BobKelleher

Author | Speaker | Leadership and Engagement Consultant

Bob Kelleher is a best-selling author, keynote speaker, and consultant and travels the globe sharing his insights on employee engagement, leadership, and workforce trends. Bob is the author of 4 books: the best-seller **LOUDER THAN WORDS**: *10 Practical Employee Engagement Steps That Drive Results;* ***CREATIVESHIP*****,** *A Novel for Evolving Leaders;* ***EMPLOYEE ENGAGEMENT*** *for Dummies;* and his most recent, **I-Engage**, *Your Personal Engagement Roadmap****.***

Bob can be seen or heard on national media (most recently on CNBC, CBS, NBC News, Business Week, Forbes, and Fortune), and is a frequent guest writer and contributing editor on many national publications.

Bob is a frequent conference keynote speaker, including talks throughout the US, Canada, China, Japan, Europe, South America, Mexico, and the Middle East.

Bob has also presented to the leadership teams of many of the world's top companies including Prudential, Lockheed Martin, Ceridian, Dana Farber, Partners Healthcare, Cumberland Farms, Gulf, TJX, The Cheesecake Factory, Abbott Labs, Amica, Fidelity, Dale Carnegie, Amica, Centers for Disease Control, SilkRoad, Covidien, Millipore, amongst many others.

Bob is also the founder and president of The Employee Engagement Group, a global survey, products, and consulting firm working with leadership teams to enhance their leadership and employee engagement effectiveness.

Previously, Bob was the Chief Human Resources Officer for AECOM, a Fortune 200 global professional services firm, with 45,000 employees located throughout the world. Before joining AECOM in 2005, Bob worked for ENSR, a 2,300-employee international environmental consulting firm, and now a subsidiary of AECOM. While at ENSR, Bob was CHRO, Executive Vice President of Organizational Development, and Chief Operating Officer and spearheaded ENSR's award winning Employee Engagement programs and initiatives.

www.EmployeeEngagement.com
21 Neal Road, Danvers, MA 01923
508-935-8070
rkelleher@employeeengagement.com

Bob actively participates in various industry roundtables and associations and is often the keynote speaker at industry conferences and annual strategic planning meetings, including those sponsored by SHRM, The Conference Board, Linkage, Human Capital Institute, NEHRA, HRLF, Aberdeen, amongst many others.

Bob can be seen or heard on national media (most recently on CNBC, CBS Radio, Fox Radio, Business Week) and is a frequent guest writer on many national publications. He has also been a contributing editor on Boston.com, and Hotel Executive.

Bob is the recipient of numerous awards, including the prestigious John Erdlen “5 Star” Award, awarded in 2008 by the Northeast Human Resources Association’s (NEHRA), and presented annually to the top HR leader in the northeast, the AECOM Excellence Award, awarded in 2008 for spearheading AECOM’s “Employee Engagement” culture, ENSR’s President’s Award, awarded in 2007 for outstanding performance, and the Beasely Leadership Award, awarded in 2006 by Wingate Partners’ for “Extraordinary Leadership”

He holds a BS in Education and an MBA, and resides in Danvers MA with his wife and three children.

www.EmployeeEngagement.com
21 Neal Road, Danvers, MA 01923
508-935-8070
rkelleher@employeeengagement.com

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498 **March 10, 2021**

Virtual Practice

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.[2]

II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.[3] A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

[3] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,[4] virtual practice commonly implicates the key ethics rules discussed below.

A. Commonly Implicated Model Rules of Professional Conduct

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."[5] Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.[6]

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[7] The following non-

[4] For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

[6] Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[8] As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.[9] At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[10] However, depending on the circumstances, lawyers may need to take special precautions.[11] Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."[12] As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.[13] Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."[14] Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].
[9] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[10] *Id.*
[11] The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).
[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[13] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.,* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).
[14] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[15] The duty to supervise nonlawyers extends to those both within and outside of the law firm.[16]

B. Particular Virtual Practice Technologies and Considerations

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.[17] To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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[15] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

[16] As noted in Comment [3] to Model Rule 5.3:

> When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[17] For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer."[18] Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.[19]

3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.[20] Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,[21] to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that

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[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018).

[19] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'").

[20] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[21] Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).[22]

5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.[23] Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.[24] This duty requires regular interaction and communication with, for example,

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[22] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

[23] As ABA Formal Op. 477R noted:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

[24] The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.[25]

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.[26]

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,[27] and should ensure that all client-related information is secure, indexed, and readily retrievable.

7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.[28] The

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- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

[25] *See* ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

[26] For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

[27] *See, e.g.*, Mo. Bar Informal Advisory Op. 20070008 & 20050068.

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.15; *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

January 01, 2021
THE TECHSHOW ISSUE

In the Office, Out of the Office: Remote Challenges Outside, Safety Inside

At last, the transformation of the practice of law moves forward.

Mary E. Vandenack

With almost no notice, law firms of all sizes found themselves functioning remotely.
Dave Weatherall via Unsplash

A global pandemic found its way to the United States in March 2020. With almost no notice, law firms of all sizes found themselves functioning remotely. While fully virtual law firms have existed for quite some time, the fully virtual law firm is entirely different from a typical in-office law firm with lawyers and staff working remotely. Even in the typical in-office law firm, many lawyers have long worked remotely at least some of the time, but taking a full firm remote, on a sudden time frame, posed challenges for many firms.

A variety of factors affected how law firms had to adjust to functioning amid a pandemic. Firm size was a factor. Firm geographic location was a factor. Firm management was a factor. Even as the pandemic ultimately passes, firms should evaluate the changes that

should be incorporated in the long term. Additionally, law firms should use lessons learned during the pandemic to update disaster plans for other types of disasters.

To provide a variety of perspectives as to how firms responded to the pandemic and what changes may be made permanently, we interviewed law firm partners and administrators from different size firms across the country. Lance G. Johnson is a solo practitioner concentrating in intellectual property and located outside Washington, D.C. Mary E. Vandenack is managing partner at Vandenack Weaver LLC, a small boutique tax, business, trusts and estates firm located in Omaha, Nebraska. Kim Ess is the chief operating officer of Nilan Johnson Lewis, a midsize firm in Minneapolis, Minnesota.

Q *Law Practice:* **What were the most significant challenges for you in taking some or all your office remote? How did you solve these challenges?**

A **Lance G. Johnson:** When I established my firm, I had no desire to incur a large, continuing overhead cost of a physical office since the vast majority of my clients were outside the D.C. metro area. I set up, from day one, as a remote practice that relied completely on cloud-based applications for document storage, docketing/billing and accounting. This allowed me to use part-time service providers that were not necessarily located near me for my paralegal and bookkeeping needs. When the COVID shutdowns came, I was already remote. However, I did rely before the pandemic on travel and conventional face-to-face meetings for meeting new clients and maintaining my existing client relationships. Zoom helped me transition, while also cutting the costs of travel. That system is so easy to use that it has become part of my standard toolkit.

Mary E. Vandenack: The reason that I left a big law firm in the early 2000s was because I wanted to use technology to deliver services more efficiently and cost-effectively. We have long focused on process automation, document automation, web-based services and apps to connect with clients and provide innovative approaches to legal services. While most of our attorneys are able to work remotely, we are in a state where rural internet can be spotty at best. Some of our attorneys and staff live in remote areas. As a result, it is difficult for some attorneys to work remotely. Additionally, some of our paraprofessionals had never worked remotely.

We had to adapt. For our attorneys and staff with poor internet, we gave them in-office priority. For those who had never worked remotely, we had to resolve issues of equipment, security and learning to effectively work remotely. Because our server is currently in the cloud, we purchased laptops, with cameras and microphones, for our remote workers to avoid the use of personal equipment. We divided into teams. Each team leader held a morning huddle, a mid-day huddle and an end-of-day huddle using Microsoft Teams. Each remote worker provided a daily work plan for review. (This practice was so effective in terms of productivity that we have continued the practice as we returned to the office.) We also held a weekly computer training/issues meeting once a week where every employee could identify issues with working remotely so that we could work to resolve the issues.

Kim Ess: The biggest challenge was making sure everyone had access to needed technology for remote work. Our attorneys and paralegals were accustomed to working remotely, and all had firm-issued laptops and were accustomed to working in our firm's virtual environment. But other staff, including legal administrative assistants and administrative staff, did not have laptops and had not previously worked from home. Some staff were able to access our virtual environment from home computers; others received laptops and other equipment including monitors and scanners for their use at home. We acted quickly, getting ready a week before Minnesota's stay-at-home order went into effect, which allowed ample time for everyone to bring equipment home. In addition, we needed to ensure everyone had access to and was trained on using videoconferencing technology from their computers. Our new office space (which we moved into just five weeks prior to the order) includes integrated Zoom conference rooms, so many employees had been trained on the use of Zoom but did not have much opportunity to use it. To transition to working from home, we made sure that everyone had the Zoom technology installed on their laptops and then we provided directions on how to schedule and host a Zoom meeting, as well as other videoconferencing tools.

Q *LP:* **After COVID shutdowns, many law firms now see the need for disaster planning differently. Can you provide your top five tips for evolving your law firm disaster planning, whether the disaster is a pandemic or something else?**

A **Johnson:** Number one for me is to back up everything on the computer at least once a month. I have decent local security, but hard drives still die without warning. I lost a motherboard three years ago from a power spike, so I picked up a new box at Office Depot and had it running by the next day. The work product was all online, and I had a solid backup of the old system. I could download and install the Microsoft Office 365 apps and get started with a fresh install fairly quickly. Number two for me, as a solo, is to have a personal backup plan for access to the docket and handling the personal due dates in the event that I am taken offline for what might be an extended or indefinite period. My plan includes an experienced paralegal with full access and a working relationship with another IP firm who can step in quickly should the need arise. My number three tip is to have a fully configured and updated laptop in case my desktop software goes down for any reason. Number four is a good tablet with cellular capabilities. If the power goes out in the house/office, I can still get communications in and out with the cellular connection. Number five is to be sufficiently paranoid about the possibility of failure for tips one to four that I continue to reevaluate and refine them by tracking the newest tools and technologies that make economic sense for a solo.

Vandenack: First, be prepared to go entirely remote quickly. As part of this, reconsider firm equipment. We are transitioning to docking stations with laptops so that each employee can take their laptop to their remote location. Additionally, train all employees on how to work remotely. Second, identify the essential functions that you have historically concluded must happen in the office. Reconsider. We found that almost every function that we had once concluded was an essential in-office activity could be conducted remotely if necessary. (This does require a firm to be paperless, so if that is not yet your situation, make that a priority.) Third, managing attorneys and staff working remotely is very different from in office, but the strategies that work while working remotely likely will facilitate better in-office production. Create remote work teams, establish remote team leaders and have a plan for how work is organized and facilitated when working remotely. Fourth, identify the significant security issues that arise from remote work. Develop a security plan and educate the entire firm on security measures. Fifth, create an effective system to ensure that all client documents are part of the firm's document management system. One of the benefits of having firm laptops to send home is that each can be set up to access the firm server and policies can be created that require saving documents to the client's files on the server. This will save the malpractice issues that can result if members of the firm begin saving documents locally where others do not have access. Sixth (one extra), review your backup procedures. Consult a professional and make sure that the backup procedures you have in place will be as effective if your office goes remote as if you are in the office.

Ess: As part of our disaster planning, we maintain an employee list sorted by the location of their home. This list has been used quite a few times for minor and major events so we can quickly determine which employees may be at risk and to check on them to ensure their safety and well-being. We are proud of our disaster planning plan, and we regularly test it to make sure everyone on the team knows the plan, so we can determine how we may need to update it; a plan that sits on a shelf may not be relevant when a disaster strikes. Several of these tests used a pandemic as a scenario, which was a tremendous help in our COVID-19 response. We also followed our mantra: communicate, communicate, communicate . . . and then communicate more. Employees need to know what you are doing to keep the business in business. When you aren't sure what might be coming, admit it and then follow up with them when you do know. Share your financial information. What you don't share is being made up in the minds of your employees, so give them information including how the financials look. We found it beneficial to do semimonthly updates via Zoom with smaller groups. We have also used calling trees to stay connected and provide opportunities to hear individual concerns.

Q *LP:* **As you returned to the office, did you make changes to the physical layout? What policies or procedures did you adopt to keep law firm employees and clients safe?**

Johnson: No changes needed for me. Working and staying in quarantine are the same thing for me.

Vandenack: Initially, we brought our crew back in waves. We gave priority to those who had poor internet or who were struggling to work remotely. We adopted policies that created a safe environment. We had plexiglass barriers made for our reception area. We placed them on tables and used them for document signings. Clients could enter our front door, sit down, sign documents and leave. The attorney or paraprofessional would be on the other side and could answer any questions. We have clients who prefer in-person meetings for certain issues. We closed our small conference rooms and structured our large conference room with 6-foot spacing. We require all incoming clients or professionals to wear masks. We require all our staff to wear masks when they are not in their personal office. We designated each person's office as their safe space. No one can enter unless invited. We use Teams within the office for larger meetings. We provided individual coffeepots for the offices of those who wanted them. We have put germ-reducing filters in each office and conference room, and we have created an approach to the use of restrooms that has no more than one person in the restroom at any given time.

Ess: We instituted a number of changes to our physical office. We marked traffic flow and directions throughout the space, added social distancing markers, minimized touch points, marked entrances and exits, increased cleaning and sanitizing of high-touch surfaces and common areas, and placed signage in numerous locations to remind people of our policies. We also changed our procedures for those who came to the office. Anyone in the office was required to wear a face covering. The number of people allowed at any one time was strictly limited, and we closely tracked attendance in the office and developed contact tracing procedures in the event of a positive diagnosis. We restricted office access to employees and essential business guests only, and attorneys were asked to only allow clients or other counsel in the office if absolutely necessary. Finally, we instituted travel restrictions, and prohibited anyone who had traveled to high-risk areas to stay away from the office for 14 days.

Q ***LP:*** **As a result of working remotely, did you make any changes to how you use technology in terms of internal operations?**

A **Johnson:** No. I started out with the plan that I would be permanently virtual and avoid the overhead costs of an actual office. It would be nice to have a conference room, but I can rent those when (and if) it becomes necessary or continue to connect by Zoom.

Vandenack: We used the pandemic as an opportunity to review, evaluate and improve all our internal technologies. We considered anything that we did that seemed time consuming and tedious. One area that we achieved great success in automating was our billing process. Prior to the pandemic, we still went through the process of distributing WIPs and having a staff member make changes based on attorney notes. We trained attorneys on how to edit the WIPs electronically. Our attorneys found great satisfaction in being able to get the bills to say what they wanted to without having to revise three or four times. We cut down the time consumption of our billing process by more than half. Additionally, we reviewed our financial reporting software. We were always struggling to get the exact data that we wanted. We worked with a consultant to install an overlay financial software product that would pull the data we wanted to review and organize it into reports that made sense to us. Each revenue producer has the ability to readily review his or her own reports on a daily basis and each group leader can readily review the performance of his or her team. As a result, we are seeing better management of production with improved results in billing and realization.

