No. 22O154

IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant.

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

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INTRODUCTION

New Hampshire's Bill of Complaint rests on a serious injury to New Hampshire's sovereign identity that only this Court can redress. Massachusetts' attempts to minimize that injury neither diminish its seriousness nor deprive New Hampshire of standing to seek relief in this forum. The issues presented in this case are of national importance and are likely to recur. This Court should hear this case.

Massachusetts downplays the seriousness of New Hampshire's claim in three ways. First, Massachusetts contends that the Tax Rule does not impede any tax policy New Hampshire desires to implement. It is perhaps unsurprising that a State that has taken a fundamentally different fiscal approach would fail to appreciate that New Hampshire's rejection of broad-based taxation is central to its sovereign identity. But New Hampshire's sovereign interests are no less serious merely because Massachusetts may think its own policies are preferable.

Second, Massachusetts contends that the Tax Rule merely maintains the status quo because Massachusetts continues to impose an income tax on nonresidents solely for Massachusetts-sourced income. In fact, Massachusetts has radically redefined what constitutes Massachusetts-sourced income in order to tax earnings for work performed entirely outside its borders. This does not maintain the status quo. It upends it.

Third, Massachusetts insists that the Tax Rule addresses a temporary problem. Yet even in the short time New Hampshire's motion has been pending, Massachusetts has extended the Tax Rule indefinitely. And, as *amici* demonstrate, this is an issue of national importance certain to survive the current pandemic.

This Court should accordingly grant New Hampshire's Motion for Leave to File a Bill of Complaint.

ARGUMENT

I. The Seriousness of This Dispute Warrants the Court's Original Jurisdiction.

A. The Tax Rule Invades New Hampshire's Sovereign and Quasi-Sovereign Interests.

New Hampshire's tradition of rejecting broad-based taxation of its residents is an essential element of its sovereign identity. In its 232-year history, no matter the political party in power, New Hampshire has never subjected its residents to a personal income tax on earned income. Br. 15. This deliberate policy choice is central to New Hampshire's fiscal structure and its economic-development strategy. Even in this era of heightened political polarization, this is a high-profile policy issue on which Granite Staters of all political stripes remain largely unified. New Hampshire competes with other States, and by dint of geography, none more so than Massachusetts. The power of New Hampshire's differentiating fiscal policy is evidenced by the tens of thousands of people

who flee northward to New Hampshire each year. Br. 17-18. It has created the widely recognized "New Hampshire Advantage," which boosts economic development by attracting businesses and leaving more money in residents' pockets.

Massachusetts has plenty of reasons to downplay the significance of these interests based on an apparent belief that its own fiscal choices are better. In Massachusetts' view, New Hampshire's sovereign interests are not sufficient to warrant this Court's review because the two States' tax policies are not "mutually exclusive." *See* BIO 15-17. But the only way the Tax Rule and New Hampshire's sovereign choice not to tax its residents' earned income are compatible is if New Hampshire agrees that Massachusetts may tax New Hampshire residents for work performed entirely within New Hampshire simply because those individuals once commuted to Massachusetts for work. Short of agreeing with that proposition, New Hampshire contends it violates the Constitution. At best, Massachusetts' assertion that the Tax Rule is compatible with New Hampshire's sovereign interests reflects a fundamental misunderstanding about New Hampshire's sovereign identity. As does its attempt to impose the very tax on New Hampshire residents that New Hampshire has rejected for over two centuries.

Thus, what to Massachusetts might seem to be "routine taxation," BIO 16, to New Hampshire attacks the core of its sovereign identity. That attack is not, as Massachusetts suggests, limited to only a

small "subset of residents." BIO 13. This unconstitutional tax is extracting hundreds of millions of dollars from over one hundred thousand New Hampshire residents—more than 15 percent of the state's workforce. It requires these individuals to pay Massachusetts taxes on income that is being earned *entirely* within New Hampshire. Br. 21.

