No. 154, Original

# In the Supreme Court of the United States

STATE OF NEW HAMPSHIRE, PLAINTIFF

*v.*

COMMONWEALTH OF MASSACHUSETTS

*ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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This brief is submitted in response to the order of this Court inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the motion for leave to file a bill of complaint should be denied.

## STATEMENT

This case involves a facial constitutional challenge to a temporary Massachusetts tax rule. The rule requires certain nonresident employees of Massachusetts employers to treat income earned for services performed in another State because of the COVID-19 pandemic as if the income had been earned in Massachusetts.

States may (and generally do) tax all income earned by their residents, no matter where the income is earned. See *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 556 (2015). But most States tax income earned by nonresidents only insofar as the income is earned for services performed in the State. See *Oklahoma Tax Commission* v. *Chickasaw Nation*, 515 U.S. 450, 463

n.11 (1995); cf. New Jersey et al. Amici Br. 4-5 (cataloging the few exceptions). Until recently, Massachusetts was one of those States, generally treating as Massachusetts-sourced income only that portion of a nonresident employee's income "received for services performed in Massachusetts." 830 Mass. Code Regs. 62.5A.1(5)(a); see 830 Mass. Code Regs. 62.5A.1(3)-(6) (setting forth sourcing and apportioning rules for myriad types of nonresident income).

That changed during the recent COVID-19 pandemic. After the Governor proclaimed a state of emergency, see *Governor's Declaration of Emergency* 2 (Mar. 10, 2020), and large numbers of employees began working remotely, Massachusetts promulgated an emergency regulation (and later, following notice and comment, a formal administrative rule) to "set[] forth the sourcing rules that apply to income earned by a nonresident employee who telecommutes on behalf of an in-state business from a location outside the state due to the COVID-19 state of emergency in Massachusetts." 1471 Mass. Reg. 71 (Apr. 21, 2020); see 830 Mass. Code Regs. 62.5A.3.

The rule provides that nonresidents who were working in Massachusetts "immediately prior to the Massachusetts COVID-19 state of emergency," but who are "performing services from a location outside Massachusetts due to a Pandemic-related Circumstance," generally must treat income earned for those services as having been earned in Massachusetts. 830 Mass. Code Regs. 62.5A.3(3)(a). An affected employee may, however, apportion such income between Massachusetts and his or her home State based on either "the percentage of the employee's work days spent in Massachusetts during the period January 1 through February 29,

2020," or, "if the employee worked for the same employer in 2019, the apportionment percentage properly used to determine the portion of employee wages constituting Massachusetts source income on the employee's 2019 return." 830 Mass. Code Regs. 62.5A.3(3)(b). The rule will remain in effect and apply to qualifying income earned between March 10, 2020, and "90 days after the date on which the Governor of the Commonwealth gives notice that the Massachusetts COVID-19 state of emergency is no longer in effect." 830 Mass. Code Regs. 62.5A.3(1)(d). On May 17, 2021, the Governor announced that he "will end the State of Emergency [on] June 15." Press Release, Governor's Press Office, *Baker-Polito Administration to Lift COVID Restrictions May 29, State to Meet Vaccination Goal by Beginning of June* (May 17, 2021), www.mass.gov/lists/press-releases-related-to-covid-19.

New Hampshire seeks leave to file a bill of complaint under this Court's original jurisdiction. New Hampshire alleges that more than 100,000 of its residents work in Massachusetts and are thus potentially subject to the rule. See Compl. ¶ 35. New Hampshire further alleges that the Massachusetts rule is facially unconstitutional on the ground that it violates the "dormant" or "negative" Commerce Clause, see Compl. ¶¶ 84-103, and the Fourteenth Amendment's Due Process Clause, see Compl. ¶¶ 104-112. New Hampshire asserts injuries to its own sovereign and proprietary interests and, as *parens patriae*, to its residents' economic and other interests. Reply Br. 8-10. Among other requests for relief, New Hampshire seeks an injunction preventing Massachusetts from enforcing the rule and requiring it to refund all funds collected under the rule. Compl. 32.

