax would never apply. Aside from this reciprocal tax, Connecticut otherwise generally applies a physical presence test.

(e.g., a weeklong conference in New Jersey, or a placement at a site in Connecticut), then New York rightly does not levy any taxes on that income. But where an employee chooses to work from home in New Jersey or Connecticut or any other State, New York levies a tax on that income as if the nonresident worked their entire day in a Manhattan office. *See id.* (That is true, as explained *infra*, even if an individual is required to work from home during this emergency.)

The impact across the country is readily apparent. As New Hampshire highlights, an individual who spends her day working at home in New Hampshire could be required to pay Massachusetts taxes on her entire income, even though her Home State (where she spent the entire month) levies no such tax. Similar rules apply to the Iowa resident who regularly works from home for an employer in Omaha, the Oklahoma employees who work from home most days for a boss in Fayetteville, and the Connecticut and New Jersey residents who work most days from their Stamford or Jersey City apartments for a company based in Manhattan. That so many individuals across the country would be affected by the disposition of this case bolsters its importance—and thus confirms the urgency of exercising original jurisdiction.

Notably, the risk of harm to these taxpayers exists no matter whether they live in a jurisdiction that does not levy an income tax (like New Hampshire) or in one that does (like amici States). While New Hampshire's Complaint describes the former harms in detail, the harm is profound even for residents of Home States with income taxes. After all, while it is often

true that States will credit their residents for taxes paid to other States, they are not required to do so, so long their overall tax scheme is internally and externally consistent. *See, e.g., Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 462-63 (1995) (a State "may tax all the income of its residents"). Said another way, residents who work from home could be required to pay taxes on the same income to two States—despite never leaving their Home State. Moreover, even where a State does provide a tax credit, the tax rate of the taxing jurisdiction could be higher than that of the resident's Home State.[3]

But most importantly for the instant complaint, the harms to the States themselves are especially profound—bolstering the seriousness and dignity of New Hampshire's claims. New Hampshire amply describes the way in which taxes targeting nonresidents working from home encroach on its sovereign decision not to levy an income tax. *See, e.g.*, Compl. ¶¶ 1-3. Notably, such taxes also encroach upon the sovereignty of Home States that *do* levy income taxes on their residents, *see, e.g.,* N.J. Stat. Ann. § 54A:2-1; Conn. Gen. Stat. § 12-700(a); Haw. Rev. Stat. § 235-4, since they impose fiscal burdens on Home States' treasuries.

Indeed, to mitigate the problem of double taxation, a number of States—including amici—provide a

[3] For example, residents of amici Connecticut are subjected to a top marginal rate by New York that is 126.2% the top marginal rate in their Home State. *Compare* Form CT-1040 TCS, 2019 Tax Calculation Schedule, https://tinyurl.com/yaq35ftx (6.99% top rate), *with* N.Y. Dep't of Taxation & Fin., N.Y. State tax rate schedule, https://tinyurl.com/ycg4xybc (8.82%).

credit against their state income tax to offset most or all of the taxes an individual has paid to other States. *See, e.g.,* N.J. Stat. Ann. § 54A:4-1(a) (establishing "[a] resident taxpayer shall be allowed a credit against the tax otherwise due under this act for the amount of any income tax or wage tax imposed for the taxable year by another state"); Conn. Gen. Stat. § 12-704; Haw. Rev. Stat. § 235-55(a).

Although such laws protect a State's residents, the problem is obvious: if another State levies an impermissible tax on nonresidents, the Home State pays the price. Said another way, the decision of six States to directly tax income of nonresidents working from home results not only in an unconstitutional windfall, but diverts the revenues that Home States would otherwise receive. This is particularly troubling because, as New Hampshire notes, Home States provide services to residents working at home—e.g., police and medical services—without collecting tax revenue. Yet that is the Hobson's Choice to which they are put: doubly tax residents' income or suffer fiscal consequences. *See, e.g., Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 386 (1991) (this Court "act[s] as a defense against state taxes which … give rise to serious concerns of double taxation").