Ess: We rolled out a new softphone system in November 2019 that provided capabilities for most firm employees to access their phone line through computers and mobile devices. Our new system also included videoconferencing and instant messaging features. We were able to push out the softphones to all staff to allow for seamless access to make and receive calls with their office phone number. This was a huge benefit to ensure we were able to still meet client needs and remain responsive. The instant message tool was introduced as an alternative way to stay connected. We increased our Zoom licenses and provided training and resources to help everyone become familiar with using Zoom for videoconference calls. We increased the number of virtual meetings substantially. We were still reliant on paper for two of our main accounting functions, proforma editing and expense reports, but quickly rolled out procedures to accomplish these tasks in a fully digital manner.

Q ***LP:*** **As a result of experiences from the pandemic, have you used technology or otherwise changed the way you deliver client services? Which changes will you continue and why?**

A **Johnson:** There has been no substantive change to my practice after the pandemic, although I am busier than I was before. That change may be due to economics and the unique nature of my practice than any pandemic issue.

Vandenack: We concluded that the pandemic created the opportunity to push our technology to an entirely new level. While we have long offered clients the ability to initiate certain legal services online and offered client portals, we decided to take these services to a new level. We have significantly enhanced the automation of processes. The pandemic raised awareness of mortality and the need for access to estate planning documents. We created various ways to facilitate the creation of estate planning documents and to make them readily available online or via an app. We have added care management services, family office services, digital asset management services and personal effect inventory services. We have affiliated with companies that offer complementary services for our clients, and we have worked to provide them through online means to the extent possible. Many of our add-ons were in the planning stages before the pandemic, but the pandemic highlighted the intense need for moving services along immediately. We also created affiliations with like-minded law firms across the country to ensure that we could help as many people as possible in as many ways as possible in dealing with all the ramifications of the pandemic.

Ess: As we adapted to using videoconference technology for formerly in-person events, client meetings, depositions and witness interviews, we learned this could be an effective and a cost-saving option for our clients. We expect to continue using this option in the future when traveling could be avoided. We were able to move our main reception line and plan to continue using a "mobile/virtual" phone answering structure going forward. This will allow our receptionist to focus on hospitality and concierge services without interruption. We will likely add additional videoconferencing rooms beyond the three Zoom rooms we have now and include multiple platforms. We feel there will be higher demand, and it is helpful and effective to have multiple individuals in the same room during a meeting.

Authors

ENTITY:

LAW PRACTICE DIVISION

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PRACTICE MANAGEMENT, PUBLIC INFRASTRUCTURE, GENERAL PRACTICE

May 01, 2021

THE MANAGEMENT ISSUE

Managing a Hybrid Workforce

Clarity and structure are keys to creating a positive experience for both remote and in-office groups.

Matthew Driggs & Amber Southern

Share:

> What worked when most of your group was in one location may be less efficient with a hybrid group.
> *via carlosdavid.org / iStock / Getty Images*

Telecommuting, remote employees and work from home were being used by some firms and individual attorneys, but became a way of life for many legal professionals in 2020. As we plan for t-pandemic world, working from home will likely remain the norm in many industries,

including law. A flexible work location creates an increased talent pool for firms. However, it comes with challenges, especially for a business that also maintains employees in an office, creating a hybrid workforce. From equipment needs to communication, team building and employee engagement, everything must be viewed from multiple perspectives.

The general concepts and key points to effective leadership are fundamentally the same with a hybrid workforce. But determining how and when to apply those principles becomes more challenging.

Effective Technology

The first consideration with a hybrid workforce is ensuring that employees have effective technology. What worked when most of your group was in one location may be less efficient with a hybrid group. For example, as we reviewed our phones, most remote employees could not support our traditional setup without purchasing expensive power-over-Ethernet switches. By transitioning them to USB headsets, we found a higher-quality product for those in a remote setting and eliminated the need for two pieces of equipment. As an added benefit to this switch, we reduced our phone hardware expenses by two-thirds. This freed up our budget to invest in new videoconferencing technologies and make webcams standard for all employees, allowing them more effective means to connect with their co-workers, no matter the distance.

Standards and Expectations

As you create more ways for employees to connect, you also need to set in place standards and expectations for when and how they do so. Having personnel in a brick-and-mortar environment creates a physical start and stop to their day. When you split your workforce between in-office and ote employees, it becomes less clear, especially when team members are geographically d out. While letting work bleed into personal time is not unique to remote employees, this

group must make additional efforts to divide their workday from their home life. With their workspace just a few steps away, it is easy to join a late meeting or respond to a few messages, stretching the employee's workday far past what they would have experienced when working in the office.

As leaders, we must create a culture of respecting employees' schedules and personal time, while holding them accountable for the time they should be working. Create written expectations for communication beyond their established work hours, such as availability for meetings and responding to emails and other forms of digital communication. Encourage all employees to set up "do not disturb" hours for work communication, mark after hours as busy on their calendars and have redundancy plans in place to cover for days they are out sick or on vacation. By establishing these boundaries firm-wide, it allows employees to embrace their personal time without feeling guilt or pressure.

Communication

Communication can be any company's biggest challenge. Employees can feel as if they are not given information promptly, not given enough information or only receive it through back-channel gossip. These issues amplify when you have a hybrid group. Those working from home have the benefit of missing some of the distractions, the overly chatty co-worker or the office mate who spends all day complaining, but they may also feel like they are the last to know important information and miss the relationship building and socializing that comes from sharing a physical space.

Start by establishing systems and schedules for how you will communicate with your teams and firm-wide. When considering the frequency of team meetings, seek feedback from your employees regarding their desired frequency and style of meeting.

Meeting standards should be set. If meetings are via videoconference, is everyone expected to have their cameras on, or is it a personal choice? Have an agenda for your meetings to keep things on track. If the team has goals they are working toward, try integrating scoreboards into your meetings, or send out weekly or monthly scoreboards via e-mail to show progress. On a larger scale, using quarterly firm-wide meetings to communicate progress and remind everyone of the objectives and goals will help maintain alignment and focus on the overall vision.

Be thoughtful when communicating major changes to staffing, responsibilities and processes. If the change could be misconstrued without tone and enough context, use videoconferencing to create an opportunity to connect, as well as open a line of communication so the entire team can feel heard.

A last note on meetings—take employee time into consideration. For items that don't warrant a full meeting, consider sending a quick instant message. Overscheduling your employees to the point that they don't have time to take care of their responsibilities can lead them to work through meetings, undermining the goal of the gathering. This long-term split focus can impact an employee's energy and stress level. Find the balance between keeping everyone connected and communicating while allowing employees time to focus on the task at hand, whether that is a meeting or their day-to-day responsibilities.

Accountability

The fastest way to kill a great employee's engagement is by tolerating a bad employee. This may be an employee failing to do their work or even the perception that the employee is failing to fulfill their roles and responsibilities. As we transitioned from all our employees in the office to a hybrid workforce, we faced unexpected conflicts between the two groups.

When you have employees in similar roles but split between an office and remote setting, the responsibilities may differ slightly. Clear expectations and accountability processes based on quantifiable metrics establish a healthy system for both groups. This may require a separate set of standards for each role. If so, be transparent and consistent in how you apply the standards. We have written position agreements for all our roles. They lay out the critical responsibilities and standards that must be met for an employee to be successful, regardless of whether they are in the office or not.

We use regularly scheduled employee development meetings (EDM) to not only connect with our employees but also to review how well they are fulfilling their position agreement. These meetings create an environment where the employee is supported and coached through struggles they may be having as well as given positive feedback. Within the meeting, the employee also has an opportunity to share personal and professional goals they would like to achieve, set up a plan and get a commitment from their leaders to support them.

This process benefits employees who are struggling as well as those who are excelling. For remote employees, holding these meetings via videoconference is ideal. They will see your expressions, excitement for progress and even a friendly smile. This will further strengthen your communication by bringing in some of the nonverbal elements that are lost with a phone call. Regular coaching conversations help contribute to a healthy work environment for everyone by opening lines of communication for employees both in and out of the office and providing feedback equally to all team members, no matter their work location.

Through your EDMs, you will monitor how employees are doing, but also pay attention to other cues. For remote employees, don't let the subtle signs pass you by. Are they quieter in meetings? Are they no longer reaching out to team members? Has their productivity inexplicably dropped? Staying aware of how your employees are doing will help curb long-term issues. Take the steps to check in on employees, give them a call, say a quick hello.

While this takes thought and planning for those working from home, rather than if you happened to walk past them in the hall, the impact is also amplified. Where before it may have been considered polite, it now has the potential to mean more because of the effort. You did it because you care, not because it's convenient. When reaching out to either group of employees, remember to be empathetic to the different challenges that each group faces and always take the opportunity to ask what you and the firm can do to help with any roadblocks they may face. Feeling heard and knowing they make an impact will benefit both the employee and the firm.

Stay Connected

The feeling of belonging and connection is frequently listed as a key engagement factor for employees. This may be the most compromised factor when considering a hybrid workforce. Those who worked in an office and relocated to remote work will likely maintain their relationships with little help needed from leadership. We suggest that you remain proactive in helping maintain those existing connections.

However, with limited resources, your focus must be skewed toward new employees. Consider those who are split by location and never had the ability to create a strong connection to their team, co-workers and leadership in person. How can we create a culture where all teammates can grow, bond and thrive together? Look for tools to connect your groups and build their relationships.

When feasible, allow employees in the same region the opportunity to gather for annual firm parties. For example, we have many offices within driving distance of Yellowstone and plan to hold a summer party, inviting everyone to join. Establish an open-door policy encouraging employees to stop by other offices if they are in the area for any reason. We share a bimonthly newsletter that covers upcoming events, announcements, and highlights of different teams and offices, as well as showcases of individual employees. Setting up instant messaging channels to announce birthday celebrations, additions to the family, weddings and other events provides a fun and casual way for employees to show support and celebration.

Create ways for your employees to connect over common activities and find ways for them to have fun together. We have held game tournaments, had wellness challenges, set up competitions and established instant messaging channels to share everything from the important to the silly. We recently held a game tournament via video and allowed employees to watch the finalists compete. Mix up how you have employees interact for these fun events. Having a place for casual communication can bring together the group and help them find connections on a personal level. Make sure leaders join in to show their support, sending the message that participation is not just allowed but encouraged. All of these have proven effective strategies to help people bond and build a culture of trust.

Vision

Another significant factor is our unified vision. As a firm, we have three foundational documents that unify us in purpose: our Brand Promise, Strategic Objective and Core Values. Our Brand Promise is to care and advocate for our clients.

When our employees are driven by the idea of the client first, the group is further unified. By sharing our Strategic Objective to become a Northwest regional law firm, we prepare our employees for growth and the associated opportunities and challenges. Lastly, we have our Core Values that define who we are and how we interact with each other. Having everyone base decisions and goals on these same factors further builds the connection. No matter where we work, we are all working toward the same vision.

In the end, clarity and structure are key. Establishing clear expectations, systems for communication, accountability and methods for giving recognition creates a positive experience

for both remote and in-office groups, and a common goal and objective will bring everyone together to build the success of the firm.

ENTITY:

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Authors

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The New World of Remote Work: The Impact on Wellness

A healthy workforce is a productive one, and law firm leadership can play a key role in supporting lawyers with well-being both in the office and working remotely.

Brooke Moore

Flexibility in work can reduce the struggles we face when balancing personal and professional lives and equip lawyers to care for their mental needs.

via Mihailomilovanovic / E+ / Getty Images

As lawyers increasingly moved to remote work during the pandemic, it became apparent that working remotely can be effective, efficient and a viable way to conduct business. This is a powerful realization. The law firms and businesses that will succeed will be those that embrace a new vision for what lawyering looks like, which not only refers to where and how we work but also how we are supported in our roles.

A healthy workforce is a productive one. It is imperative that we recognize the importance of caring for our minds and bodies. Cultivating a culture of well-being is vital to adapt to this new workforce. Adaptation is key. Flexibility in work can significantly reduce the struggles we all face when balancing our personal and professional lives and better equip lawyers to care for their own mental, emotional and physical needs.

So How Does Well-Being Work?

Well-being isn't just casual Fridays and bubble baths. Well-being is a state of mind. There is a whole science evidencing the benefits of increasing lawyer effectiveness by encouraging wellness, well-being, and implementation of personal and systemic strategies. Well-being considers quantum physics, which is the study of how the universe works. It explains how everything in your world came to be part of your world. We are directly in control of our physical world, even though we may not be aware of it. The key is to understand how all the parts work together to create the circumstances you desire.

How do we make choices that will lead to fulfillment? First, we must become aware. Awareness is not just about being aware of our circumstances; it's about becoming aware of how those circumstances came to be. Lawyers often struggle because we are constrained by our limiting beliefs of how we must practice law. Lawyers may have created habits that hurt their well-being because of those beliefs. Habits are involuntary. We do them instinctually and without thought. However, by paying attention to your habits, you then become consciously aware of those patterns and behaviors and can choose to continue or alter that habit. To overcome limiting beliefs and negative patterns, you must confront unconscious behaviors and patterns to evaluate whether they are beneficial or no longer serve you.

On my own personal journey of self-discovery, awareness has both helped me overcome negative patterns and toxic habits and helped me shift my perspective. I have become actively aware of the things and people that do not serve me and find the power within that I needed to grow and let go. This all starts in your mind, with your thoughts.

Thoughts become things. Your thoughts are powerful. The profession of law can feel overwhelming at times. The demand on our time and energy is high, and we often meet clients when they are at their worst, which can be emotionally taxing for us as well.

How Can We Protect Our Energy and Mindsets?

One way to protect our mindset is to avoid dwelling on the things we don't want or like, such as the possibility of an unfavorable case outcome. Focusing on the negative only attracts and perpetuates the negative. Instead, change the lens through which you perceive the situation.

For instance, if you are financially struggling in your practice, use that as a sign that you should re-evaluate where you are spending your time and energy rather than making unconscious (or conscious) assumptions that you are a failure. Perhaps you should charge more or you should eliminate a legal service you offer. Removing unprofitable services frees up your time to focus on that which is more rewarding and likely more profitable to you.

Similarly, if you are focused on the possibility of unfavorable verdict, then you are likely to become more anxious. Instead, focus on your desired outcome and the merits of your case. Shifting your focus toward a positive outcome can help alleviate some of the ent pressures of the job that can lead to burnout or toxic stress. Also, drop the "I can't" and "I'm not" statements. If you keep g yourself that you aren't a good enough lawyer or can't find time to get things done, then you will never feel good enough and

you will never find time. After enough negative self-talk, eventually you will believe and become your lies because that is the reality you have created and the truth about your narrative that you have written.