**DISCUSSION**

The motion for leave to file a bill of complaint should be denied. This is not an appropriate case for the exercise of this Court's original jurisdiction, which the Court has repeatedly stated should be exercised only "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (citation omitted). New Hampshire does not invoke the types of interests that would warrant such an exercise, and the issues New Hampshire seeks to present can adequately be raised and litigated by New Hampshire residents who are subject to the Massachusetts income tax. In addition, the constitutional claims would more appropriately be considered on developed factual records concerning affected individuals and with the benefit of authoritative interpretations of the relevant tax provisions by Massachusetts courts.

1. a. The Constitution grants this Court original jurisdiction over "all Cases * * * in which a State shall be Party." U.S. Const. Art. III, § 2, Cl. 2. Since the First Judiciary Act, Congress has provided by statute that the Court has "original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. 1251(a); see Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 80-81; see also Stephen M. Shapiro et al., *Supreme Court Practice* § 10.1, at 10-2 to 10-6 (11th ed. 2019). But although that jurisdiction is exclusive, the Court has "interpreted the Constitution and [Section] 1251(a) as making [its] original jurisdiction 'obligatory only in appropriate cases,'" *Mississippi* v. *Louisiana*, 506 U.S. at 76 (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)), and therefore "as providing [the Court] 'with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum

in this Court,'" *ibid.* (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

In exercising that discretion, this Court has "said more than once" that its original jurisdiction should be invoked only "'sparingly,'" observing that original jurisdiction "'is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.'" *Mississippi* v. *Louisiana*, 506 U.S. at 76 (quoting *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992), and *Louisiana* v. *Texas*, 176 U.S. 1, 15 (1900)). The Court has therefore expressed "reluctance to exercise original jurisdiction in any but the most serious of circumstances." *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995); see *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669 (1931) ("[T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.").

b. New Hampshire and several amici invite (Br. in Support 32-34; Ohio et al. Amici Br. 5-17) this Court to reconsider its well-established conclusion—reaffirmed a number of times over more than 40 years—that the exercise of original jurisdiction in controversies between States under 28 U.S.C. 1251(a) is discretionary. The Court has recently declined similar invitations and opportunities. See *Texas* v. *California*, 141 S. Ct. 1469 (2021) (No. 153, Orig.); *Arizona* v. *California*, 140 S. Ct. 684 (2020) (No. 150, Orig.); *Missouri* v. *California*, 139 S. Ct. 859 (2019) (No. 148, Orig.); *Nebraska* v. *Colorado*, 577 U.S. 1211 (2016) (No. 144, Orig.). New Hampshire and its amici identify no sound basis to take a different course here. The Court has explained that its interpretation of Article III and the statute is grounded in the

historical understanding that original jurisdiction over suits between States arose from the "'extinguishment of diplomatic relations between the States,'" and was therefore intended by "the framers of the Constitution" to be available only "when the necessity was absolute." *Louisiana* v. *Texas*, 176 U.S. at 15 (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 15 (1890)). The Court's interpretation also finds support in structural limits on the Court's ability "to assume the role of a trial judge," *South Carolina* v. *North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., concurring in the judgment in part and dissenting in part); the Court's duty to attend to its appellate docket, see *City of Milwaukee*, 406 U.S. at 93-94; and the doctrine of stare decisis, see *United States* v. *Maine*, 420 U.S. 515, 527-528 (1975).