The reduction of the Home States' tax base that follows from unconstitutional tax laws like Massachusetts's works a variety of harms. In New Jersey, for example, the state constitution expressly dedicates all income tax proceeds for the exclusive "purpose of reducing or offsetting property taxes," N.J. CONST. art. VIII, § I, ¶ 7, meaning that unconstitutional income

taxes levied on New Jerseyans working from home directly reduce the property tax relief the State can provide. And States, of course, rely on income tax revenue to provide all manner of other services, from education to health care to social services—which is undermined by the challenged state tax laws.

Resolution of the issue presented thus impacts States across the Nation, emphasizing the seriousness and dignity of this claim.

2. The *degree* of impact on Home States offers further evidence of the seriousness of this claim—another reason why this Court must resolve it. See *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981)) (in original jurisdiction case, inquiring as to whether "the threatened invasion of rights" is "of serious magnitude") (citation omitted). In short, resolution of this issue will govern which States are entitled to *billions* of dollars in tax revenue.

As this Court is well aware, the national economy this year has seen unprecedented growth in work from home borne of the ongoing COVID-19 pandemic. According to Gallup, in April 2020, 70 percent of U.S. employees "always" or "sometimes" worked from their home—double the number from mid-March 2020[4]—and in May Gallup again found the number of individuals who "always" or "sometimes" worked from home

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[4] Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP, Apr. 3, 2020, https://tinyurl.com/y85g986c.

remained at 68 percent.[5] Whether States are entitled to tax the income of individuals working from home now has an especially large impact—as amici's experiences illustrate powerfully.

New Jersey provides a useful example. Before the emergence of COVID-19, more than 400,000 residents of amici New Jersey commuted to jobs in New York City (as did up to 78,000 residents of amici Connecticut).[6] This interstate travel came to an abrupt halt in March 2020, when rising COVID-19 cases compelled the New York Governor to prohibit employees of non-essential businesses from reporting to the workplace.[7] Offices and stores in New York City were permitted to reopen in June 2020, but because of the ongoing pandemic, employers are still subject to various capacity limits, employers must take measures to reduce interpersonal contact in the office, and many former commuters keep working from home.[8] Indeed,

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[5] Adam Hickman & Lydia Saad, *Reviewing Remote Work in the U.S. Under COVID-19*, GALLUP, May 22, 2020, https://tinyurl.com/ycxhhgqw.

[6] New York City Dep't of City Planning, *The Ins and Outs of NYC Commuting* (Sept. 2019), at 34, 38, https://tinyurl.com/ybd2xcnr.

[7] N.Y. Exec. Order No. 202.8 (Mar. 20, 2020).

[8] *See* N.Y. Dept. of Health, *Interim Guidance for Office-Based Work During the COVID-19 Public Health Emergency* (July 17, 2020), at 3, 5, https://tinyurl.com/ycgcf8xy; Michael Gold & Troy Closson, *New Yorkers Can Now Go Back to Offices, but Many Won't*, N.Y. TIMES, June 22, 2020.

in early October 2020, when COVID-19 cases and hospitalizations began to spike in clusters across New York, non-essential businesses in the most severe zones were shut down again.[9]

New York also made clear that nonresidents who are working from home due to the COVID-19 pandemic should consider their days working from home on account of these orders as "days worked in [New York] unless [their] employer has established a bona fide employer office at [their] telecommuting location."[10] Given the stringent test for a bona fide employer office,[11] residents working from home in amici New Jersey or Connecticut are virtually certain to fail New York's test and will be required to pay income taxes to New York even if they never left the borders of their Home State.

New Jersey's Office of Revenue and Economic Analysis ("OREA") explains in detail the financial impact of New York's rule. *See* N.J. OREA, *Estimating the Impact on N.J.'s Gross Income Tax of Other States' Taxes on N.J. Residents Working From Home* (Dec. 11, 2020), available at https://tinyurl.com/y797vn47. In 2018, New Jersey credited more than $2 billion to res-

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[9] N.Y. Exec. Order No. 202.68 (Oct. 6, 2020).

[10] N.Y. Dep't of Taxation & Fin., *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax*, https://tinyurl.com/y2k42o8c.

[11] *See* TSB-M-06(5)I, https://tinyurl.com/yafjfgpk.

ident taxpayers who worked for out-of-state employers; virtually all of this income tax credit related to work done for New York employers. *Id.* at 3. Based on available estimates, approximately $100 million to $400 million of the credits were for work performed by New Jersey residents at home. *Id.* at 4. So even in pre-pandemic years, the question whether the six state tax rules at issue are constitutional had an impact of hundreds of millions of dollars in revenue for a single State.