As a result of our thoughts, we trigger emotional responses, and our emotions dictate our physical and mental state. There are several ways in which you can control your thoughts to elicit a positive emotional response. To achieve your desired emotional state, you can focus on things and people that you appreciate, express gratitude, perform acts of service and create a self-care routine. Practicing these things can lead to greater empathy, self-awareness, creativity, connection and happiness.

Reimagining the Practice of Law

With the growing movement toward do-it-yourself legal services and the relaxed regulations on providers, more clients are turning to online, remote, alternative legal services and legal technicians who are more adequately addressing the needs of the masses. With advances in technology and initiatives to bring archaic practice rules into the modern-day realities of the practice of law, lawyers have untapped potential to reimagine what it looks like to practice law. As lawyers, the time is ripe for us to capitalize on this by utilizing technology and creating more efficient processes and systems. Remote work is the first step toward making that shift.

Mental Health Risks of Remote Work

The pandemic forced law firms to quickly pivot to remote work. Most firms were not prepared for the transition, which not only put strain on law firms but also put strain on lawyers. Even though remote work has become more commonplace in many industries, most lawyers are still accustomed to a conventional brick-and-mortar office environment. Two prominent concerns with this shift from conventional office to remote work are burnout and isolation

One struggle for attorneys learning to work remotely is establishing clear work boundaries. It's not uncommon for remote workers to work longer hours in pursuit of productivity or to feel like they need to overcompensate for their lack of physical presence. The line between personal and work life can become readily blurred, especially for lawyer parents who may have the added pressures of virtual schooling happening concurrently with their workday.

For the remote worker, it is very important to create and maintain healthy boundaries. Doing so can be supported by set times to turn off notifications, creating a dedicated office space and setting regular business hours.

I have been running a virtual office for over six years, so our operations didn't change, and I was accustomed to the remote lifestyle. However, now that every interaction I have is remote, I have struggled myself with being immersed in the virtual world constantly. I have found that for conferences and other meetings, I am far more successful when I am removed from my daily routine and not worrying about wrapping up in time to pick up my kids from school. I have had to be very careful to keep all my work within the parameters I had previously established as a virtual practitioner. Doing so can be difficult when you are adding additional remote obligations to your regular workload. It is very important to get adequate sleep and maintain healthy eating habits. Remote work can sometimes drastically alter your daily routine. It is crucial to be cognizant of how you are tending to your physical health because stress can harm your overall well-being and lead to burnout.

Being isolated from the social aspects of the office environment can also impact our well-being. Loneliness is a potential setback of remote work, especially if you aren't getting much social interaction from friends and family or elsewhere in your personal life. It is important to try to maintain the relationships you have with co-workers for your overall well-being and to enhance your performance. There are a ton of technology tools at our disposal to keep us connected, help people feel like part of the community and foster collaboration, even when the business is remote. Virtual coffee meetups and meditation breaks are a few great ways to bring people together or provide some respite from their computer. Replace the water cooler breaks with Teams chats.

Remote Work Can Support Mental Health

If one can resolve the issues that arise from remote work, remote work can actually help to alleviate some stress-related issues that arise from work generally. When people have more time to devote to their personal lives, they can more easily maintain overall wellness.

I created my entirely virtual law practice because I had burned out in the traditional law practice model. The traditional model just didn't work for me. My physical and mental health began to suffer, so I left the practice of law temporarily until I designed and launched my virtual practice. What was appealing to me about practicing remotely was that it allowed me the flexibility to remain meaningfully involved in the profession while fulfilling my personal responsibilities in a way in which I felt good. Remote work allows room for flexibility in work hours and schedules. Having flexibility as to when, how and where I work has had a huge, positive impact on my quality of life. Working remotely allows me to better accommodate my personal health routine and my family obligations. It also eliminates stressful commuting and allows for a better work-life balance.

Remote work was also appealing to me because it allowed me to reach and serve more clients. It has been better for my clients because it is a more convenient way to conduct business, offers fewer interruptions to their day and provides for more efficiency in the process. A greater number of work opportunities are available if physical geographical restrictions are removed, which also allows law firms to attract and hire from a more diverse and competitive pool of talent. Remote workers can also be more productive, as they tend to take shorter breaks, fewer sick days and less time off.

How to Avoid Stress and Burnout

It is as important to take care of your well-being as it is to hit your productivity benchmarks. As more people are adapting to remote work, here are a few ways to avoid stress and burnout.

First, learn to identify when you are burning out. If you are exhausted after a long workday or start losing interest in your job, then you may be experiencing burnout. Not only is this bad for your overall well-being, it can impact your performance at work. You can combat this by practicing regular self-care.

Some remote workers express a feeling of loneliness. Key tells for someone experiencing feelings of isolation are emotional outbursts, declining work performance, withdrawal and persistent sadness. Find ways to connect.

Law firm leadership can play a key role in supporting lawyers with well-being both in the office and working remotely. By educating and talking about mental health at work, the door can be opened for discussion for those struggling with work generally or remote work specifically. This may result in a sharing of solutions that help lawyers as a whole and will provide a layer of safety and validation for the individual. Law firms should consider providing and encouraging teams to take mental health days. Providing teams support in the pursuit of well-being can have significant positive effects for the members of the team and the law firm.

Authors

ENTITY:

LAW PRACTICE DIVISION

TOPIC:

PROFESSIONAL DEVELOPMENT, PRACTICE MANAGEMENT, HEALTH

May 15, 2021

PRACTICE POINTS

Twin ABA Ethics Opinions Cover What You Need to Know About Remotely Practicing Law

Two opinions issued during the COVID-19 pandemic combine to address the key ethical dilemmas lawyers face when working remotely.

By Laurie Webb Daniel and Philip George

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In the wake of COVID-19, the ABA Standing Committee on Ethics and Professional Responsibility has issued complementary ethics opinions addressing the remote practice of law; Formal Opinion 495 (December 2020) and Formal Opinion 498 (March 2021) raise important ethical considerations to keep in mind when working away from the office.

Opinion 495 Addresses Unauthorized Practice of Law and Working Remotely

Formal Opinion 495 addresses the reality that lawyers are increasingly working remotely while being physically present in jurisdictions in which they are not admitted. ABA Model Rule 5.5 generally prohibits lawyers from practicing law "in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist[ing] another in doing so" unless authorized by the rules or laws of that state. Without opining on specific state laws and rules, the Opinion allows that lawyers may practice pursuant to the jurisdictions in which they are licensed even from a physical location where the lawyer is not licensed, under specific parameters.

Notably, lawyers cannot establish an office, hold themselves out as being able to practice, or advertise in jurisdictions in which they are not admitted. The opinion notes that under Model Rule 5.5(c), lawyers may, under certain circumstances, provide legal services on a "temporary basis" in jurisdictions in which they are not admitted. Several state bar ethics opinions, including Maine, Utah, Pennsylvania/Philadelphia, Washington D.C., and Florida, address these issues and generally follow the committee's conclusion that simply being physically present in a different jurisdiction does not constitute the unauthorized practice of law.

Opinion 495 raises several significant issues to keep in mind for those practicing law outside of their home jurisdiction. For example, each jurisdiction determines for itself what constitutes the "unauthorized practice of law." So the first thing a lawyer should do before practicing in a state in which they are not licensed is to check the rules in that jurisdiction. To avoid non-compliance, larger firms need to keep abreast of the laws and rules in every state where firm employees may be residing and working. And if practitioners are practicing in other jurisdictions for any extended period, they should consider becoming admitted in those jurisdictions. In several jurisdictions, this can simply be done by motion with paying a fee.

Additionally, the opinion states that Model Rule 5.5(b) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law," or holding out to the public that the lawyer is admitted to practice in those jurisdictions. Typically, working remotely will not constitute "establish[ing]" an office or other systematic and continuous presence because the lawyer's physical presence in the local jurisdiction is incidental and not for the practice of law. However, the committee points out that a lawyer who includes an address from a jurisdiction where they are not licensed on websites, letterhead, business cards, or in advertising may be said to have established such an office and likely violated the rule. Therefore, to the extent lawyers are working out of a temporary office in a jurisdiction where they are not licensed, they must be careful not to hold themselves out as being able to practice in that jurisdiction.

Opinion 498 Discusses Ethics Rules Most Likely to Be Violated by Remote Practice

In Formal Opinion 498, the committee provides additional guidance on a virtual practice. The opinion focuses on ABA Model Rules of Professional Conduct that are particularly affected by virtual practice, including those of competence, diligence, communication, confidentiality, and

supervision. Underlying the opinion is the understanding that lawyers should remain competent regarding relevant technology. It contains examples of special precautions that may be necessary for remote work, including using secure internet access, creating unique complex passwords and changing them periodically, and implementing firewalls.

Opinion 498 includes a list of potential problems with remote work and supervision of associates and staff. Because adequate supervision is more difficult via telephone or videoconference, those responsible for supervising should be doubly sure that the firm has updated and thorough policies and procedure in place and that everyone at the firm has been trained on and implements those policies.

Client confidentiality is also of increased importance and should be a part of any employee handbook. When working from home, lawyers and staff may share computers with others in the household, participate in calls with clients within earshot of others, or leave client files or documents in plain view of household trash. They may work in unsecure locations—such as the local coffee shop—where lawyers can be easily overheard or the internet is not secure. Anyone handling confidential information must take care to protect it—no matter where they are working.

Formal Opinions 495 and 498 provide useful guidance to practitioners no matter where they are located. Lawyers should remain vigilant about ensuring that the same standards of practice that exist in the office are in place for those working remotely.

ENTITY:

LITIGATION

TOPIC:

ETHICS, LITIGATION & TRIALS

Authors

Working Remotely Under NH Rule 5.5

Most Recent Ethics Corner & Practical Ethics Articles

Ethics Corner Article

Dear Ethics Committee:

The American Bar Association recently issued an opinion regarding lawyers working remotely in a state in which they are not licensed to practice. What are the relevant ethics rules in New Hampshire for this situation?

Given the technological advances in recent years, an increasing number of lawyers are working from their homes or locations other than their normal offices. This has only increased since the onset of the COVID-19 pandemic, which likely inspired the American Bar Association Opinion you reference. This is a good opportunity to review the New Hampshire ethics rules that apply to lawyers working

remotely, more specifically working from home in a different state than where they are licensed to practice law.

The New Hampshire Rules of Professional Conduct (the "Rules") embrace the reality that an increasing number of attorneys work remotely and may do so permanently. Rule 5.5 states that "[a] lawyer admitted in another United States jurisdiction … may provide legal services through an office or other systematic and continuous presence in this jurisdiction that … relate solely to the law of a jurisdiction in which the lawyer is admitted." Rule 5.5(d).

Subsection (d)(3) of Rule 5.5 differs from Model Rule 5.5, in allowing lawyers to be physically present in New Hampshire (the "Local Jurisdiction") while practicing the law solely of another jurisdiction (the "Licensed Jurisdiction"). This clause "clarif[ies] that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely

because the lawyer is present in New Hampshire." Ethics Committee Comment 3 to Rule 5.5.

While an out-of-state lawyer may establish an office or systematic and continuous presence in New Hampshire to practice the law of their Licensed Jurisdiction, that lawyer may not "hold out to the public or otherwise represent that the lawyer is admitted to practice the law of [New Hampshire]." Rule 5.5(b). Importantly, a lawyer that practices law in New Hampshire, even if they do not practice the law of New Hampshire, may be subject to the disciplinary authority of the New Hampshire Supreme Court. *See* Rule 8.5(a).

Recently the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 495 on December 16, 2020 (the "ABA Opinion"), concerning American Bar Association Model Rule 5.5 ("Model Rule 5.5"). Like the New Hampshire version of Rule 5.5, the ABA Opinion addresses the issue of whether a lawyer may practice the law of a Licensed Jurisdiction while being physically

present in a Local Jurisdiction. While New Hampshire's version of Rule 5.5 focuses on the nature of the legal services being provided in the Local Jurisdiction, the ABA Model Rule 5.5 and the ABA Opinion focus on the character of the lawyer's presence in the Local Jurisdiction.

The ABA Opinion interprets Model Rule 5.5 as permitting a lawyer to be in the Local Jurisdiction while practicing the law of the Licensed Jurisdiction, as long as: 1) the Local Jurisdiction has not determined such conduct is the unlicensed or unauthorized practice of law; 2) the lawyer does not establish an office or systematic presence in the Local Jurisdiction; 3) the lawyer does not hold themselves out to be available to perform legal services in the Local Jurisdiction; and 4) the lawyer does not actually perform legal services for matters in the Local Jurisdiction unless otherwise authorized.

The ABA Opinion carves out an exception to the "systematic presence" concept in order to accommodate the increasing number of lawyers working remotely. The ABA Opinion

specifically states that a lawyer's mere physical presence does not create a 'systematic presence' because as long as the lawyer does not hold themselves out to the Local Jurisdiction, they are "for all intents and purposes invisible as a lawyer to a local jurisdiction." ABA Opinion. The ABA contrasts this 'invisible' presence to a lawyer who lists their local address and contact information in the Local Jurisdiction on letterhead or business cards, and states that such actions "may be said to have established an office or a systematic and continuous presence." ABA Opinion.

New Hampshire has been generous in allowing lawyers to live in New Hampshire while working remotely for clients in jurisdictions where they are licensed. With the recently published ABA Formal Opinion, it appears that other jurisdictions are following suit and embracing the increasingly remote practice of law.

It should be noted that New Hampshire Rule 5.5 only applies to out-of-state lawyers who are practicing in New Hampshire.

New Hampshire lawyers who wish to practice in a state where they are not licensed should consult the ethics rules of the Local Jurisdiction.

This Ethics Corner Article was submitted for publication to the NHBA Board of Governors at its May 20, 2021 Meeting. The Ethics Committee provides general guidance on the New Hampshire Rules of Professional Conduct and publishes brief commentaries in the Bar News and other NHBA media outlets. New Hampshire lawyers may contact the Committee for confidential and informal guidance on their own prospective conduct or to suggest topics for Ethics Corner commentaries by emailing: Robin E. Knippers at reknippers@nhba.org.

Paying Fact Witnesses for Testimony

December 20, 2021

ARTICLES

Young Attorneys' Takeaways on Remote and In-Person Work Post-COVID-19

There is no one-size-fits-all model for employers to follow as we transition into a post-COVID-19 world.

By Erica Abshez Moran and Elie C. Biel

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Tell me how you really feel!

Pexels | Edward Jenner

We are monitoring the coronavirus (COVID-19) situation as it relates to law and litigation. Find more resources and articles on our COVID-19 portal. For the duration of the crisis, all coronavirus-related articles are outside our paywall and available to all readers.