2. This is not one of the rare cases that warrants the exercise of this Court's original jurisdiction. In deciding whether to exercise jurisdiction, the Court considers both "'the nature of the interest of the complaining State,' focusing on the 'seriousness and dignity of the claim,'" and whether there exists an alternative forum "in which the issue[s] tendered" to the Court "'may be litigated,'" even though it will necessarily be true that no other forum may adjudicate a dispute directly between the States. *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted). Both factors weigh against the exercise of jurisdiction here.

a. This Court has explained that "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (quoting *Texas* v. *New Mexico*, 462 U.S. at 571 n.18). The Court has

agreed to exercise original jurisdiction "most frequently" to consider disputes "sounding in sovereignty and property, such as those between states in controversies concerning boundaries, and the manner of use of the waters of interstate lakes and rivers." *Supreme Court Practice* § 10-2, at 10-7 (collecting cases). The Court "has also exercised original jurisdiction in cases sounding in contract, such as suits by one state to enforce bonds or other financial obligations of another state," or "to construe and enforce an interstate compact." *Id.* at 10-9.

New Hampshire's asserted interests do not fall into any of those categories. New Hampshire alleges that the assessment of a Massachusetts personal income tax on New Hampshire residents during the COVID-19 state of emergency based on the pre-pandemic apportionment of their income (i) infringes New Hampshire's sovereign interest in controlling its own tax policies with respect to its residents; and (ii) could decrease incentives for individuals to relocate to New Hampshire, to work for the New Hampshire government, or to work from home (which would in turn increase the risk of COVID-19 transmission). Neither of those asserted interests justifies the exercise of this Court's original jurisdiction.

i. New Hampshire principally contends (Br. in Support 14-19) that by apportioning nonresident income during the pandemic using the taxpayer's pre-pandemic apportionment, Massachusetts "infringes * * * New Hampshire's sovereign right to control its own tax and economic policies," *id.* at 14, and "has overridden New Hampshire's sovereign discretion over its tax policy to unilaterally impose the precise tax on New Hampshire residents that New Hampshire itself has consistently

rejected," *id.* at 15. New Hampshire is of course correct that States have a sovereign interest in their own "power to create and enforce a legal code," *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982), including their tax laws, see *Wyoming* v. *Oklahoma*, 502 U.S. at 451. But individuals often have tax obligations to multiple sovereigns. New Hampshire has not identified any case suggesting that one State's taxation of employees who reside in another State violates the sovereign interests of the other State, much less that it amounts to the type of serious violation of sovereignty (akin to "*casus belli*," *Mississippi* v. *Louisiana*, 506 U.S. at 77) that would support the exercise of original jurisdiction.

Although New Hampshire might prefer that its residents not pay personal income taxes to any government, an independent tax obligation falling on a State's residents generally is not an injury to that State's own sovereign prerogatives. See *Massachusetts* v. *Missouri*, 308 U.S. 1, 15 (1939) ("Missouri, in claiming a right to recover taxes from the respondent trustees, or in taking proceedings for collection, is not injuring Massachusetts"); *Florida* v. *Mellon*, 273 U.S. 12, 16-17 (1927) (rejecting, on standing grounds, a state's claim that a change to federal tax law would "constitute an invasion of the sovereign rights of [a] state"). New Hampshire's contrary contention—that it has suffered a serious violation of its sovereignty warranting the exercise of this Court's original jurisdiction because another sovereign has imposed an obligation on its residents of a type that it chose not to impose—has no limiting principle. If accepted, it "could well pave the way for putting this Court into a quandary whereby" it "must opt either to pick and choose arbitrarily among similarly situated

litigants" to preserve the Court's ability to attend to its appellate docket, "or to devote truly enormous portions" of the Court's "energies to such matters." *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 504 (1971).

ii. New Hampshire also asserts (Br. in Support 15-20) that the Massachusetts tax rule will create incentives for individuals to behave in ways that might ultimately harm New Hampshire. For example, New Hampshire contends that the rule "effectively negates the express financial incentive (tax savings)" for individuals and businesses to move to New Hampshire, which has no income tax. *Id.* at 15. It also contends that the rule "harms New Hampshire's ability to recruit individuals to work for its state government" because those recruits might "have spouses or other family members" who would not want to move to New Hampshire unless such a move would relieve them of the obligation to continue to pay Massachusetts personal income tax. *Id.* at 20. And it contends that the rule "endangers public health in New Hampshire" because it reduces the tax inventive for New Hampshire residents to work from home during the pandemic. *Ibid.*