But now the financial impact has risen by orders of magnitude. Current work-from-home rates—where estimates range from 44 percent to 58 percent—indicate that New Jersey may credit anywhere from *$928.7 million to $1.2 billion* to its residents for taxes paid to New York based on income they earned or are projected to earn *while working at home in New Jersey* for the 12-month period beginning March 2020. (This analysis indicates that, during the same period, New Jersey may credit $3.2 million to $4.2 million to residents for taxes paid to Massachusetts based on income earned while working in New Jersey.) Said another way, how this case is resolved means the difference of approximately *one billion dollars* in revenue for a single state treasury in a single year.

But New Jersey is hardly alone in experiencing significant fiscal consequences from the six jurisdictions that directly tax income of nonresidents working from home. Based on 2020 work-from-home rates with an estimated range of 44 percent to 57.7 percent, Connecticut may credit residents anywhere between $339 million and $444.5 million for income taxes they paid

to New York, and $48.2 million and $63.2 million for income taxes paid to Massachusetts.

The resolution of this case thus has far-reaching implications as to which States will collect billions in revenue during the pandemic—whether the States that unlawfully tax nonresidents working from home or the Home States.

3. Resolution of the question presented will remain critical well after the pandemic ends. After all, while Massachusetts repeatedly stresses that its Tax Rule is only "temporary," Br. in Opp. 13,[12] there are five other States with similarly infirm laws not tied to the pandemic. *See supra* at 4-5.[13] Because five other laws will remain in full force and effect even after the emergency ends, the constitutional question will continue to require resolution by this Court.

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[12] Notably, it is not clear when Massachusetts will stop levying a tax on out-of-state residents working from home. The Massachusetts Department of Revenue previously committed to terminating this rule no later than December 31, 2020, *see* Br. in Opp. 6, but this month reversed course and intends to tax nonresidents working from home until 90 days after the end of the state of emergency. *See* Br. in Opp. 7. It remains uncertain when the emergency will end, so the tax on New Hampshire residents working from home may continue well into the future.

[13] Connecticut recognizes that, should the Court grant New Hampshire's motion to file its complaint, and should New Hampshire ultimately prevail, Connecticut's tax would become a nullity, and Connecticut would revert to the taxing scheme in place prior to May 31, 2018. *See supra*, Section I.A & n.2. Nevertheless, Connecticut is willing to accept that outcome in order to obtain a uniform principle applicable to all the States.

And the rise of work from home will ensure that the question remains critical. Technological advances over the last two decades, particularly in high-speed Internet,[14] virtual private networks,[15] and videoconferencing,[16] have eliminated the need for many employees to be physically present at their employer's location. The ability to work from home thus extends to an unprecedented range of occupations. "The fast pace with which many firms adapted to the COVID-19 health crisis by conducting a large number of jobs from home indicates that the use of telework pre-crisis remained well below what is feasible."[17]

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[14] In 2019, 73 percent of Americans (and 93 percent of those with bachelor's degrees or more) had high-speed Internet service at home. *See* Monica Anderson, *Mobile Technology and Home Broadband 2019*, June 13, 2019, at 2, 4, https://tinyurl.com/y8h6wd2z.

[15] Ken Schachter, *Cybersecurity at the kitchen table*, NEWSDAY, Mar. 22, 2020, at 31, https://tinyurl.com/y8cee4co.

[16] *America's Hottest Brands; 20 standouts that are thriving in tough times*, ADVERTISING AGE, July 13, 2020, at 12, https://tinyurl.com/yavr5gfg ("Zoom went from hosting 10 million daily meeting participants in December [2019] to 300 million by April [2020] and from 100 billion annualized meeting minutes to 2 trillion").

[17] Org. for Econ. Cooperation & Dev., *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?*, Sept. 7, 2020, at 3, https://tinyurl.com/y9zyuwbj.