The year 2022 is almost upon us, and as is the case with every new year, change is afoot. While that change may come in many forms, one topic at the forefront of our minds is the prospect of returning to a prepandemic, work-in-the-office lifestyle: Many legal employers have indicated that they expect employees to return in some form to in-person, in-office work in early 2022. Expectations surrounding that move may vary, but it is generally understood that the new "normal" will be anything but normal, particularly given the emergence of the Omicron variant (and whatever variants follow). In short, many of us (and our employers) don't know exactly what work will look like in 2022; and, in fact, many of us may be conflicted about what we want it to look like.

With this in mind, we wondered what lessons young lawyers have gathered from working remotely over the past 20 months, and what they may mean for legal employers and attorneys moving forward. We reached out to young attorneys across the country (including those in private practice, those in government, and those working as in-house lawyers) to discuss the challenges they faced, the benefits they gleaned, and what remote work measures they want to see carried forward. Here is what we found, organized generally around the questions we asked.

The Best Aspects of Working Remotely

Across the board, attorneys reported that increased flexibility was a huge benefit of remote work. Multiple attorneys noted that it was nice to be able to choose to weave in personal tasks throughout the workday, such as doing laundry, taking a shower after an early-morning meeting, or exercising in the middle of the day (Peloton workouts between meetings were all the rage). Attorneys also pointed to the flexibility of being able to work from anywhere as a big upside to remote work. One attorney told us that the ability to travel and work in different places broke up the monotony of the pandemic and helped her mental health. Another enjoyed the unquestioned

ability to work from the beach or a cabin or a park—anywhere but in a buttoned-up, climate-controlled office setting.

Another universally reported benefit was the time saved by not having to go into the office. Indeed, in some instances, the reported time savings from forgoing the commute was significant—upwards of two hours a day (hello, Los Angeles!)—and helped attorneys better meet the demands of work and home. As one attorney put it, the lack of a commute provided the ability to pivot quickly from work to home life. Several attorneys also reported time savings (and less stress) due to not having to dress up to "office standards." One attorney noted that she was able to be more efficient and save time because her workday wasn't interrupted by socializing with her coworkers. In general, most attorneys felt they were able to use all of this saved time to enjoy a better work-life balance.

One in-house attorney who often works with international colleagues noted that she saw a benefit from the normalization of joining videoconferences and taking calls at home. Because she is located on the West Coast, she often had very early Zoom meetings (e.g., 5:00 a.m.) and appreciated that she could attend the meetings from home rather than in the office.

Several attorneys with young children identified the extra time with their families as the best aspect of working remotely. For example, one senior associate noted that he was able to actually experience his child's first steps and other developmental milestones because he was working at home. Another in-house attorney stated that she believes the remote-work model can help ensure that women remain in the workforce because it provides more flexibility in terms of time and project management. That same attorney noted that while working remotely, an individual can juggle caring for a sick child at home while working, even if it means working well into the evening. And an attorney working in a government job noted that his family was able to keep one child in half-day day care rather than sending the child to day care full-time.

We wondered if in-house counsel noticed any difference in their communications with outside counsel during remote work. The attorneys we spoke with did not notice a change in outside counsel's responsiveness or work product (either positive or negative). One attorney noted that being in-house, she was already working with outside counsel "remotely," so nothing really changed and the transition in the pandemic was smooth.

Challenges of Working Remotely

While many attorneys experienced positive changes from the remote work environment, many timekeepers also reported a variety of challenges.

One recurrent theme: the difficulty of setting boundaries between office and home life. For example, one attorney noted that having the discipline to stick to a daily work schedule was a challenge at home but that having that schedule was necessary to avoid working late into the evening. Another attorney noted that she struggled to stop working each day—feeling the need to constantly be "on" at nights and on weekends so that people saw that she was working.

Productivity was also a challenge. One attorney noted that she thought she was less productive at home, stating that it was hard to "get in the zone and stay in the zone." Attorneys pointed out that working at home came with distractions, including barking dogs, screaming kids, inadequate home offices, and the omnipresent need to do household tasks.

Many attorneys noted that they missed interacting with their colleagues in person and felt isolated due to remote working. Many attorneys in private practice noted the value of being able to walk down the hall and bounce an idea off of a colleague in person; they stated that replacing these conversations with scheduled calls was difficult and not the same. One in-house counsel noted that she felt "out of the loop" working remotely; she noticed that she was missing out on in-person conversations that were taking place between her CEO and general counsel, who had returned to the office—conversations in which she otherwise would have been included if she had been there. Attorneys also missed the social aspect of being in the office.

Several attorneys voiced opinions about the increased use of videoconferences during remote work. One in-house attorney thought that there were benefits and drawbacks to increased videoconferencing. On the positive side, videoconferencing encouraged one person speaking at a time and neutralized the sidebars that often occur during in-person meetings. However, she also pointed out that videoconferencing lacked interpersonal connection and gave participants "permission" to be more passive than they might be in person. This sentiment was echoed by another attorney, who noted that aspects of human response are lost in Zoom calls and remote depositions. Another in-house attorney described Zoom as a "double-edged sword." However, she also noted that her organization had instituted informal measures to avoid Zoom burnout by encouraging several "No Zoom" days a week—on those days, employees were not expected to turn on their cameras for meetings.

Remote Work and Work-Life Balance

Opinions were split as to whether work-life balance was helped or hindered by remote work during the pandemic. Some attorneys felt that, overall, the remote work environment was a good thing for work-life balance due to the flexibility and time savings identified above. These attorneys pointed to the following specific benefits, among others: an increased ability to be both a high-performing employee and a present and involved parent; an enriched, flexible lifestyle with more time to spend with family; and better self-care and mental health.

A minority of attorneys noted that they found no real change or impact in their work-life balance while working at home.

The remainder of attorneys felt that working at home completely blurred the lines between work and home life. These attorneys noted that they had difficulty disconnecting, such that work bled into home life, leading to higher stress and burnout. Some of these same attorneys reportedly chose to return to the office months ago in an effort to reestablish a boundary between home and work.

Concerns about Returning to the Office

Some attorneys with whom we spoke did not have any concerns with returning to the office and were looking forward to it. These attorneys felt comfortable with the measures put in place by their organizations to address any health and safety risks. Other attorneys expressed indifference about returning to in-person work because their organizations have already indicated that they will not be required to return full-time.

However, there were several attorneys who identified COVID-19 exposure as their primary concern with returning to the office. These attorneys worried about transmitting COVID-19 to spouses with work-from-home flexibility and to children too young to be vaccinated (under age five).

Other attorneys were concerned about how a return to the office would impact caregivers, especially women, single parents, and others who do not have as much flexibility at home. Additionally, some attorneys voiced concern about returning to "normal" prepandemic activities

and behaviors, such as (perhaps unnecessary) in-person meetings, commuting, being places on time, and looking presentable.

Finally, one attorney was concerned about potential inequities that might ensue from a hybrid return-to-work model. He expressed concern that those choosing to work in the office would be provided with better opportunities than those electing to work predominantly remotely due to the informal social interactions and comradery among and between coworkers in an in-person office setting. He also pointed out that in his experience, partners (particularly senior partners) overwhelmingly favor the in-office environment, such that work allocations could lean toward in-office attorneys.

Going Forward

In terms of elements that attorneys would like to see carried forward from the pandemic-driven remote-work environment, we heard a common refrain: flexibility. Across the board, attorneys want the ability to work at home (or elsewhere) on demand, without being penalized. Attorneys noted that the pandemic has proven that they have the ability to work from home and that, as a result, employers should not arbitrarily require people to work in-person going forward. Several attorneys also noted that they would like to see more casual dress codes kept in place when returning to work.

Finally, a few attorneys noted that they believed working remotely gave them, employers, clients, and colleagues a greater recognition that home and family life were important and should be valued. These attorneys hoped that this new understanding would infuse their working relationships going forward.

Conclusion

The ongoing COVID-19 pandemic has wrought many changes in the practice of law over these last 20 months. While individual circumstances varied, younger attorneys reported, in general, that some changes have been positive (e.g., increased flexibility, increased personal time, and the now-proven ability to work remotely), while others have proven problematic (e.g., blurring of work-life boundaries, social isolation, increased burnout, and home-based distractions). We recognize that attorneys are notoriously opinionated and that there is no one-size-fits-all model for employers to follow as we transition into a post-COVID-19 world; however, if our survey has shown anything, it's

that legal employers would be wise to avoid implementing heavy-handed policy changes that force people to return fully to a prepandemic lifestyle or that remove timekeepers' ability to employ flexible strategies for performing their duties. Young attorneys now expect and demand flexibility to determine their preferred work environment. And with the legal talent war continuing to rage throughout various markets, lifestyle considerations may very well hold the key to attracting and retaining talent in 2022 and beyond.

Erica Abshez Moran and Elie C. Biel are associates at Faegre Drinker in Minneapolis, Minnesota.

ENTITY:

LITIGATION

TOPIC:

ANTITRUST, LITIGATION & TRIALS, BUSINESS & CORPORATE, HEALTH

Authors

Published on *The National Law Review* (http://www.natlawreview.com)

A Guide to Attract and Retain Lawyers and Law Students

Article By:
PracticePanther

Young lawyers are a significant investment for a law firm. From the hiring process to training, the goal should be to attract and retain lawyers for the long term. If an associate is brought on and ends up leaving, law firms have to start all over and reinvest in hiring another, which can cost the industry roughly $1 billion annually.

What does it take to attract and retain lawyers and law students? With the spike in law school enrollment, law firms need to prepare for a competitive job market and a pool of talent that expects a positive company culture, flexible work options, tracks for growth, mentorship, and innovative technology.

The Importance of Attracting and Retaining Talent in a Changing Legal Industry

Law firms need to focus on attracting and retaining talent and getting new lawyers current on the firm's processes and practice areas to provide excellent service to clients as a way to stand out.

Clients may be reluctant to pay for services from junior or new associates and prefer knowing they have years of legal experience and knowledge behind their case. These clients are looking for firms that demonstrate legal expertise, business acumen, and project management skills.

Of course, allowing only senior associates and partners to provide legal services can cause firms to rack up high client bills that can price them out of the market. Young lawyers with training can offset these costs and provide high-value services to clients, directly contributing to the firm's revenue.

Cultivate a Positive Culture

Young lawyers are looking for firms that have a culture of support and mentoring. When they choose a law firm to sign on to, they want to know that they'll have professional development and growth opportunities to turn the job into an investment into their future career.

Law firms can attract this type of lawyer by creating a positive, engaging culture that's up to date on current trends and innovations in the industry and focused on supporting the goals of associates.

Because of this, one of the most important moves a firm can make is adopting technology and innovating their practice. As digital natives, young lawyers are learning how to use legal technology and practice management software to support remote work, automate tasks and track time efficiently. If a firm is sticking to old-school methods, it's not likely to bring in the best and brightest.

It's also important for firms to offer space for collaboration and socialization with coworkers. An employee lounge, virtual hangouts, or other suitable spaces allow for relationship building. Young lawyers also want inclusive work environments and mentors that offer feedback and honest, two-way communication about goals and progress – a goal that can be served better with neutral, relaxed settings.

Focus on Impact with the Practice of Law

The young lawyers of today have lived through a lot of strife, and they're hungrier than ever to make a difference in the world using the practice of law. In fact, this may be more important than status or money.

Law firms looking to attract this type of talent need to offer meaningful, impactful pro bono work and a dedication to justice, not just client billing. A desire to improve the community and give back, whether through pro bono work, donations, or volunteer programs, is likely to resonate with these new lawyers.

Foster Continued Support and Mentorship

Law firms can be competitive environments with an "everyone out for themselves" attitude, but the next generation of lawyers aren't drawn to this environment. Being the new hotshot lawyer isn't important – instead, these young associates are looking for support, mentoring, and training that will help them further their careers.

Firms that want to capture this talent need to include a variety of opportunities to show their investment in new recruits, such as coaching services, professional development, career planning, CLE training options, and stress management workshops. These programs can ensure the young lawyers feel like part of the team and have an interest in giving back to the firm that invested in them.

In addition, a firm that invests in its talent is gaining valuable team members for the future. Professional development services help lawyers define their goals and take concrete steps toward achieving them, which can pay off for the firm that brought them there.

Promote Work-Life Balance

Young lawyers, like other young professionals in other industries, are increasingly interested in work-life balance and flexibility in the workplace. Instead of working long hours and being married to the job, young lawyers are looking for firms that allow them interests and obligations outside of the office.

Despite anyone's best efforts, personal lives can impact professional lives (and vice versa). Firms that give associates space and time to manage their personal lives get more efficient and productive lawyers in return and team members who are loyal to their workplace.

Remote and hybrid work also goes along with this. Fresh graduates are looking for flexibility in work locations and hours, whether through a remote or hybrid model, to support work-life balance. In return, young lawyers are able to find creative approaches to the work, rather than a focus on long hours that can be billed.

Support Different Career Paths

Progressive law firms offer different paths and timing to get to a partnership. This accounts for the personal lives of associates and how that may impact their careers, such as milestones like parenthood or marriage. Instead of putting lawyers on the fast track to success, these firms are giving associates the freedom to decide when the time is right.

If being a partner isn't the goal for a young associate, law firms can offer alternative career paths that keep them in the industry. These may include professional development coaching, business management for the firm, human resources, or legal technology leadership. Firms should also allow flexibility for lawyers to explore different practice areas to gain new skills and ensure their choice is the best fit.

Attract and Retain Lawyers and Promising Law Students

Attracting young lawyers and law students can be difficult, but law firms can invest in professional development, upgrade legal technology, and shift the business model to support better work-life balance, a supportive company culture, and a focus on creating impact through law.

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Directives / Home-Based Worksites.

- **Record Type:** OSHA Instruction
  Current Directive
- **Number:** CPL 02-00-125
  Old Directive
- **Number:** CPL 2-0.125
- **Title:** Home-Based Worksites.
- **Information Date:** 02/25/2000

OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR Occupational Safety and Health Administration

DIRECTIVE NUMBER: CPL 2-0.125	**EFFECTIVE DATE:** February 25, 2000
SUBJECT: Home-Based Worksites	

ABSTRACT

Purpose: This instruction provides guidance to OSHA's compliance personnel about inspection policies and procedures concerning worksites in an employee's home. This instruction supersedes all previous statements and guidance on the subject.

Scope: OSHA-wide

References: OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM)
OSHA Instruction CPL 2.115, Complaint Policies and Procedures;
OSHA Instruction STP 2.22A, State Plan Policies and Procedures Manual.

State Impact: State Adoption not Required, See Section IV.

Action Offices: National, Regional, and Area Offices.

Originating Office: Directorate of Compliance Programs.