None of those possibilities, however, is sufficiently direct or serious to support this Court's original jurisdiction. Consistent with the respect ordinarily afforded co-sovereigns in our constitutional system, this Court's decisions "establish that not every matter" that might "warrant resort to equity by one person against another would justify an interference by this court with the action of a State." *Alabama* v. *Arizona*, 291 U.S. 286, 292 (1934). Rather, only a "threatened invasion of rights * * * of serious magnitude" will justify the Court's "exercise [of] its extraordinary power under the Constitution to control the conduct of one State at the suit of

another." *New York* v. *New Jersey*, 256 U.S. 296, 309 (1921). Accordingly, even when this Court has permitted a State to proceed on a claim that another State's regulatory actions have inflicted an economic injury on the plaintiff State or its residents, the Court generally has required the plaintiff State to demonstrate that "the injury for which it seeks redress was *directly* caused by the actions of [the defendant] State." *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 663 (1976) (per curiam) (emphasis added); see *Maryland* v. *Louisiana*, 451 U.S. 725, 733, 736 (1981); *Wyoming* v. *Oklahoma*, 502 U.S. at 442-445, 451.

The second-order effects that New Hampshire identifies would at most be indirect or incidental results of the temporary Massachusetts tax rule here. The rule generally freezes the income apportionment of an employee who was working in Massachusetts "immediately" before the pandemic at its pre-pandemic level for the duration of the pandemic. 830 Mass. Code Regs. 62.5A.3(3)(a). That sort of temporary rule, applicable only to a subset of nonresidents based in part on their having satisfied a *past* condition, is unlikely to substantially affect long-term incentives about relocation or employment going forward. It is speculative whether, for example, a temporary tax apportionment rule would meaningfully alter migration patterns in New Hampshire or induce an employee to commute to work (at greater expense) rather than telecommute during the pandemic despite the myriad legal, health, and employer-imposed reasons to work from home. Cf. *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 409-410 (2013).

Moreover, it could just as easily be argued that the rule provides a *greater* incentive for New Hampshire

residents to seek employment at New Hampshire businesses and governmental agencies, rather than at their Massachusetts counterparts. At all events, such uncertainties underscore that the second-order effects New Hampshire identifies do not constitute a "threatened invasion of rights" of such "serious magnitude" as to justify this Court's intervention. *New York* v. *New Jersey*, 256 U.S. at 309.

b. Original jurisdiction is unwarranted in this case for the additional reason that the constitutional claims New Hampshire seeks to raise are derivative of the claims of, and of the tax's effect on, individual New Hampshire residents—and those individual taxpayers' challenges to the tax could be raised through Massachusetts's procedure for challenging tax assessments. See *Arizona* v. *New Mexico*, 425 U.S. 794, 796-787 (1976) (per curiam) (availability of actions by other parties raising same legal claims counsels against exercise of original jurisdiction); *Mississippi* v. *Louisiana*, 506 U.S. at 76 (same). As Massachusetts explains, individuals who are subject to Massachusetts income tax may file an abatement request with the Massachusetts Commissioner of Revenue, seek further review from the state's Appellate Tax Board, and, if unsatisfied, obtain judicial review in state court. Br. in Opp. 9, 22-25. Indeed, those individuals would be the most natural plaintiffs because they are directly affected by the challenged tax policy. Following review in Massachusetts administrative and judicial tribunals, such an individual could present to this Court the same legal issues raised here. See 28 U.S.C. 1257.