Analysts and business leaders are exploring what working from home will mean for many employees after the COVID-19 pandemic.[18] Employers are experimenting with how to restructure work, where workhours or workweeks are staggered to reduce the number of employees who are in the office at once. One survey found "94% of organizations … expect remote work to be normalized in their organizations in a post-vaccine environment," while "76% believe that full-time remote work will be normalized in their organizations."[19] And one expert has estimated that 25 to 30 percent of the U.S. workforce will work from "home on a multiple-days-a-week basis by the end of 2021."[20] A work-from-home rate in that range means billions of dollars in state tax revenue will continue to depend on the answer to this constitutional question.

There is another reason why resolution of this question will remain consequential in the future: the

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[18] *See, e.g.*, Brodie Boland, Aaron De Smet, Rob Palter & Aditya Sanghvi, *Reimagining the office and work life after COVID-19*, McKinsey & Co., June 2020, https://tinyurl.com/yap7zxgk.

[19] Cecilia Amador de San José, *Future of Work: Tech Companies are Rethinking Workplace Density* (Oct. 23, 2020) https://tinyurl.com/ydhfamgr.

[20] Global Workplace Analytics, *Work-at-Home After Covid-19—Our Forecast*, https://tinyurl.com/ydflo3f5; *see also* Willis Towers Watson, *Actions to Restore Stability Survey*, Aug. 3, 2020 ("Employers expect 19% of their workforce to be full-time employees working from home post-COVID-19, which is roughly half of current levels (44%) but almost three times last year's figure (7%)."), https://tinyurl.com/yco2rpeg.

special resonance it has for populations that face additional burdens from commuting. For example, individuals with child and elder care responsibilities find work from home to be more family-friendly and flexible than commuting to work.[21] Individuals with disabilities also benefit from working from home.[22] These individuals are thus most likely to remain exposed to unconstitutional taxation from the six state laws, all but ensuring the continued need for resolution.

Finally, there is little chance this issue will be resolved outside of the judiciary. Given the billions of dollars of income tax credits and many more billions of dollars of projected budget shortfalls due to COVID-19 that are involved,[23] political resolution is practically impossible. *See* David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 L. REV. M.S.U.-D.C.L. 95, 97 (1999) (taxes on

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[21] *See* Harley Frazis, *Who Telecommutes? Where is the Time Saved Spent?*, U.S. Bureau of Labor Statistics Working Paper 523, at 11 (Apr. 2020).

[22] *See* Global Workplace Analytics, *Latest Work-at-Home/Telecommuting/Mobile Work/Remote Work Statistics* (463,000 individuals with disabilities, (7.1% of population with disabilities "regularly work from home"), https://tinyurl.com/y6necvla.

[23] *See generally* Ctr. on Budget & Policy Priorities, *States Grappling With Hit to Tax Collections*, Nov. 6, 2020 (estimating tax revenue declines of $319 million for Arkansas for 2020 and 2021, $713 million for Nebraska for 2020 through 2022, and $4.7 billion for Pennsylvania for 2020 and 2021).

nonresidents "can be very popular" because "non-constituents cannot vote against the legislator, and have little opportunity to be heard in their complaint"). Absent a determination by this Court, States will continue to directly tax value generated beyond their borders by taxing nonresidents working from home.

B. THE LACK OF ALTERNATIVE FORA REQUIRES EXERCISING JURISDICTION.

In determining whether to exercise original jurisdiction, the Court considers the availability of other fora "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Wyoming*, 502 U.S., at 451. That cuts in favor of jurisdiction.

1. Most importantly, no other court can adjudicate the States' independent interests in the resolution of the question presented. In *Wyoming v. Oklahoma*, this Court exercised original jurisdiction over Wyoming's Commerce Clause claim that it sustained "direct injury in the form of a loss of specific tax revenues." 502 U.S., at 448. The Court found it "beyond peradventure that Wyoming has raised a claim of sufficient 'seriousness and dignity'" because Oklahoma's legislation "directly affects Wyoming's ability to collect" revenues, "an action undertaken in its sovereign capacity." *Id.* at 451; *see also Maryland v. Louisiana*, 451 U.S., at 737 (exercising original jurisdiction because of direct financial harms to States). Such a "challenge under the Commerce Clause precisely implicates serious and important concerns of federalism fully in accord with the purposes and reach of [the

Court's] original jurisdiction." *Wyoming v. Oklahoma*, 502 U.S., at 451.