Contact: William J. Smith or
Helen Rogers (202-693-1850)
Directorate of Compliance Programs
Frances Perkins Building, N-3603
200 Constitution Avenue, NW
Washington, DC 20210

By and Under the Authority of
Charles N. Jeffress
Assistant Secretary

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II. Scope. This instruction applies OSHA-wide.

III. References.

OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM);
OSHA Instruction CPL 2.115, Complaint Policies and Procedures;
OSHA Instruction STP 2.22A, State Plan Policies and Procedures Manual (SPM).

IV. Federal Program Change. This instruction describes a Federal Program Change for which State adoption is not required.

NOTE: In order to effectively enforce safety and health standards, guidance to compliance staff is necessary. Therefore, although adoption of this instruction is not required, States are expected to have enforcement policies and procedures which are at least as effective as those of Federal OSHA.

V. Action Offices.

A. Responsible Office. Directorate of Compliance Programs.

B. Action Offices. Regional, Area, and District Offices and State Plan States.

C. Information Offices. Consultation Project Offices.

VI. Action.

OSHA Regional Administrators, Area Directors, and National Office Directors will ensure that the policies and procedures regarding employee home-based worksites set forth in this instruction are followed.

VII. Definitions.

A. **Home-Based Worksite**: The areas of an employee's personal residence where the employee performs work of the employer.

B. **Home Office**: Office work activities in a home-based worksite (e.g., filing, keyboarding, computer research, reading, writing). Such activities may include the use of office equipment (e.g., telephone, facsimile machine, computer, scanner, copy machine, desk, file cabinet).

VIII. Background.

The Department of Labor strongly supports telecommuting and telework. Family-friendly, flexible and fair work arrangements, including telecommuting, can benefit individual employees and their families, employers, and society as a whole.

The purpose of the Occupational Safety and Health Act of 1970 (OSH Act) is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions...." (Section 2(b)). The OSH Act applies to a private employer who has any employees doing work in a workplace in the United States. It requires these employers to provide employment and a place of employment that are free from recognized, serious hazards, and to comply with OSHA standards and regulations (Sections 4 and 5 of the OSH Act). By regulation, OSHA does not cover individuals who, in their own residences, employ persons for the purpose of performing domestic household tasks.

OSHA respects the privacy of the home and has never conducted inspections of home offices. While respecting the privacy of the home, it should be kept in mind that certain types of work at home can be dangerous/hazardous. Examples of such work from OSHA's past inspections include: assembly of electronics; casting lead head jigs for fishing lures; use of unguarded crimping machines; and handling adhesives without protective gloves.

IX. Policy for Home Offices.

OSHA will not conduct inspections of employees' home offices.

OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.

If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If an employee makes a specific request, OSHA may informally let employers know of complaints about home office conditions, but will not follow-up with the employer or employee.

X. Policy for Other Home-Based Worksites.

OSHA will only conduct inspections of other home-based worksites, such as home manufacturing operations, when OSHA receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.

The scope of the inspection in an employee's home will be limited to the employee's work activities. The OSH Act does not apply to an employee's house or furnishings.

Employers are responsible in home worksites for hazards caused by materials, equipment, or work processes which the employer provides or requires to be used in an employee's home.

If a complaint or referral is received about hazards at an employee's home-based worksite, the policies and procedures for conducting inspections and responding to complaints as stated in OSHA Instruction CPL 2.103 (the FIRM) and OSHA Instruction CPL 2.115, will be followed, except as modified by this instruction.

XI. Other Requirements.

Employers who are required, because of their size or industry classification, by the OSH Act to keep records of work-related injuries and illnesses, will continue to be responsible for keeping such records, regardless of whether the injuries occur in the factory, in a home office, or elsewhere, as long as they are work-related, and meet the recordability criteria of 29 CFR Part 1904.

Other than clarifying the policy on inspections and procedures concerning home-based worksites, this instruction does not alter or change employers' obligations to employees.

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Considerations for New Hampshire Employers Hiring Out of State Remote Workers

By Amy R. Resnick

More than a year into the COVID-19 pandemic and the corresponding shift to a predominately remote workforce, many employers have changed their opinions about the success of remote employment. Employers have realized that not only is remote work feasible, it can also be advantageous in significantly widening the potential pool of applicants and employees.

A silver lining of the pandemic is that employers can now interview and hire the best candidate, even if that candidate lives hundreds or thousands of miles away. This is a significant change for many New Hampshire employers, particularly those that struggle to find high quality employees. This change also permits employees working remotely to relocate to an area they view as more desirable—which was often unfeasible due to onerous daily commutes.

This change in the workforce brings new questions for employers, including which state laws to follow: the state where the employer is based, or the state where the employee works?

While there is no simple answer for all cases, generally employers must follow the laws of the state where the employee is located. In several aspects, New Hampshire is more employer-friendly than many other states, including those in the rest of New England and the Mid-Atlantic. Accordingly, there are several laws that employers need to be aware of if they decide to hire remote workers outside of New Hampshire.

Wages

One of New Hampshire's most prominent lures for employers and employees alike is the lack of an income tax. While it depends upon specific state laws, frequently when employees live and work in different states, an employee pays income tax to the state where she or he works and then is eligible to receive a tax credit in his or her home state to avoid double taxation. This is known as a "convenience of the employer" rule. Many New Hampshire salaries are calibrated to account for its lack of income tax. If an employee lives in a state where she or he is obligated to pay income tax, the employee may require or demand a higher wage to accommodate this difference. In October of 2020, the State of New Hampshire filed a Motion for Leave to File a Bill of Complaint in the Supreme Court of the United States to address this issue and the legality of "convenience of the employer" rules under the Court's original jurisdiction in *New Hampshire v. Massachusetts*, Docket No. 220154. Massachusetts claims that its taxation rule simply preserves the tax revenue it was receiving prior to COVID-19. Several states have submitted amicus curiae briefs in support of New Hampshire. As of this writing, the Court has not issued any ruling in this matter.

Another benefit New Hampshire employers enjoy is a low minimum wage of $7.25 per hour. This is in stark contrast to our neighbors, which all have a minimum wage over $11.00 per hour. An employer must pay an employee at least the minimum wage in the state in which the employee works. Similarly, each state has specific laws on the methods of payment, timing of payment, and what needs to be included on a wage statement. For example, in Massachusetts, if an employee is terminated or laid off, she or he must be given his or her final paycheck on the same day as the separation, which is different than the New Hampshire rule that requires employers to issue final paychecks to terminated employees within 72 hours.

Paid Leave

New Hampshire employers are not required to provide paid leave for sick, family, or parental needs. All three of New Hampshire's border states, and a growing number of states nationwide, require some form of paid leave be provided to employees. Whether a New Hampshire employer has an obligation to provide a required paid leave of another state for a remote worker will depend upon the specific laws of the state where the remote employee is working. For example, New York Paid Sick Leave must be provided to employees physically working in New York, even if the employer is located outside of New York. Likewise, with limited exceptions, Massachusetts' Paid Family and Medical

WORKERS *continued on page 38*

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Leave covers employees living in Massachusetts who are working remotely for an employer in another state.

Drug Testing

Drug testing laws vary widely from state to state. This is another example of an employment area where an employer needs to be aware of the specific state law of the remote worker to determine what testing can be done, if any. Currently, New Hampshire does not have a drug testing law, so employers are able to test and make decisions based upon those tests, as long as the actions are not discriminatory. This ability to test freely without specific procedures and paperwork could disappear with the hiring of non New Hampshire workers.

Background Checks

Similar to drug testing, the rules for criminal background checks, credit checks, and the like, differ from state to state. New Hampshire has several specific laws regarding background checks and requirements for specific industries such as the Residential Care and Healthy Facility Licensing Law; Child Day Care, Residential Care, and Child Placing Agencies Law; and the Licensing of Sales Finance Companies and Retail Sellers of Motor Vehicles Law. Other than those specified industries, New Hampshire permits employers to conduct criminal background checks and has very minimal limitations on the use of credit reports by employers under the New Hampshire Fair Credit Reporting Act. Depending upon the remote worker's location, a New Hampshire employer may need to modify its practices regarding background checks.

As the pool of potential employees expands via the acceptance of remote work, it is crucial for New Hampshire employers to analyze the pros and cons of such decisions and how additional human resources and legal needs may be required.

Amy Resnick is an employment lawyer for Downs Rachlin Martin PLLC in Lebanon, New Hampshire.

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ther hired to be a minister or a teacher of religion in a primary or secondary school environment as in those cases. In *Hosanna-Tabor*, the employer was an Evangelical Lutheran church and school, and the plaintiff was a "called" teacher, who had undergone formal religious training and accepted a formal call to religious service. She and her employer both viewed her as a minister, and her employment documents described her as such. The two teachers in *Our Lady of Guadalupe* worked in an elementary school where they taught all subjects, including religion. They were expected not only to teach the faith to their students but also to guide them "by word and deed" toward the goal of living their lives in accordance with the Catholic faith. They prayed with the students, attended Mass with them, and prepared the children for participation in other religious activities.

As a Professor, DeWeese-Boyd was not ordained or commissioned, not held out as a minister, was not required to undergo formal religious training, pray with her students, participate in or lead religious services, take her students to chapel services, or teach a religious curriculum.

The SJC also rejected Gordon College's argument that all its employees should come under the ministerial exception as too broad an interpretation which would allow religious organizations to simply ignore secular anti-discrimination laws.

The Supreme Court will likely see more cases of this nature in the coming years as both religious and non-religious organizations grapple with the inevitable tug that comes with balancing the rights of all.

Charla Bizios Stevens practices in McLane Middleton's Employment Law Practice Group, Education Law and Health Care Practice Groups. She can be reached at 603-628-1363 or at charla.stevens@mclane.com

March 11, 2021

PRACTICE POINT

State Taxation of Employees Working Remotely from Another State

By Michael McLoughlin, Kean Miller LLP, New Orleans, LA

Even though New York and Massachusetts have restricted out-of-state commuters from coming back to their pre-pandemic offices to work, they still expect them to pay personal income taxes to the state as if they were working in the state. That is, the two states are taxing nonresidents as if they continued to commute to work every day even if they do not set foot in the state and do all of their work remotely from a home office. Not surprisingly, the home states where those commuters live and (now) work are fighting back against what they see as a money grab by states that do not have any right to the tax revenue.

On October 19, 2020, New Hampshire filed a petition with the U.S. Supreme Court to overturn an April 2020 Massachusetts emergency regulation (1) that requires nonresidents who were working in Massachusetts when the pandemic started, many of whom live in New Hampshire, to continue to pay Massachusetts' personal income tax even though they have not been commuting to Massachusetts since early 2020 and will likely continue to work from home for the foreseeable future. On December 22, 2020, New Jersey--joined by Connecticut, Hawaii, and Iowa--filed an *amici curiae* brief supporting New Hampshire's petition. In late January, the Supreme Court asked the Acting Solicitor General to weigh in on the debate. (2) A date for argument before the Supreme Court has not yet been set.

The New Hampshire petition asserts that the Massachusetts emergency regulation violates the Commerce and Due Process constitutional provisions by imposing income tax on New Hampshire residents despite the fact that the individuals did not enter Massachusetts to work during the period at issue. Specifically, the Massachusetts regulation requires individuals who were employees performing services in Massachusetts immediately prior to the start of the pandemic to continue to pay Massachusetts personal income tax even if they are now working from home in another state due to the effects and restrictions from the pandemic. This rule could

potentially result in an individual who does not enter Massachusetts for a single day in 2021 being considered to have nexus there and to be subject to income tax there, simply because that person once actually conducted the work in Massachusetts.

New Hampshire argues that Massachusetts is effectively eliminating what it has called the "New Hampshire Advantage"--i.e., the fact that a resident of New Hampshire who works in New Hampshire does not<\/u> have to pay a traditional personal income tax. Thus, New Hampshire claims that Massachusetts is impermissibly interfering with New Hampshire's right to provide its residents a planned tax benefit from working inside the state.

New Jersey elected to file an amicus brief supporting New Hampshire because it is fighting a similar battle with New York. New York has long required nonresident individuals who work for New York companies but perform their services outside of the state to pay New York personal income tax unless it was a "necessity" that the employee work outside the state. If the individual worked outside the state purely for the employee's convenience, then the individual was required to continue to pay New York taxes. The New York Department of Taxation and Finance has recently confirmed that nonresidents who are working from home because they cannot return to their New York offices due to COVID-19 must still pay New York income tax unless a bona fide office has been established from which the employee telecommutes.

The problems that result from this taxation of non-residents for states like New Hampshire, which does not impose a personal income tax, and New Jersey, which provides a credit to residents for taxes paid to other states, are slightly different. As noted, New Hampshire claims that Massachusetts is eliminating the advantage of not having to pay an income tax that the New Hampshire legislature has provided to its residents who work in New Hampshire. New Jersey, on the other hand, asserts that it is losing tax revenue to New York on income earned by its residents who are working full time in New Jersey because New Jersey residents receive a credit against taxes owed to New Jersey for taxes they pay to other states.

The issue is an important one for the Supreme Court to resolve. The problem is not likely to go away soon, and residents of New Hampshire and New Jersey who are affected by the Massachusetts and New York provisions, respectively, do not have an adequate state forum in which to protest the imposition of the taxes at issue. Moreover, even if pandemic restrictions end within the next six to twelve months, many people will likely choose to continue to work remotely from their homes in these and other states, and employers will likely support that decision, as they

realize that they save money by doing so. If states continue to struggle with declining tax revenues in 2021 and 2022, there will likely be even fiercer competition for those tax revenues between states where the employer and its primary offices are located and those whose residents, prior to the pandemic, regularly commuted to those states for work. ■

Endnotes

ENTITY:

SECTION OF TAXATION

TOPIC:

TAXATION

No. _____, Original

IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

October 19, 2020

Plaintiff, the State of New Hampshire, respectfully moves this Court for leave to file the attached Bill of Complaint. The grounds for this Motion are set forth in an accompanying brief.

Respectfully submitted,

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

October 19, 2020

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IN THE

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STATE OF NEW HAMPSHIRE,

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BILL OF COMPLAINT

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

October 19, 2020

BILL OF COMPLAINT

Plaintiff, the State of New Hampshire brings this action against Defendant the Commonwealth of Massachusetts, and for its causes of action asserts as follows:

NATURE OF THE ACTION

1. The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty. For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. Not only does New Hampshire sit as an island among the New England States, but this choice differentiates New Hampshire from nearly every other State in the union. Indeed, just one other State—Alaska—has such a tax structure.

2. New Hampshire's sovereign policy choice has had profound effects. It has resulted in, on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this advantage that New Hampshire successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity.