Proceeding through that alternative channel is particularly prudent for cases (like this one) involving personal income taxes. As a general matter, one State

should not lightly be permitted to demand relief for its residents from another State when the individual residents themselves have an available means of redress. See *New Hampshire* v. *Louisiana*, 108 U.S. 76, 90-91 (1883). Permitting personal income-tax issues to proceed through the courts of the taxing State also is more respectful of that State's significant sovereign interest in taxation, and more consistent with principles of equity, comity, and federalism that traditionally have prevented federal courts from interfering in state taxation when taxpayer challenges can be raised in state court. See *National Private Truck Council, Inc.* v. *Oklahoma Tax Commission*, 515 U.S. 582, 586-592 (1995). Indeed, the federal Tax Injunction Act bars injunctive relief in suits by individual taxpayers in federal district court if the taxing State offers a "plain, speedy and efficient remedy" in its courts. 28 U.S.C. 1341; see *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 421-422 (2010). Because New Hampshire's constitutional challenges and claimed injuries are derivative of the effects of the tax on its individual residents, this Court should not lightly permit New Hampshire to sue for injunctive relief directly in this Court when Congress has determined that the residents themselves should first avail themselves of remedies in the courts of the taxing State.

Waiting for such suits to proceed through state administrative and judicial systems also would have practical benefits if the issues later were to reach this Court. Cf. *Texas* v. *New Mexico*, 462 U.S. at 570 (describing the Court's "discretion to make case-by-case judgments as to the practical necessity of an original forum * * * with an eye to promoting the most effective functioning of this Court within the overall federal system") (citations omitted). The possibility of state tax abatement

could reduce the number of affected individuals and narrow the class of affected cases. And proceeding through the state administrative and judicial systems would permit state courts to clarify any pertinent ambiguities in state law. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 410 (1982) (observing that "federal constitutional issues are likely to turn on questions of state tax law").

New Hampshire argues (Br. in Support 30-31; Reply Br. 6-7) that another action must be pending for the Court to decline to exercise original jurisdiction. But this Court has repeatedly referred to the "*availability* 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." *City of Milwaukee*, 406 U.S. at 93 (emphases added); see *Mississippi* v. *Louisiana*, 506 U.S. at 77 (referring to "the availability of an alternative forum in which the issue tendered can be resolved"). While the Court sometimes has referred to "pending" actions, it has never stated that it will defer only to already-filed cases. Cf. *Arizona* v. *New Mexico*, 425 U.S. at 797 (holding that pending state-court action provided appropriate alternative forum "[i]n the circumstances of this case"). Instead, this Court has stated that it will decline to exercise jurisdiction when the plaintiff State "fails to show that * * * [its] assertion of right may not, or indeed will not, speedily and conveniently be tested by [private parties]." *Alabama* v. *Arizona*, 291 U.S. at 292.

New Hampshire's reliance (Br. in Support 30-31) on *Wyoming* v. *Oklahoma*, *supra*, is misplaced. There, the Court exercised its original jurisdiction after concluding that no other action was pending *and* that "[e]ven if such action were proceeding," "Wyoming's interests [in

protecting state tax revenue] would not be directly represented." 502 U.S. at 452. The absence of a pending proceeding is thus not a sufficient basis in itself for this Court to exercise its original jurisdiction, and here New Hampshire has not identified any direct harm to its own tax revenues that would result from the Massachusetts tax. Any such categorical requirement of a pending suit also would contravene this Court's stated policy of making "*case-by-case* judgments as to the practical necessity of an original forum." *Mississippi* v. *Louisiana*, 506 U.S. at 76 (emphasis added; citation omitted). And notwithstanding the Court's repeated emphasis that original jurisdiction should be exercised only "sparingly," *ibid.*, such a rule could invite a race to the courthouse—specifically, to *this* Courthouse—by States that wish to control litigation and to have this Court adjudicate challenges to other States' laws on a broad, facial basis.