So too here. In addition to the interference with the New Hampshire Advantage, *see* Compl. ¶ 8, such taxes directly harm Home States that do maintain income taxes by interfering with their ability to collect revenue. When a State unconstitutionally taxes nonresidents working from home, it forces amici States to choose between losing billions of dollars of revenue by allowing credits to offset such taxes, or double taxing their residents. *See supra* at Part I.A. Home States thus incur costs by providing their residents services while they work from home, while a taxing State reaps income tax revenue derived from that work. But while Home States are directly harmed, they cannot seek redress in any forum but the present.

Although the direct harms provide a compelling and sufficient basis to exercise jurisdiction, the States' role in bringing *parens patriae* suits cuts in the same direction. *See Maryland v. Louisiana*, 451 U.S., at 737 (exercising original jurisdiction based on the financial harms to State's residents, and explaining that States may "act as the representative of its citizens in original actions where the injury alleged affects the general population of a State in a substantial way"); *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921) (exercising original jurisdiction because the interests "of the people of the State and the value of their property" were "gravely menaced" by the New York legislature); *North Dakota v. Minnesota*, 263 U.S. 365, 373-74 (1923) (exercising original jurisdiction in suit brought by State on behalf of its farmers).

Although Massachusetts argues the "questions presented here can and should be litigated" by individual taxpayers "through the established processes for review of state taxation questions," Br. in Opp. 12, a taxpayer suit is no substitute for a State action advancing its own interests. For one, as New Hampshire notes, amici know of no other cases currently litigating the issue. *Wyoming v. Oklahoma*, 502 U.S., at 452 (exercising original jurisdiction because "no pending action exists to which we could defer adjudication on this issue"). Moreover, many taxpayers living in amici States have reduced incentive to file suit because their Home States accord them a credit in whole or in part. *Supra* at 7-9. If this Court does not exercise its original jurisdiction, Home States will continue to pay the price without judicial recourse.

But more fundamentally, even if a resident of New Hampshire or another State challenges the Massachusetts Tax Rule, the States' own "interests would not be directly represented" in that suit. *Wyoming v. Oklahoma*, 502 U.S., at 452 (finding this a dispositive basis to exercise original jurisdictional in a challenge to a state tax). Only New Hampshire can sufficiently litigate the direct harm it experiences to its sovereign choice not to levy a tax, and only amici Home States can address the direct harms to their public treasuries. Those harms are distinct from the ones taxpayers feel—and they can only be addressed through the exercise original jurisdiction.[24]

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[24] Indeed, Massachusetts emphasizes that its approach does "leave some leeway for taxpayers to argue that the regulation is unconstitutional as applied to their particular circumstances" in

2. Notably, the need for an expedient resolution of the question presented confirms the importance of exercising original jurisdiction. As courts have recognized time and again, having certainty in matters of tax is particularly critical. *See, e.g., Thor Power Tool Co. v. Comm'r of Internal Revenue*, 439 U.S. 522, 543 (1979) (noting "tax law, with its mandate to preserve the revenue, can give no quarter to uncertainty"); *Buffalo Bills, Inc. v. United States*, 31 Fed. Cl. 794, 802 (1994) ("The taxpayer and the [taxing jurisdiction] both expect and are entitled to receive a reasonable degree of certainty in their tax planning."); *Madden v. Comm'r of Internal Revenue*, 514 F.2d 1149, 1152 (9th Cir. 1975) ("[T]he element of certainty [is] particularly desirable in tax law."); *Estate of Herman Borax v. Comm'r*, 349 F.2d 666, 670 (2d Cir. 1965) (same).

That interest is especially compelling here because States rely on sustainable, predictable revenue streams for budgetary planning. *See Bull v. United States*, 295 U.S. 247, 259 (1935) ("[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need."); *Rubel v. Comm'r of Internal Revenue*, 856 F.3d 301, 306 (3d Cir. 2017) ("[The] predictability of the revenue stream ... is vital to the government."). As explained above, without a determination from this Court on the constitutional question presented, States will remain uncertain as to

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state agencies and state courts. Br. in Opp. 24. Individual taxpayers' incentives thus differ sharply from the interests of New Hampshire and amici States—which benefit little from an individual taxpayer obtaining a one-off exemption.

billions of dollars in potential tax revenue, leaving legislatures in a budgetary quagmire. That is a problem both for States that levy taxes on residents working from home, and Home States that credit residents for taxes paid to other jurisdictions.