3. In the middle of a global pandemic, Massachusetts has taken deliberate aim at the New

Hampshire Advantage by purporting to impose *Massachusetts* income tax on New Hampshire residents for income earned while working within New Hampshire. Upending decades of consistent practice, Massachusetts now taxes income earned entirely outside its borders. Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.

4. New Hampshire brings this case to rectify Massachusetts' unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire's to make.

5. On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed *outside Massachusetts* would be subject to the State's income tax. This emergency regulation applied retroactively to March 10, 2020. Massachusetts extended this regulation on a temporary basis in July and, most recently, adopted it as a final rule, effective October 16, 2020 (the "Tax Rule").

6. This extraterritorial assertion of taxing power is unconstitutional. Massachusetts claims the authority to tax New Hampshire residents who earn their incomes from activities they undertake solely within New Hampshire. For example, the *entire* salary of a New Hampshire resident who commuted to work

full time in Boston in February but has not set foot in the Commonwealth for more than eight months continues to be subject to the Massachusetts state income tax as if he were still working every day in Boston.

7. This Court has long recognized that States have limited power to tax nonresidents. Both the Commerce Clause and the Due Process Clause prohibit the States from "tax[ing] value earned outside [their] borders." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777 (1992). A State's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, Massachusetts subjects Granite Staters to simple but unconstitutional confiscation.

8. This Court's exercise of its original jurisdiction is urgently needed. New Hampshire has fundamental sovereign interests at stake. Indeed, Massachusetts' extraterritorial Tax Rule imposes an income tax on citizens of a state who are not, and historically have not been, subject to one, and who have selected New Hampshire (at least in part) for that reason. New Hampshire has long relied on its sovereign policy choices to create the New Hampshire Advantage, which, in turn, attracts both businesses and workers to the State.

9. The Tax Rule is a direct attack on this New Hampshire Advantage. It disrespects New

Hampshire's sovereignty. It undermines an incentive for businesses to locate capital and jobs in New Hampshire, a motivation for families to relocate to New Hampshire's communities, and the State's ability to pay for public services by reducing economic growth. It weakens efforts to recruit individuals to work for the state government. It endangers public health in New Hampshire by penalizing workers for following public health guidance and working from home rather than from their offices. And it undermines New Hampshire's sovereign duty to protect the economic and commercial interests of its citizens.

10. While the Tax Rule has a set expiration date, there is significant reason to believe the underlying shift in policy will survive the current pandemic. To date, Massachusetts has twice extended the Tax Rule, first as a temporary measure and now as a final rule. Further, the pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court's ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic. *See, e.g.*, *Microsoft makes remote work option permanent*, BBC (Oct. 9, 2020), https://bbc.in/2H1fPpX. Thus, it is likely that Massachusetts will continue to impose the Tax Rule or some similar policy long after the pandemic abates.

11. New Hampshire has no choice but to bring this action in this Court. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This Court therefore is the *only* forum that can hear New Hampshire's claims. The Court should exercise its jurisdiction to hear this dispute and grant New Hampshire declaratory and injunctive relief against Massachusetts' unconstitutional attempt to tax New Hampshire residents.

JURISDICTION

12. This Court has original and exclusive jurisdiction because the dispute is both a "Case[] . . . in which a State shall be Party" and a "controvers[y] between two or more States." U.S. Const., art. III, §2, cl. 2; 28 U.S.C. §1251(a).

PARTIES

13. Plaintiff is the State of New Hampshire. The State of New Hampshire is a sovereign State, whose citizens enjoy all the rights, privileges, and immunities guaranteed by the U.S. Constitution and federal law.

14. Defendant is the Commonwealth of Massachusetts, which is also a sovereign State.

FACTUAL ALLEGATIONS

A. The Limited Power of States to Tax Nonresidents

15. The power to tax may be "essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2219-20 (2019) (citations omitted).

16. States impose taxes on their residents "to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens." *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a State and its citizens: the citizens agree to pay a percentage of their worth in exchange for the State's commitment to provide protection and services.

17. A State's power to tax its residents is far-reaching. A State like Massachusetts "may, and does, exert its taxing power over [residents'] income from all sources, whether within or without the State." *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) *abrogated on other grounds by Comptroller of Treasury of Maryland v. Wynne*, 135 S. Ct. 1787 (2015).

18. But a State's power to tax nonresidents is far more circumscribed. Under both the Commerce Clause and the Due Process Clause, a State has no authority to "tax value earned outside its borders."

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 777 (1992).

19. A State's power to tax an individual's activities is justified only by the "'protection, opportunities and benefits' the State confers on those activities." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

20. Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, "fairly apportioned" and "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (requiring "income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State").

21. The tax policies of the various States reflect these constitutional constraints. Nearly every State that imposes a broad-based personal income tax on earned income requires nonresidents to pay tax only on income they earned "within the State." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶20.05[4](a) (3d ed. 2020).

22. States have various methods of determining when income is earned "within the State," but nearly all methods prevent taxation of nonresident income earned beyond their borders. *Id.* States' rules for determining the portion of a nonresident employee's compensation that is attributable to the State "generally reflect the relative amount of time that the nonresident employee spends

working in the state, or the amounts attributable to the specific services provided within the state." *Id.*; *see, e.g.,* W. Va. Code St. R. §110-21-32.2.1.2.e (taxing nonresidents based on "the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned").

23. Income earned by a nonresident who works *outside* of the State is not subject to taxation by any State other than the residence State. *See* Hellerstein, *supra*, at ¶ 20.05[4].

B. Massachusetts' Prior Tax Policies

24. Massachusetts long respected these constitutional restraints. Under Massachusetts law, nonresidents with an annual "Massachusetts gross income" of more than $8,000 are required to pay state taxes on their income. *See* M.G.L. c. 62C, §6.

25. The "Massachusetts gross income" is determined "solely with respect to items of gross income from sources within the commonwealth of such person." M.G.L. c. 62 §5A(a).

26. Massachusetts currently taxes earned income at 5%. *See Income Tax Rate Drops to 5% on January 1, 2020*, Mass. Dep't of Rev. (Dec. 23, 2019), https://bit.ly/3cRwQ11.

27. Until recently, Massachusetts regulations made clear that nonresidents owed taxes only for the work they performed while physically within Massachusetts. Under the prior regime, "[w]hen a non-resident employee is able to establish

the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income." 830 CMR 62.5A.1(5)(a) (2008). When a precise determination was not possible, Massachusetts regulations required allocation of income between taxable Massachusetts sources and non-taxable out-of-state sources by using a fraction, "the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days." *Id.*

28. "Compensation rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax." Mass. Dep't of Revenue, Letter Ruling 84-57, *Withholding for Non-Resident Employees* (Aug 2., 1984), https://bit.ly/3j6bnDe.

29. This allocation rule respected New Hampshire's rights, as a coequal sovereign in our federal system, to enact its *own* tax policies upon which its residents may rely. It also protected New Hampshire residents from paying unconstitutional taxes on income earned outside of Massachusetts. In those ways, the policy harmonized Massachusetts' sovereign interests with the interests of nonresidents and its neighboring States.

C. Massachusetts' Taxation of New Hampshire Residents Working in New Hampshire

30. That harmony recently came to an abrupt end. In March 2020, Massachusetts, like many States, declared a state of emergency in response to the COVID-19 pandemic. *See Governor's Declaration of Emergency*, Massachusetts Office of the Governor (Mar. 10, 2020), https://bit.ly/2GuugSM.

31. Pursuant to that declaration, Governor Baker ordered all businesses that did not provide "COVID-19 Essential Services" to cease in-person operations by March 24, 2020. *See Governor Charlie Baker Orders All Non-Essential Business to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks*, Massachusetts Office of the Governor (Mar. 23, 2020), https://bit.ly/30gWuY4.

32. Massachusetts businesses and their employees followed that order, and many employees transitioned to working from home indefinitely. In particular, tens of thousands of Granite Staters who formerly commuted to Massachusetts began working entirely from home in New Hampshire.

33. Instead of relying on Massachusetts' services during the workweek—police and fire protection, ambulance services, roads, and more—these individuals now consumed those same services within New Hampshire. Thus, if an emergency arose, these workers called New Hampshire's police and ambulance services, not Massachusetts'.

34. Because New Hampshire has made a fundamental policy decision, in its sole sovereign discretion, not to impose an income tax, it pays for these services through various other revenue sources.

35. As of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, accounting for more than 15 percent of New Hampshire workers. U.S. Bureau of the Census, *Longitudinal Employer Household Dynamics*, https://bit.ly/2HiSLCv.

36. Those workers generated billions of dollars of income and paid hundreds of millions of dollars in Massachusetts state taxes.

37. Under Massachusetts' longstanding allocation policy, Massachusetts taxed the portion of income that New Hampshire residents earned while physically working *in Massachusetts*. New Hampshire residents working for Massachusetts enterprises were not taxed on income earned while physically working *in New Hampshire*.

38. On April 21, 2020, Massachusetts published an emergency regulation taxing—for the first time—income *earned in New Hampshire*.

39. Having already required or encouraged most employees to work from home, the Commonwealth declared: "[F]or the duration of the Massachusetts COVID-19 state of emergency, all compensation received for personal 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, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding." Mass. Dep't of Revenue, Technical Information Release 20-5, *Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (Apr. 21, 2020), https://bit.ly/3n2BrCp. Massachusetts imposed the emergency regulation retroactive to March 10, 2020. *Id.* By its terms, the regulation would expire on the date on which the Governor gave notice that the state of emergency was no longer in effect. *Id.*

40. Under Massachusetts law, emergency regulations are valid for only three months. *See* M.G.L. c. 30A, §2. Accordingly, on July 21, 2020, Massachusetts adopted a second emergency regulation imposing similar requirements. *See* Mass. Dep't of Revenue, Technical Information Release 20-10, *Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (July 21, 2020), https://bit.ly/3l6Q05Q.

41. That same day, Massachusetts also proposed a formal administrative rule ("Proposed Rule"), which would impose the same requirements over a longer period (until the earlier of December 31, 2020 or 90 days after the Governor ended the state of the emergency). *See* 830 C.M.R. 62.5A3:

Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue (July 21, 2020), https://bit.ly/2SXirY4.

42. The Proposed Rule declared: "[A]ll compensation received for services performed by a non-resident 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 subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2." *Id.* at 830 CMR 62.5A.3(3).

43. The Proposed Rule defined "Pandemic-Related Circumstances" broadly to include, *inter alia*, "any . . . 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." *Id.* at 830 CMR 62.5A.3(2).

44. The Proposed Rule drew strong opposition during the comment period. More than 100 individuals, including nonresidents and legislators, testified at a hearing to review the Proposed Rule. Many criticized Massachusetts for "attempting to balance the budget on the backs of hard-working

Granite Staters." Greg Moore, *Testimony for Massachusetts Dep't of Revenue, Rulings & Regs. Bureau* (Aug. 27, 2020), https://bit.ly/3j9EqWg.

45. The New Hampshire Attorney General's office submitted comments opposing the Proposed Rule, pointing out that the Proposed Rule unconstitutionally imposed a tax on New Hampshire residents working entirely within New Hampshire and "infringe[d] upon the State of New Hampshire's fundamental interests as a sovereign." *See* N.H. Atty. Gen. Gordon MacDonald, *Comments on Proposed Regulation 830 CMR 62.5A.3*, 3 (Aug. 21, 2020).

46. The New Hampshire Department of Business and Economic Affairs submitted similar comments criticizing the Proposed Rule. *See* New Hampshire Department of Business and Economic Affairs, *Re: Proposed Regulation Relative to Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*, 2 (Aug. 21, 2020) (noting that the proposed rule "does not reflect the realities of how work is being accomplished" during these difficult times).

47. Despite these objections, on October 16, 2020, Massachusetts published and approved the final rule ("Tax Rule"), largely as proposed. *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue, (Oct. 16, 2020), https://bit.ly/31fgB9r. The Tax Rule took effect immediately.

D. New Hampshire's Strong Interest in Challenging the Tax Rule.

48. New Hampshire has a strong interest in eliminating the Tax Rule, for multiple reasons.

49. *First*, the Tax Rule infringes on New Hampshire's sovereign right to control its own tax and economic policies and undermines the strategy New Hampshire has deliberately employed to provide current and prospective businesses and residents with the New Hampshire Advantage.

50. New Hampshire has never imposed an income tax on its residents.[1] *See* N.H. Dep't of Revenue, *Taxpayer Assistance—Overview of New Hampshire Taxes*, https://bit.ly/2ET6i2T.

51. This longstanding policy choice is a fundamental part of the New Hampshire Advantage central to New Hampshire's sovereign identity, which distinguishes New Hampshire regionally and nationally.

52. By unlawfully levying an income tax on a sizable percentage of New Hampshire residents—on income earned *in New Hampshire*—Massachusetts has overridden New Hampshire's sovereign discretion over its tax policy to unilaterally impose the precise tax on New Hampshire residents that New Hampshire

[1] New Hampshire does impose a tax on interest and dividend income, *see* N.H. Rev. Stat. Ann. ch. 77 (2016), but does not impose an income tax on residents or nonresidents' individual earned income.

itself has consistently rejected. The Tax Rule directly contradicts New Hampshire's tax policies and effectively negates the express financial incentive (tax savings) that fuels New Hampshire's successful competition for capital and labor resources.

53. A State's decision about whether and how it collects revenue is "an action undertaken in its sovereign capacity." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). In that sovereign capacity, New Hampshire has set its own revenue collection policies for the benefit of its citizens. Moreover, New Hampshire has a sovereign duty to protect the "economic and commercial interests" of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609 (1982). This, too, it accomplishes through its sovereign policy choices.

54. The New Hampshire Advantage is not merely an abstract concept. New Hampshire's sovereign policy choices have helped boost per capita income, decrease unemployment, and create a competitive advantage that motivates businesses and individuals to choose New Hampshire as their homes.

55. New Hampshire has the seventh-highest median household income of any State at $74,057 per household. U.S. Bureau of the Census, *Median Household Income by State*, https://bit.ly/34XJd8t. This median household income is significantly higher than Maine, Rhode Island, Vermont, and the national average, and is comparable to Connecticut and Massachusetts, which also rank in the top ten. *Id.*

56. Importantly, New Hampshire's competitive and successful tax policies have not adversely impacted its ability to provide important public services to its citizens. For example, New Hampshire's public education systems have been ranked the sixth highest quality in the nation by Education Week, *see* Education Week, *Quality Counts 2020, State Grades on Chance for Success: 2020 Map and Rankings*, (Jan. 21, 2020), https://bit.ly/3lNyiVm, and New Hampshire ranks in the top ten highest spending per pupil among all states, *see* U.S. Bureau of the Census, *2018 Public Elementary-Secondary Education Finance Data*, Table 11 (Apr. 14, 2020), https://bit.ly/2SZsifV.