New Hampshire correctly observes (Br. in Support 30-32; Reply Br. 7-8) that state court actions would be unavailable to New Hampshire itself. But that only underscores that Massachusetts's personal income tax is not levied on and does not directly affect the State of New Hampshire, and that New Hampshire is thus not the most natural plaintiff to challenge the application of that tax. That distinguishes this case from *South Carolina* v. *Regan*, 465 U.S. 367 (1984), which involved a State's constitutional challenge to a federal statute eliminating a certain tax exemption for interest on State-issued bearer bonds. Even though a bond purchaser could bring an individual suit, this Court exercised its original jurisdiction to hear the State's challenge in part because the statute was alleged to "materially interfere with and infringe upon the authority of

South Carolina to borrow funds." *Id.* at 382 (citation omitted). The statute thus directly affected the plaintiff State's fisc, which is not the case here. And given that New Hampshire's asserted interests in this case do not include any loss of its own tax revenue, private suits by its residents would vindicate its claimed interests, especially given Massachusetts's representation (Br. in Opp. 23-24) that successful suits by individual taxpayers could benefit other taxpayers who decline to sue. In any event, this Court has found it sufficient that a private action would permit litigation of "the same constitutional *issues*" as would an original action, even if not pursued by the same party. *Arizona* v. *New Mexico*, 425 U.S. at 796 (emphasis added).

New Hampshire contends (Br. in Support 31) that there are "disincentives" to taxpayer challenges in state forums, but experience belies that contention. Taxpayer challenges routinely arise in and proceed through state-court systems, including challenges that reach this Court. *E.g.*, *North Carolina Department of Revenue* v. *The Kimberley Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 (2019); *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542 (2015). New Hampshire relies (Reply Br. 7) on *Maryland* v. *Louisiana*, *supra*, to suggest that any potential relief would not "justify the litigation costs." That reliance is misplaced. Unlike the natural-gas tax at issue in *Maryland* v. *Louisiana*, in which the cost passed on to "individual consumers" was "likely to be relatively small," 451 U.S. at 739, personal income taxes typically are more substantial, especially when (as here) the alternative for a New Hampshire resident to paying a Massachusetts income tax likely is paying no state income tax at all. Besides, in *Maryland*

v. *Louisiana*, individuals were "not directly responsible to Louisiana for payment of the taxes," and so were "foreclosed from suing for a refund in Louisiana's courts." *Ibid.*; see *id.* at 742 n.18. That is not the case here.

Finally, New Hampshire suggests that individual taxpayer challenges in the state administrative scheme would be inadequate because the Massachusetts Commissioner of Revenue could rule for challengers on individualized or other state-law grounds and thus "avoid the constitutional issues" altogether. Reply Br. 8 (emphasis omitted). But that is a *benefit* of requiring individual taxpayers to proceed through the taxing State's system, and in the present context it confirms—consistent with principles of constitutional avoidance, comity, and federalism—that this Court's consideration of New Hampshire's facial challenge ultimately could prove to be unnecessary.

3. The nature of New Hampshire's claims also counsels against an exercise of original jurisdiction.

a. New Hampshire contends that Massachusetts's temporary continuation of pre-pandemic income-tax apportionment impermissibly burdens interstate commerce and violates due process. But when Massachusetts tax law applies to New Hampshire residents, the impact of the law is directly upon them, not the State, and the cited constitutional provisions—including the Commerce Clause, see *Dennis* v. *Higgins*, 498 U.S. 439, 447 (1991), and the Due Process Clause, see *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966)—are personal to and more appropriately raised by the directly affected individuals, not the State. Cf. *Pennsylvania* v. *New Jersey*, 426 U.S. at 665 (rejecting Penn-

sylvania's challenges under the Privileges and Immunities and Equal Protection Clauses to taxes collected from its residents by New Jersey because "both Clauses protect people, not States").

b. In addition, resolution of any Commerce Clause and due process challenges to the assessment of a Massachusetts personal income tax on New Hampshire residents would benefit from a more developed factual record and from an authoritative construction of the rule and any other relevant provisions of state law by Massachusetts courts.