The exercise of original jurisdiction is the most efficient way to resolve this dispute. Even if this Court believes taxpayers may file lawsuits that could partly represent a State's interests, there will be a lengthy and laborious process before resolution of this pressing national question. Because the Tax Injunction Act, 28 U.S.C. §1341, limits resort to federal district court, taxpayers must first seek redress from a taxing State's administrative agencies and/or trial courts, appeal to the intermediate state appellate courts, petition to the highest state court, and *then* file a petition for certiorari. *See* Mass. Gen. Laws ch. 62C, §§37, 39 (Massachusetts law requiring multistep administrative review of taxpayer suits). In the intervening years, uncertainty would reign over budgetary planning: States cannot be certain the revenues they will receive, and taxpayers cannot be certain the taxes they owe. The instant case, by contrast, presents a purely legal question regarding the constitutionality of state income taxes directly imposed on out-of-state residents working from home—one that this Court could straightforwardly resolve. In a time already riddled with uncertainty, this case demands prompt resolution.

II. NEW HAMPSHIRE SHOULD PREVAIL ON THE MERITS.

Although this Court should exercise its original jurisdiction regardless of its view on the constitutional question, New Hampshire's claims are plainly meritorious. Black letter legal principles foreclose laws that directly tax the income of nonresidents earned while working from home in another State.

This Court has long acknowledged that while States are free to tax all the income of their residents, their authority to tax nonresidents "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." *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) (analyzing Dormant Commerce Clause, Due Process, and other constitutional claims) (emphasis added); *see also Chickasaw Nation*, 515 U.S. at 463 n.11 (contrasting States' authority to tax 100% of residents' income no matter where earned with States' limited authority to tax only that income of nonresidents that is "earned within the" State); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992).

Direct taxes on the income nonresidents earn working from home are unconstitutional because, among other things, they are unfairly apportioned. *See Jefferson Lines*, 514 U.S., at 184 (noting the "central purpose" of fair apportionment is "to ensure that each State taxes only its fair share" of a tax base) (quoting *Goldberg*, 488 U.S., at 260-61). In particular, such taxes fail what this Court terms the "external

consistency" test, which is the most "difficult requirement" of fair apportionment. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).

First, a tax "must actually reflect a reasonable sense of how income is generated." *Id*. Here, the tax is directly imposed on individuals who generate income with *their labor* performed at home. Reaching into an individual's home to directly tax labor performed there does not "actually reflect a reasonable sense of how income is generated."

Second, external consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity *within the taxing*" jurisdiction. *Jefferson Lines*, 514 U.S., at 185 (emphasis added). Here, States "reach[] beyond" their borders to directly tax income that individuals earn *outside of* the taxing jurisdiction when they impose taxes directly on the income of nonresidents working from home. Such taxes contain no mechanism to prevent double taxation if the taxpayer's Home State does not allow a credit. Direct taxation on individuals' incomes renders this case distinguishable from constitutional taxes on employers or interstate businesses themselves that provide a link between the taxing State and the value taxed. No sufficient justification exists for directly taxing the incomes of individuals working from home.

Third, "[t]he external consistency test asks whether the State has taxed only that portion of the

revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S., at 262. The taxes here do not reasonably reflect in-state activity. Just the opposite: they tax employee labor done at home—*i.e.,* activity performed entirely in the Home State.

In short, the challenged taxes—which tax individuals for income earned outside of the taxing States' borders—violate the Constitution.

CONCLUSION

For these reasons, this Court should grant New Hampshire leave to file its complaint.

Respectfully submitted,

GURBIR S. GREWAL
Attorney General
State of New Jersey

JEREMY M. FEIGENBAUM*
State Solicitor
AMY CHUNG
JAMIE M. ZUG
Deputy Attorneys General
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625
(609) 292-4925
jeremy.feigenbaum@njoag.gov
*Counsel of Record

Counsel for New Jersey

WILLIAM TONG
Attorney General
State of Connecticut

CLARE E. CONNORS
Attorney General
State of Hawai'i

THOMAS J. MILLER
Attorney General
State of Iowa

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