57. Similarly, in both 2018 and 2019, New Hampshire had the second-lowest average unemployment rate in New England and, respectively, the second-lowest and third-lowest unemployment rates nationally. *See* U.S. Bureau of Labor Statistics, *Regional and State Unemployment – 2019 Annual Averages*, Table 1 (Mar. 4, 2020), https://bit.ly/3lJa1jy. In both years, New Hampshire's average employment rate was significantly lower than the national average. *See id.*

58. New Hampshire's sovereign policy choices, and the advantageous economic landscape they create, are essential to New Hampshire's economic vitality. Numerous top companies from diverse business sectors call New Hampshire home. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Top Companies*, https://bit.ly/34QTwes. New Hampshire's

tax policies are also central to its efforts to motivate businesses to relocate to or expand within the State. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Why New Hampshire*, https://bit.ly/3lFTRHy.

59. The tax policies at the core of the New Hampshire Advantage have likewise succeeded in encouraging individuals and families to move to the State. Tens of thousands of people move to New Hampshire each year. Lori Wright, Univ. of New Hampshire, New Hampshire Agricultural Experiment Station, *Migration is Biggest Driver of Population Change in New Hampshire* (Nov. 19, 2019), https://bit.ly/33KHK63. In 2018, more than 20,000 people moved to New Hampshire from Massachusetts alone. U.S. Bureau of the Census, *State to State Migration Flows*, Table 1 (July 20, 2020), https://bit.ly/3dwuzZL.

60. A significant number of those new residents continue to work for Massachusetts-based employers, and many explicitly cite New Hampshire's tax laws as a reason why they moved. *See* Kenneth Johnson, *Why People Move to and Stay in New Hampshire*, Univ. of New Hampshire, Carsey School of Public Policy (Summer 2020), https://bit.ly/33pF3GB.

61. Indeed, tax experts agree that New Hampshire's tax policies have been key to "attracting new businesses and . . . generating economic and employment growth." Jared Walczak, *2020 State Business Tax Climate Index* at 8, Tax Foundation (Oct.

21, 2019), https://bit.ly/3dkZszV; *see also* Joe Horvath, *Why New Hampshire Attracts More Wealth and Commerce Than Maine*, Maine Policy Institute (June 22, 2016), https://bit.ly/33R2oBr ("Maine and New Hampshire are similar states," yet "New Hampshire . . . is outperforming Maine" because of "better economic policy").

62. By reaching across its borders into the wallets of New Hampshire residents, Massachusetts takes direct aim at New Hampshire's policy choices as a sovereign, and the New Hampshire Advantage that has resulted from those choices. Through the Tax Rule, Massachusetts effectively imposes its income tax in a State in which no comparable tax exists.

63. Massachusetts' actions undermine New Hampshire's efforts to maintain attractive economic conditions that motivate new businesses and workers to relocate to the State and existing businesses to expand within the State.

64. The Tax Rule also exacerbates the burden on New Hampshire's public services. The COVID-19 pandemic has increased demand for New Hampshire's government services generally, and work-from-home policies mean that tens of thousands of individuals are now exclusively relying on *New Hampshire*'s public services—including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more—rather than Massachusetts'. Yet the Tax Rule ensures that those individuals continue to support public services in *Massachusetts* that they no longer use.

65. Massachusetts' actions harm the fabric of New Hampshire's communities. In recent years, young people and their families have flocked to New Hampshire to take advantage of the State's favorable policies and high quality of life. This migration is "important to New Hampshire's demographic future." Johnson, *supra*. These new residents bring tremendous energy and a wealth of new ideas to the State and further the State's longstanding culture of innovation in the economic and education sectors. The Tax Rule's attack on New Hampshire's migration incentives puts all these gains at risk.

66. In short, Massachusetts has taken aim at a defining feature of New Hampshire's sovereign identity through unconstitutional means. For this reason alone, New Hampshire has an existential interest, as a sovereign, in eliminating the Tax Rule.

67. *Second*, and relatedly, the Tax Rule harms New Hampshire's ability to recruit individuals to work for its state government.

68. More than 17,000 people work for the State of New Hampshire. Every day, New Hampshire state employees ensure public safety through police, fire, and rescue services, maintain public transportation, operate state courts, run New Hampshire's university system, and much more.

69. Many of the employees who New Hampshire recruits have spouses or other family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New Hampshire). If these families will be

forced to pay Massachusetts income taxes regardless where their work is performed, many will choose to live in Massachusetts.

70. New Hampshire has an interest, as a sovereign, in continuing to recruit and retain these individuals and their families.

71. *Finally*, the Tax Rule endangers public health in New Hampshire.

72. In March 2020, through his executive order, Governor Baker sent millions of workers home. As a result, tens of thousands of New Hampshire residents who had been traveling to Massachusetts to work were required to perform their duties from New Hampshire. And even now, when governments have rolled back many pandemic-related restrictions, working from home remains best practice for thousands of New Hampshire residents. For these residents, this shift in location is not merely a matter of preference or convenience, but rather required or encouraged by the government or their employers to protect the public health.

73. If these residents had *chosen* to work at home prior to the pandemic, any income they earned while working in New Hampshire would not be taxed as Massachusetts income.

74. Under the Tax Rule, however, income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income.

75. And while the Tax Rule purportedly applies solely to remote work resulting from "Pandemic-Related Circumstances," that term is defined so broadly that seemingly *any person* who transitions to working from home for *any reason* while the Tax Rule is in effect remains subject to Massachusetts income tax for work performed in New Hampshire. *See* Tax Rule, 830 CMR 62.5A.3(2) (defining "Pandemic-Related Circumstances" 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 830 CMR 62.5A.3 is in effect").

76. In other words, the Tax Rule both penalizes individuals who are working from home at the direct request of the Massachusetts Governor and, more generally, disincentivizes *all* individuals from pursuing alternative work arrangements at a time when health officials continue to stress the importance of social distancing and other restrictions on in-person interactions.

77. Massachusetts has suggested that the Tax Rule is merely designed to maintain the status quo until the pandemic abates. This suggestion is belied by the definition of "Pandemic-Related Circumstances" in the Tax Rule, which inevitably sweeps up workers who are remote for reasons entirely unrelated to the pandemic. Thus, while Massachusetts paints the Tax Rule as a stopgap

measure designed to bridge a finite period of uncertainty, it in fact reflects an aggressive attempt to impose Massachusetts income tax within the borders of a coequal sovereign. The pandemic in no way alters this fact.

78. Yet, the pandemic continues to take its toll on Granite Staters. More than 9,000 New Hampshire residents have contracted the virus and more than 450 have died from it. *See* N.H. Dep't of Health & Human Servs., *COVID-19*, https://bit.ly/36s2jG4.

79. New Hampshire has a direct interest in protecting its citizens from the continued spread of the virus by incentivizing residents to work from home. *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (a core "function" of the State is to "guard the public health" of its citizens); *see also North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) ("This Court has entertained [claims] by one state to enjoin . . . another" when the latter state's actions are "dangerous to the health of the inhabitants of the former.").

80. The Tax Rule undermines that interest by penalizing New Hampshire residents for following public health requirements and recommendations and incentivizing New Hampshire residents to travel across state borders.

81. New Hampshire has a strong interest in challenging the Tax Rule for this reason as well.

82. These serious harms to New Hampshire demonstrate the need for this Court's original

jurisdiction. This action "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction.'" *Wyoming v. Oklahoma*, 502 U.S. at 451 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)) (exercising original jurisdiction over challenge to Oklahoma law under the Commerce Clause).

83. Indeed, this Court has not hesitated to entertain original actions over challenges by States to another State's taxes. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398 (U.S. 1992) (exercising original jurisdiction over a suit brought by Massachusetts and other states to challenge a New Hampshire tax); *Maryland v. Louisiana*, 451 U.S. at 756 (exercising original jurisdiction over a State challenge to a Louisiana tax). This case is equally important.[2]

[2] Although the Tax Rule expires on December 31, 2020, that will not moot this case. The legitimacy of the 2020 tax would still be at issue. Moreover, Massachusetts has already extended the rule twice over the vocal opposition of New Hampshire officials and residents, and it will surely do so again. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (case not moot when issue is "capable of repetition, yet evading review"). Further, the mere existence of this aggressive incursion into New Hampshire's sovereign jurisdiction, if allowed to stand, will cast a shadow over the New Hampshire Advantage in the future.

CAUSES OF ACTION

COUNT I:
THE COMMERCE CLAUSE

84. Plaintiff incorporates all its prior allegations.

85. The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3.

86. But the clause also has been read as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

87. This construction serves the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id*. at 179-80.

88. A State's taxation of nonresidents will survive scrutiny under the Commerce Clause only if it meets four requirements. The State's tax must be (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned"; (3) non-discriminatory—*i.e.*, it must not "discriminate against interstate commerce"; and (4) "fairly related to the

services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

89. If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398, at *21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).

90. The Tax Rule fails all four prongs.

91. It fails the first prong because when a New Hampshire resident is performing work entirely within New Hampshire, Massachusetts lacks the requisite minimum connection with either the worker or her activity. *Allied-Signal, Inc.*, 504 U.S. at 777–78. "Substantial nexus" requires that "there must be a connection to the *activity itself*, rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (emphasis added). The Tax Rule, in contrast, imposes a tax based solely on the location of the employer regardless of the work being done and where. Indeed, that is its very point: to recapture income on activity that *used to be* performed in Massachusetts. Because the Tax Rule purports to tax nonresidents on income earned from activity lacking any connection with Massachusetts, no "substantial nexus" exists.

92. The Tax Rule also fails the second prong of *Complete Auto*'s test, which requires that a tax must be "fairly apportioned." This "ensure[s] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989), *abrogated on other grounds by Wynne*, 135 S. Ct. at

1798. This prong is not satisfied "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Oklahoma Tax Comm'n*, 514 U.S. at 184. The test, in other words, rejects the possibility of double taxation.

93. Through the Tax Rule, Massachusetts imposes a tax on activity that is occurring *in New Hampshire*. New Hampshire has the authority and prerogative to tax that income. That New Hampshire has decided not to exercise this authority over its own citizens is not a license for Massachusetts to do so; the mere possibility of double taxation is forbidden under the Commerce Clause. *See, e.g., Evco v. Jones*, 409 U.S. 91, 94 (1972) (state tax on the proceeds of out-of-state sales violated the Commerce Clause where it created a "risk of a double tax burden").

94. Simply put, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id.*

95. For similar reasons, the Tax Rule fails *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. In *Wynne*, this Court struck down a comparable Maryland tax scheme that "had the potential to result in discriminatory double taxation of income earned

out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." 135 S. Ct. at 1795. The Court supported its conclusion with reference to similar invalidations in *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939), *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653 (1948), noting that "[i]n all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate over interstate economic activity." *Wynne*, 135 S. Ct. at 1795.

96. In *Wynne*, this Court applied the Commerce Clause's "internal consistency" test to strike down the burdensome tax scheme. The Court stated that "[t]his test, which helps courts identify tax schemes that discriminate against interstate commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1802 (quoting *Oklahoma Tax Comm'n*, 514 U.S. at 179).

97. The complex Massachusetts tax scheme under the Tax Rule fails the internal consistency test. If every state imposed a regime like the Tax Rule, a taxpayer who confined her activity to one State would pay a single tax on her income to the State where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across state lines to earn her income would pay a double tax on

such income, one to her State of residence and another to the State in which she earned the income. As a result, "interstate commerce would be taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed a rule similar to the Tax Rule, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to move between States or accept flexible working assignments. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

98. Finally, the Tax Rule fails *Complete Auto*'s fourth prong, which requires the state tax to be "fairly related to the services provided by the State." 430 U.S. at 279.

99. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citation omitted).

100. Under the Tax Rule, New Hampshire residents are taxed as though they are travelling to and working in Massachusetts—even if they never set foot in the State.

101. The Tax Rule thus is not in "proper proportion" to New Hampshire residents' "activities within [Massachusetts] and, therefore, to their consequent enjoyment of the opportunities and

protections which the State has afforded in connection with those activities." *Id.* (citation omitted).

102. Because Massachusetts' tax is not "assessed in proportion to a taxpayer's activities or presence in a State," the Tax Rule unconstitutionally requires New Hampshire residents to "shoulder[] [more than their] fair share." *Id.* at 627.

103. The Tax Rule accordingly violates the Commerce Clause.

COUNT II:
THE DUE PROCESS CLAUSE

104. Plaintiff incorporates all its prior allegations.

105. Due process "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.*, 139 S. Ct. at 2219.

106. The Court has long recognized that the Due Process Clause prohibits a State from "tax[ing] value earned outside its borders." *Allied-Signal Inc.*, 504 U.S. at 778 (1992). That is because the "seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co.*, 347 U.S. at 342.

107. To survive a challenge under the Due Process Clause, there must be "'some definite link, some minimum connection, between a [S]tate and the person, property or transaction it seeks to tax.'" *Allied-*

Signal Inc., 504 U.S. at 777 (quoting *Miller Brothers Co.*, 347 U.S. at 344-45).

108. In the case of a tax on an activity, "there must be a connection to the *activity itself*, rather than a connection only to the *actor*, the State seeks to tax." *Id.* at 778 (emphasis added).

109. In addition, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Moorman Mfg. Co.*, 437 U.S. at 273 (citation omitted). If the connection is too attenuated, the state tax will violate the Due Process Clause. *See id.*

110. The Tax Rule violates these fundamental requirements of due process. It requires no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer. Put differently, the Tax Rule bears no "fiscal relation to [the] protection, opportunities and benefits given by the state." *Wisconsin*, 311 U.S. at 444.

111. New Hampshire residents earning a living from home offices in New Hampshire are not protected by Massachusetts police, fire, and rescue services, do not seek education or housing opportunities provided by Massachusetts, and do not enjoy the benefits of Massachusetts roads, public transportation, or utilities. They do not "earn" income "in Massachusetts" any more than an outsourced customer service operator in a foreign country "earns" income "in the United States" by working for a U.S.-based employer.

112. The Tax Rule accordingly violates the Due Process Clause of the Fourteenth Amendment.

PRAYER FOR RELIEF

WHEREFORE, New Hampshire requests that the Court order the following relief:

a) Declare that the Tax Rule violates the Commerce Clause and the Due Process Clause;

b) Preliminarily and permanently enjoin Massachusetts from enforcing the Tax Rule;

c) Enter an injunction requiring Massachusetts to refund all funds, including interest, collected from nonresidents pursuant to the Tax Rule;

d) Award costs and reasonable attorney's fees; and

e) Grant any other relief available at law or equity.

Respectfully submitted,

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

October 19, 2020

No. _____, Original

IN THE

Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant.