Pennsylvania v. New Jersey, 426 U.S. 660 (1976), is readily distinguishable. There, Pennsylvania sued New Jersey to recover tax credits Pennsylvania gave to its residents for income taxes paid to New Jersey. *Id.* at 663. Because Pennsylvania's tax credits reimbursed its residents for taxes paid to New Jersey, Pennsylvania residents *were not harmed* by New Jersey's taxes on out-of-state residents. Pennsylvania thus had no "quasi-sovereign interests" in protecting these residents and the State's harms were "self-inflicted." *Id.* at 664-66.[1]

Here, Massachusetts is imposing state taxes on *New Hampshire* residents that New Hampshire does not impose. New Hampshire does not reimburse its residents for these out-of-state taxes. These economic harms are precisely the type of "quasi-sovereign" interests that make this Court's original jurisdiction appropriate. New Hampshire has a quasi-sovereign "interest in protecting its citizens

[1] This is not to downplay the magnitude of the economic injury to those states that do impose an income tax but credit their residents for taxes paid in other jurisdictions. *See Amici* Br. of New Jersey, *et al.*, at 6-13.

from substantial economic injury presented by imposition of the" Tax Rule. *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (original jurisdiction appropriate because Louisiana tax affected "a great many citizens" in the State who could not "be expected to litigate the validity of the [tax]" on their own). New Hampshire's harms also are more "serious" than Pennsylvania's "self-inflicted" monetary harms. Br. 9-10.

Massachusetts finds it "speculative" that the Tax Rule will harm New Hampshire's ability to recruit new state employees, attract new businesses to the State, or protect the public health. BIO 27-28. This is patently false. New Hampshire's tax policies provide employers with a remarkable workforce recruitment tool through an increase in bottom-line pay compared to an income-tax state. By partnering with its businesses in this way, New Hampshire enhances its economy with new businesses, new jobs, new families, vigorous economic activity, and additional tax revenues for the State fisc. There is nothing "speculative" about how this intentional growth dynamic is ingrained into New Hampshire's core sovereignty—the State has made it central to its economic development policies. *See, e.g.*, New Hampshire's Recruiting Bid for Amazon HQ2, at 8-9, 23, https://bit.ly/38riAu9 (quantifying the financial benefits to the business and its employees from unique tax policies at $600,000,000).

New Hampshire likewise does not claim that, under this Court's precedent,[2] every State has "inherent standing as sovereigns to contest every allegedly unconstitutional or otherwise unlawful tax on a subset of their residents." BIO 17. The Tax Rule strikes at the heart of New Hampshire's sovereign interests, imposes a large tax on a substantial portion of New Hampshire's population, and threatens a core principle of what it means to live and work in New Hampshire. This alone is sufficiently serious to justify this Court's review. Moreover, the question presented has nationwide implications, and tax disputes between States will become increasingly common if it is not resolved. *See Amici* Br. of New Jersey, *et al.*, at 13-17. This is precisely the type of dispute that warrants this Court's original jurisdiction.

B. No Alternative Forum Exists.

Massachusetts argues against original jurisdiction, claiming that New Hampshire residents can challenge the Tax Rule through abatement actions with the Massachusetts Commissioner of Revenue. BIO 22-23. This Court has never refused to exercise its original jurisdiction because an action *could* be filed that *might* raise the same issues. There must be a "*pending action* to which adjudication could be deferred." *Wyoming v. Oklahoma*, 502 U.S.

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[2] As explained, the Court should reexamine its precedent and hold that it *must* hear this dispute because it arises between two States. Br. 32-34; *see also Amici* Brief of Ohio, *et. al.*, at 1-18.

437, 451-52 (1992) (emphasis added); *compare with Washington v. Gen. Motors Corp.*, 406 U.S. 109, 116 & n.7 (1972) (States already litigating same issue in federal district courts); *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (the "pending state-court action" provided "an appropriate forum in which the issues tendered here may be litigated"). The Court requires "assurances . . . that [New Hampshire's] interests under the Constitution will find a forum for appropriate hearing and full relief." *Wyoming*, 502 U.S. at 452.

Massachusetts identifies no pending action to which this Court should defer. This is not surprising. Individual taxpayers "cannot be expected to litigate the validity of the [Tax Rule] given that the amounts paid by each [taxpayer]" likely would not justify the litigation costs. *Maryland*, 451 U.S. at 739. There is, therefore, no party better suited to litigate these issues than New Hampshire. *Compare with Arizona*, 425 U.S. at 796-97 (Arizona utility companies could defend their interests in pending state action).