Even when this Court, "speaking broadly, has jurisdiction" over an original action, the Court may "forbear proceeding until all the facts are before [the Court] on the evidence." *Kansas* v. *Colorado*, 185 U.S. 125, 145-147 (1902). Forbearance is particularly appropriate in original cases involving "intricate questions" of "far-reaching importance." *Id.* at 145, 147. "Allocating income among various taxing jurisdictions" is one such question; this Court has observed that it is akin to "slicing a shadow." *Trinova Corp.* v. *Michigan Department of Treasury*, 498 U.S. 358, 373-374 (1991) (citation omitted). Resolving the merits of Commerce Clause and due process challenges to such an allocation would inevitably require "a sensitive, case-by-case analysis of purposes and effects," *Wayfair*, 138 S. Ct. at 2094 (citation omitted), and thus could depend on individual variations among taxpayers and other factual determinations that would be better resolved through tax-abatement or similar actions initiated in Massachusetts and ultimately subject to this Court's certiorari jurisdiction.

For example, an interstate tax does not impermissibly regulate interstate commerce as long as it "(1) ap-

plies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Wayfair*, 138 S. Ct at 2091 (citing *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977)); see *Allied-Signal, Inc.* v. *Director*, 504 U.S. 768, 772 (1992) (explaining that due process requires a "'minimal connection'" and "rational relation") (citation omitted). Yet whether a tax is "fairly apportioned" or "fairly related" to services that Massachusetts provides, see Br. in Support 6 (highlighting those factors); New Jersey et al. Amici Br. 22-24 (similar), could depend on the specific nature of the employee's job. Consider, for instance, a New Hampshire resident who exclusively works on computers and servers located in Massachusetts, collaborates with a team of colleagues based in Massachusetts, and conducts transactions that occur in and are regulated by Massachusetts. That employee's income might reasonably call for an analysis and treatment different from what would be appropriate for the income of an employee who performs services that have no particular connection to Massachusetts other than the employer's mailing address.

Similarly, in light of a State's "wide latitude" in apportioning income, *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 274 (1978), this Court's analysis could depend on the particular relationship of income apportionment to how the individual taxpayer divides his time. See *Trinova*, 498 U.S. at 380 (asking whether "the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted in that State,' or has 'led to a grossly distorted result'") (citations and ellipsis omitted). Consider, for instance,

a New Hampshire resident who started working in Massachusetts on January 1, 2020, with the mutual expectation of transitioning to full-time remote work after an initial three-month in-person training period. That individual's as-applied challenge to the apportionment provisions in the Massachusetts rule, 830 Mass. Code Regs. 62.5A.3(3)(b), might be analyzed differently than a challenge brought by someone who has been regularly commuting to work in Massachusetts for the same employer for years.

Likewise, this Court's analysis of the interstate commerce and due process challenges might depend on how Massachusetts interprets the rule and other relevant provisions of state law. See *Grace Brethren Church*, 457 U.S. at 410. For example, the rule states:

> all compensation received for services performed by a nonresident who, *immediately* prior to the Massachusetts COVID-19 state of emergency was an employee engaged in performing *such services* in Massachusetts, and who is performing services from a location outside Massachusetts *due to* a Pandemic-related Circumstance will continue to be treated as Massachusetts source income.

830 Mass. Code Regs. 62.5A.3(3)(a) (emphases added). That language raises a number of questions whose answers are not obvious on the face of the text, including:

- What period qualifies as "immediately prior" to the pandemic state of emergency?
- Does the requirement that the employee have been performing "such" services before the pandemic preclude application of the rule in whole or

in part if the employee takes on new responsibilities during the pandemic (for example, because of a promotion)?

- Relatedly, what if an employee switches employers during the pandemic, but performs the same type of services in the new job?
- Does "due to" require but-for causation? Substantial-factor causation? Sole causation?