Even if a taxpayer had brought an abatement action, it would not provide New Hampshire with an "adequate remedy." *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). The Tax Rule injures New Hampshire—not just its individual residents—and this Court is the *only* forum in which the State can bring its claims. *See* Final Report of the Special Master, *Connecticut v. New Hampshire*, No. 119 Orig., 1992 WL 12620398, at *17 (U.S. Dec. 30, 1992) (finding no alternative forum in which "all of the parties could assert their claims"). The Massachusetts

Commissioner of Revenue could rule for the individual taxpayer without invalidating the Tax Rule in its entirety. Indeed, as Massachusetts notes, the state courts likely would try to *avoid* the constitutional issues by ruling on other grounds. BIO 25 n.9. Only this action protects New Hampshire's interests. *See Wyoming*, 502 U.S. at 438 (finding "no other forum in which *Wyoming's* interests will find appropriate hearing and full relief" (emphasis added)).

Massachusetts contends that an abatement action would provide a better forum because the state agency could make "highly fact-specific determinations in considering individual taxpayers' abatement requests." BIO 24. But New Hampshire's claims require no such fact finding. The State seeks a declaratory judgment that the Tax Rule unconstitutionally requires New Hampshire residents to pay taxes on income earned outside of Massachusetts. This Court regularly resolves these types of claims. *See, e.g., Wyoming*, 502 U.S. at 440-41 (seeking declaration that state tax is unconstitutional and an injunction against its enforcement); *Maryland*, 451 U.S. at 734 (same); *Connecticut*, 1992 WL 12620398, at *2 (same).

II. New Hampshire Has Standing.

New Hampshire has standing in its own right and as *parens patriae*. New Hampshire has alleged injuries in fact that can be traced to the Tax Rule. *Maryland*, 451 U.S. at 736; *see* Br. 14-23. Massachusetts argues that the Tax Rule does not invade New Hampshire's sovereignty because New

Hampshire "still may . . . set its own distinct tax policy to govern its residents and those who do business in the State." BIO 26. As explained, the Tax Rule attacks New Hampshire's sovereign identity by imposing an income tax where none exists. Short of abandoning an essential element of that sovereign identity (and, in doing so, upending its fiscal structure), New Hampshire cannot change its tax policies to accommodate the Tax Rule. The Tax Rule thus undermines New Hampshire's sovereign interest and overrides New Hampshire's objective of promoting economic growth and financial security by attracting businesses and workers with such an important financial incentive. A State's sovereignty is invaded for standing purposes when it cannot "change [its] laws to avoid injury from amendments to another sovereign's laws *and* achieve [its] policy goals." *Texas v. United States*, 809 F.3d 134, 158 n.65 (5th Cir. 2015) (citing *Wyoming*, 502 U.S. at 455-56) (emphasis in original).

Massachusetts finds it unlikely that the Tax Rule will actually harm New Hampshire's ability to recruit new state employees, attract new businesses to the State, or protect the public health. BIO 27-28. That is wrong. *Supra* 5. In any event, at the pleading stage, New Hampshire's "general factual allegations of injury resulting from the defendant's conduct" are sufficient because the Court must presume these allegations "embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Massachusetts may renew its arguments after proper fact finding, as

States often do. *See, e.g.*, *Wyoming*, 502 U.S. at 446; *Maryland*, 451 U.S. at 735-39.

New Hampshire likewise has standing as *parens patriae*. A State has *parens patriae* standing when it has a "quasi-sovereign interest" in the outcome. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982). New Hampshire has a quasi-sovereign interest in protecting the "health and well-being—both physical and economic—of its residents." *Id.* Like the Louisiana tax on natural gas in *Maryland*, the Tax Rule imposes "increased costs aggregating millions of dollars per year" on "a great many citizens" in New Hampshire who are not "likely to challenge the tax directly." *Maryland*, 451 U.S. at 739.

New Hampshire also has "a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." *Snapp*, 458 U.S. at 607. One of the "benefits of the federal system," *id.* at 608, is that States retain the right to decide how to "tax[] themselves and their property," *M'Culloch v. Maryland*, 17 U.S. 316, 428 (1819). The Tax Rule denies New Hampshire this sovereign right by overriding its decision not to tax its residents on the income they earn.