Likewise, as New Hampshire itself observes (Br. in Support 21), "Pandemic-related Circumstance[]" is defined to include "*any other work arrangement* in which an employee who performed services at a location in Massachusetts prior to the Massachusetts COVID-19 state of emergency performs such services for the employer from a location outside Massachusetts during a period in which [the rule] is in effect." 830 Mass. Code Regs. 62.5A.3(2) (emphasis added).

- Should "any other work arrangement" be read in context to implicitly include a pandemic-related limitation, even though none appears in the text?

Authoritative state court rulings on those and other questions would substantially aid any potential resolution by this Court of the issues presented in this case.

c. New Hampshire correctly observes (Br. in Support 25-30; Reply Br. 10-13) that a New Hampshire resident who works from home will rely on New Hampshire services like police and fire protection. Yet that resident's work also may continue to depend on and benefit from services provided by Massachusetts. For example, Massachusetts and its municipalities might provide similar protections to the infrastructure and staff critical to the work of the New Hampshire resident who is temporarily working from home—such as computer

servers that enable and store the employee's work product, courts that enforce contracts, and financial institutions and transactions necessary to the work. Cf. *Wayfair*, 138 S. Ct. at 2096 (observing that state taxes help to pay for "local banking institutions to support credit transactions" and "courts to ensure collection of the purchase price") (citation omitted); *Allied-Signal*, 504 U.S. at 778 (explaining that a "State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities") (citation omitted). And the employer located in Massachusetts, where the employee worked before (and may well return after) the pandemic, will continue to benefit from the services Massachusetts affords in the interim, thus helping to sustain the employee's continued employment during that temporary period. A telecommuting employee's physical location thus need not map precisely onto the location of the governmental services needed to support that employee's work.

Finally, New Hampshire and several amici contend (Reply Br. 6; New Jersey et al. Amici Br. 4-17; Zelinsky Amicus Br. 6-17) that the Court should address the questions presented here in light of the ever-increasing numbers of remote workers nationwide and the many other state laws that allocate nonresident employee wages in myriad ways. But the idiosyncratic and temporary nature of the Massachusetts tax rule makes this case a poor vehicle for resolving those broader questions, especially in the posture of a facial challenge. The rule here will expire shortly after the pandemic-related emergency ends, see 830 Mass. Code Regs. 62.5A.3(1)(d), and applies only to nonresident employees who were working in Massachusetts "immediately" before the

emergency and who are working outside the Commonwealth "due to" a pandemic-related circumstance, 830 Mass. Code Regs. 62.5A.3(3)(a).

Whether under those circumstances an employee's income retains a sufficient connection to Massachusetts for purposes of the due process and interstate commerce challenges that New Hampshire raises might not shed much light on the answer to those questions in other contexts, such as when the employee works remotely on a permanent basis or for reasons unrelated to the pandemic. Similarly, because governments cannot easily scale up or down certain infrastructure or services, such as transportation capacity or fire protection, temporary and unpredictable shifts in commuting patterns resulting from a once-in-a-century pandemic might not on balance yield meaningfully greater or lesser burdens on any given State.

On the other hand, retaining a preexisting tax apportionment during a temporary emergency could avoid imposing administrative burdens on employers, employees, and tax administrators, while still roughly reflecting an appropriate apportionment for the great majority of nonresident taxpayers when considering those taxpayers' greater connection to the taxing State over the longer term. See *Moorman Manufacturing*, 437 U.S. at 273-274 (any formula "will occasionally over-reflect or under-reflect income attributable to the taxing State"); cf. *Armour* v. *City of Indianapolis*, 566 U.S. 673, 682 (2012) (holding in the equal protection context that "[o]rdinarily, administrative considerations can justify a tax-related distinction"); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 511 (1937) (similar). Those pandemic-specific circumstances make this a poor vehicle in which to address the broader issues of

interstate taxation that New Hampshire and its amici identify.

## CONCLUSION

The motion for leave to file a bill of complaint should be denied.

Respectfully submitted.

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