III. This Dispute Presents Serious Claims on the Merits.

Massachusetts' defense of the Tax Rule misses the mark. Not only are New Hampshire's claims "serious," *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *see also* Shapiro, *Supreme Court Practice* 625-

27 (11th ed. 2019) (original jurisdiction may be denied if claims are "patently without merit"), they are correct.

The Tax Rule fails all four prongs of the *Complete Auto* test. *See* Br. 24-28 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). *First*, it is not applied to an "activity" with a "substantial nexus" with the taxing State." *Complete Auto*, 430 U.S. at 279. The "activity" subject to the Tax Rule occurs entirely in New Hampshire and has no current "substantial nexus" to Massachusetts. That similar activities *used to be* done in Massachusetts is irrelevant. Br. 25.

Second, the tax is not "fairly apportioned" because Massachusetts is not taxing its "fair share" of activities occurring entirely in New Hampshire. *Id.* Massachusetts argues that the Tax Rule is "internally consistent" because "if every state sourced employment income during this emergency using the pre-pandemic period as the yardstick, there would be no double taxation." BIO 32. But there is no identifiable "pre-pandemic" date that applies to every State. Massachusetts began taxing activities outside its borders as of March 2020, but Maine might not have done so until November 2020. *See United States COVID-19 Cases & Deaths by State*, Centers for Disease Control & Prevention, https://bit.ly/2LRFtPT. Between March and November, a person living in Maine who used to work in Massachusetts would be subject to double taxation. Massachusetts' credit for income taxes paid to other jurisdictions

does not remedy this internal inconsistency. *See* 830 Code Mass. Regs. 62.5A.3(4).

Massachusetts' defense of the Tax Rule's "external consistency" is even more specious. There is no question that the Tax Rule "reaches beyond that portion of value that is fairly attributable to economic activity *within the taxing State*." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) (emphasis added). Massachusetts defends the rule as a "temporary" response to a "crisis." BIO 32-33. But the Tax Rule is not "temporary," Br. 4, and the only "crisis" was Massachusetts' fear of losing tax revenues, Br. 10-12; *see also Amici* Br. of New Jersey, *et al.*, at 13 n.12 ("Massachusetts previously committed to terminating this rule" by the end of 2020, but "recently reversed course."). Nor must this overreach be remedied only through as-applied challenges. *Supra* 8.

Third, the Tax Rule discriminates against interstate commerce by discouraging the free movement of workers across state lines. Br. 26-27. That the Tax Rule "taxes non-residents and residents" at the same rate, BIO 35, does not eliminate the rule's discriminatory effect, Br. 26-27.

Fourth, the Tax Rule is not "fairly related to the services provided" by Massachusetts. *Complete Auto*, 430 U.S. at 279. It is irrelevant how the tax was computed in the "immediate pre-pandemic period." BIO 35-36. The Tax Rule taxes activities in New Hampshire that *currently* are not "reasonably related to . . . the activities or presence of the

taxpayer in the State." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981).

The Tax Rule violates the Due Process Clause for similar reasons. Br. 28-30; *see Amici* Br. of Southeastern Legal Foundation, *et al.* at 5-10. Massachusetts' insistence on a "significant connection" between Massachusetts and the non-resident taxpayer "in the immediate pre-pandemic period" is again irrelevant. BIO 36. There is *currently* no "fiscal relation to [the] protection, opportunities and benefits given" by Massachusetts to the activities it is *currently* taxing. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940).

Massachusetts' only defense is that New Hampshire residents working from home remain protected by Massachusetts' employment laws and have received "the very jobs . . . that Massachusetts has created." BIO 37. A State cannot manufacture the required "minimum connection" by extending its laws to cover individuals outside its borders. *See South Dakota v.* Wayfair*, Inc.*, 138 S. Ct. 2080, 2099 (2018). Nor does the mere location of an employer's headquarters create this link. *Allied Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778 (1992). By taxing work occurring in New Hampshire where it has no jurisdiction to do so, the Tax Rule is "simple confiscation and a denial of due process of law." *Miller Bros v. Maryland*, 347 U.S. 340, 342 (1954).

CONCLUSION

For these reasons, the Court should grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

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