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

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

October 19, 2020

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INTRODUCTION

The Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty. For decades, New Hampshire has made the deliberate policy choice to reject a broad-based personal earned income tax or a general sales tax. Not only does New Hampshire sit as an island among the New England States, but this choice differentiates New Hampshire from nearly every other State in the union. Indeed, just one other State—Alaska—has such a tax structure.

New Hampshire's sovereign policy choice has had profound effects. It has resulted in, on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents. In other words, it has helped create a "New Hampshire Advantage" that is central to New Hampshire's identity. It is through this advantage that New Hampshire successfully distinguishes itself as a sovereign and competes in the market for people, businesses, and economic prosperity.

In the middle of a global pandemic, Massachusetts has taken deliberate aim at the New Hampshire Advantage by purporting to impose *Massachusetts* income tax on New Hampshire residents for income earned while working within New Hampshire. Upending decades of consistent practice, Massachusetts now taxes income earned entirely outside its borders. Through its unprecedented action, Massachusetts has unilaterally imposed an income tax within New Hampshire that

New Hampshire, in its sovereign discretion, has deliberately chosen not to impose.

New Hampshire brings this case to rectify Massachusetts' unconstitutional, extraterritorial conduct, which ignores deliberate and unique policy choices that are solely New Hampshire's to make.

On April 21, 2020, Massachusetts adopted a temporary emergency regulation declaring (for the first time) that nonresident income received for services performed *outside Massachusetts* would be subject to the State's income tax. This emergency regulation applied retroactively to March 10, 2020. Massachusetts extended this regulation on a temporary basis in July and, most recently, adopted it as a final rule, effective October 16, 2020 (the "Tax Rule").

This extraterritorial assertion of taxing power is unconstitutional. Massachusetts claims the authority to tax New Hampshire residents who earn their incomes from activities they undertake solely within New Hampshire. For example, the *entire* salary of a New Hampshire resident who commuted to work full time in Boston in February but has not set foot in the Commonwealth for more than eight months continues to be subject to the Massachusetts state income tax as if he were still working every day in Boston.

This Court has long recognized that States have limited power to tax nonresidents. Both the Commerce Clause and the Due Process Clause prohibit the States from "tax[ing] value earned outside [their] borders."

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 777 (1992). A State's reach beyond its borders to take money from nonresidents "under the pretext of taxation when there is no jurisdiction or power to tax is simple confiscation." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954). By taxing income earned entirely outside of its borders, Massachusetts subjects Granite Staters to simple but unconstitutional confiscation.

This Court's exercise of its original jurisdiction is urgently needed. New Hampshire has fundamental sovereign interests at stake. Indeed, Massachusetts' extraterritorial Tax Rule imposes an income tax on citizens of a state who are not, and historically have not been, subject to one, and who have selected New Hampshire (at least in part) for that reason. New Hampshire has long relied on its sovereign policy choices to create the New Hampshire Advantage, which, in turn, attracts both businesses and workers to the State. The Tax Rule is a direct attack on this New Hampshire Advantage. It disrespects New Hampshire's sovereignty. It undermines an incentive for businesses to locate capital and jobs in New Hampshire, a motivation for families to relocate to New Hampshire's communities, and the State's ability to pay for public services. It weakens efforts to recruit individuals to work for the state government. It endangers public health in New Hampshire by penalizing workers for following public health guidance and working from home rather than from their offices. And it undermines New Hampshire's sovereign duty to protect the economic and commercial interests of its citizens.

While the Tax Rule has a set expiration date, there is significant reason to believe the underlying shift in policy will survive the current pandemic. To date, Massachusetts has twice extended the Tax Rule, first as a temporary measure and now as a final rule. Further, the pandemic has drastically altered how work is conducted, with countless Americans now performing job functions at home that they had previously performed only at their places of employment. This Court's ongoing decision to conduct oral arguments by telephone illustrates this point. And some companies are already announcing that remote work will remain a permanent option following the pandemic. *See, e.g.*, *Microsoft makes remote work option permanent*, BBC (Oct. 9, 2020), https://bbc.in/2H1fPpX. Thus, it is likely that Massachusetts will continue to impose the Tax Rule or some similar policy long after the pandemic abates.

New Hampshire has no choice but to bring this action in this Court. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This Court therefore is the *only* forum that can hear New Hampshire's claims. The Court should exercise its jurisdiction to hear this dispute and grant New Hampshire declaratory and injunctive relief against Massachusetts' unconstitutional attempt to tax New Hampshire residents.

Alternatively, the Court should consider reexamining its modern understanding that its original jurisdiction is discretionary. Article III establishes this Court's original jurisdiction in

mandatory terms: "In all cases . . . in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction." Moreover, because Congress has given this Court "exclusive" jurisdiction over disputes between States, refusing to hear such disputes is not only textually suspect, but also inequitable. The Court should grant the motion for leave to file the bill of complaint.

STATEMENT OF THE CASE

A. The Limited Power of States to Tax Nonresidents

The power to tax may be "essential to the very existence of government, but the legitimacy of that power requires drawing a line between taxation and mere unjustified confiscation." *N. Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2219-20 (2019) (citations omitted). States impose taxes on their residents "to provide for the preservation of peace, good order, and health, and the execution of such measures as conduce to the general good of [their] citizens." *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878). This reflects a bargain between a State and its citizens: the citizens agree to pay a percentage of their worth in exchange for the State's commitment to provide protection and services.

A State's power to tax its residents is far-reaching. A State like Massachusetts "may, and does, exert its taxing power over [residents'] income from all sources, whether within or without the State." *Shaffer v. Carter*, 252 U.S. 37, 57 (1920), *abrogated on other*

grounds by Comptroller of Treasury of Maryland v. Wynne, 135 S. Ct. 1787 (2015). But a State's power to tax nonresidents is far more circumscribed. Under both the Commerce Clause and the Due Process Clause, a State has no authority to "tax value earned outside its borders." *Allied-Signal, Inc. v. Director, Div. of* Taxation, 504 U.S. 768, 777 (1992). A State's power to tax an individual's activities is justified only by the "'protection, opportunities and benefits' the State confers on those activities." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). Thus, to pass constitutional muster, a state tax on nonresidents must be, among other things, "fairly apportioned" and "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (requiring "income attributed to the State for tax purposes [to] be rationally related to values connected with the taxing State").

The tax policies of the various States reflect these constitutional constraints. Nearly every State that imposes a broad-based personal income tax on earned income requires nonresidents to pay tax only on income they earned "within the State." Jerome R. Hellerstein & Walter Hellerstein, *State Taxation*, ¶20.05[4](a) (3d ed. 2020). States have various methods of determining when income is earned "within the State," but nearly all methods prevent taxation of nonresident income earned beyond their borders. *Id.* States' rules for determining the portion of a nonresident employee's compensation that is attributable to the State "generally reflect the relative

amount of time that the nonresident employee spends working in the state, or the amounts attributable to the specific services provided within the state." *Id.*; *see, e.g.,* W. Va. Code St. R. §110-21-32.2.1.2.e (taxing nonresidents based on "the ratio of days worked within West Virginia to the total days worked over the period during which the compensation was earned"). Income earned by a nonresident who works *outside* of the State is not subject to taxation by any State other than the residence State. *See* Hellerstein, *supra*, at ¶ 20.05[4].

B. Massachusetts' Prior Tax Policies

Massachusetts long respected these constitutional restraints. Under Massachusetts law, nonresidents with an annual "Massachusetts gross income" of more than $8,000 are required to pay state taxes on their income. *See* M.G.L. c. 62C, §6. The "Massachusetts gross income" is determined "solely with respect to items of gross income from sources within the commonwealth of such person." M.G.L. c. 62 §5A(a). Massachusetts currently taxes earned income at 5%. *See Income Tax Rate Drops to 5% on January 1, 2020*, Mass. Dep't of Rev. (Dec. 23, 2019), https://bit.ly/3cRwQ11.

Until recently, Massachusetts regulations made clear that nonresidents owed taxes only for the work they performed while physically within Massachusetts. Under the prior regime, "[w]hen a non-resident employee is able to establish the exact amount of pay received for services performed in Massachusetts, that amount is the amount of Massachusetts source income." 830 CMR 62.5A.1(5)(a)

(2008). When a precise determination was not possible, Massachusetts regulations required allocation of income between taxable Massachusetts sources and non-taxable out-of-state sources by using a fraction, "the numerator of which is the number of days spent working in Massachusetts and the denominator of which is the total working days." *Id.* "Compensation rendered by a non-resident wholly outside Massachusetts, even though payment may be made from an office or place of business in Massachusetts of the employer, [was] not subject to the individual income tax." Mass. Dep't of Revenue, Letter Ruling 84-57, *Withholding for Non-Resident Employees* (Aug 2., 1984), https://bit.ly/3j6bnDe.

This allocation rule respected New Hampshire's rights, as a coequal sovereign in our federal system, to enact its *own* tax policies upon which its residents may rely. It also protected New Hampshire residents from paying unconstitutional taxes on income earned outside of Massachusetts. In those ways, the policy harmonized Massachusetts' sovereign interests with the interests of nonresidents and its neighboring States.

C. Massachusetts' Taxation of New Hampshire Residents Working in New Hampshire

That harmony recently came to an abrupt end. In March 2020, Massachusetts, like many States, declared a state of emergency in response to the COVID-19 pandemic. *See Governor's Declaration of Emergency*, Massachusetts Office of the Governor (Mar. 10, 2020), https://bit.ly/2GuugSM. Pursuant to

that declaration, Governor Baker ordered all businesses that did not provide "COVID-19 Essential Services" to cease in-person operations by March 24, 2020. *See Governor Charlie Baker Orders All Non-Essential Business to Cease in Person Operation, Directs the Department of Public Health to Issue Stay at Home Advisory for Two Weeks*, Massachusetts Office of the Governor (Mar. 23, 2020), https://bit.ly/30gWuY4.

Massachusetts businesses and their employees followed that order, and many employees transitioned to working from home indefinitely. In particular, tens of thousands of Granite Staters who formerly commuted to Massachusetts began working from home in New Hampshire. Instead of relying on Massachusetts' services during the workweek—police and fire protection, ambulance services, roads, and more—these individuals now consumed those same services within New Hampshire. Thus, if an emergency arose, these workers called New Hampshire's police and ambulance services, not Massachusetts'. Because New Hampshire has made a fundamental policy decision, in its sole sovereign discretion, not to impose an income tax, it pays for these services through various other revenue sources.

As of 2017, more than 103,000 New Hampshire residents worked for Massachusetts-based companies, accounting for more than 15 percent of New Hampshire workers. U.S. Bureau of the Census, *Longitudinal Employer Household Dynamics*, https://bit.ly/2HiSLCv. Those workers generated billions of dollars of income and paid hundreds of

millions of dollars in Massachusetts state taxes. Under Massachusetts' longstanding allocation policy, Massachusetts taxed the portion of income that New Hampshire residents earned while physically working *in Massachusetts*. New Hampshire residents working for Massachusetts enterprises were not taxed on income earned while physically working *in New Hampshire*.

On April 21, 2020, Massachusetts published an emergency regulation taxing—for the first time—income *earned in New Hampshire*. Having already required or encouraged most employees to work from home, the Commonwealth declared:

> [F]or the duration of the Massachusetts COVID-19 state of emergency, all compensation received for personal 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, during such emergency, is performing such services from a location outside Massachusetts due solely to the Massachusetts COVID-19 state of emergency, will continue to be treated as Massachusetts source income subject to personal income tax under M.G.L. c. 62 and personal income tax withholding.

Mass. Dep't of Revenue, Technical Information Release 20-5, *Massachusetts Tax Implications of an*

Employee Working Remotely due to the COVID-19 Pandemic (Apr. 21, 2020), https://bit.ly/3n2BrCp. Massachusetts imposed the emergency regulation retroactive to March 10, 2020. *Id*. By its terms, the regulation would expire on the date on which the Governor gave notice that the state of emergency was no longer in effect. *Id.*

Under Massachusetts law, emergency regulations are valid for only three months. *See* M.G.L. c. 30A, §2. Accordingly, on July 21, 2020, Massachusetts adopted a second emergency regulation imposing similar requirements. *See* Mass. Dep't of Revenue, Technical Information Release 20-10, *Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic* (July 21, 2020), https://bit.ly/3l6Q05Q.

That same day, Massachusetts proposed a formal administrative rule ("Proposed Rule"), which would impose the same requirements over a longer period (until the earlier of December 31, 2020 or 90 days after the Governor ended the state of the emergency). *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue (July 21, 2020), https://bit.ly/2SxirY4. The Proposed Rule declared:

> [A]ll compensation received for services performed by a non-resident 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 subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2.

Id. at 830 CMR 62.5A.3(3). The Proposed Rule defined "Pandemic-Related Circumstances" broadly to include, *inter alia*, "any . . . 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." *Id.* at 830 CMR 62.5A.3(2).

The Proposed Rule drew strong opposition during the comment period. More than 100 individuals, including nonresidents and legislators, testified at a hearing to review the Proposed Rule. Many criticized Massachusetts for "attempting to balance the budget on the backs of hard-working Granite Staters." Greg Moore, *Testimony for Massachusetts Dep't of Revenue, Rulings & Regs. Bureau* (Aug. 27, 2020), https://bit.ly/3j9EqWg.

The New Hampshire Attorney General's office submitted comments opposing the Proposed Rule, pointing out that the Proposed Rule

unconstitutionally imposed a tax on New Hampshire residents working entirely within New Hampshire and "infringe[d] upon the State of New Hampshire's fundamental interests as a sovereign." *See* N.H. Atty. Gen. Gordon MacDonald, *Comments on Proposed Regulation 830 CMR 62.5A.3*, 3 (Aug. 21, 2020). The New Hampshire Department of Business and Economic Affairs submitted similar comments criticizing the Proposed Rule. *See* New Hampshire Department of Business and Economic Affairs, *Re: Proposed Regulation Relative to Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic*, 2 (Aug. 21, 2020) (noting that the proposed rule "does not reflect the realities of how work is being accomplished" during these difficult times).

Despite these objections, on October 16, 2020, Massachusetts published and approved the final rule ("Tax Rule") largely as proposed. *See* 830 C.M.R. 62.5A3: Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic, Mass. Dep't of Revenue, (Oct. 16, 2020), https://bit.ly/31fgB9r. The Tax Rule took effect immediately.

ARGUMENT

Article III of the U.S. Constitution provides that "[i]n all Cases . . . in which a state shall be a Party, the supreme Court shall have original Jurisdiction." U.S. Const. art. III, § 2, cl. 2. In addition, under 28 U.S.C. §1251(a), "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. §1251(a). A plaintiff

seeking to bring an original action in this Court must first file a motion for leave to file a bill of complaint. *See* S. Ct. R. 17.

The Court should grant New Hampshire's motion for leave to file a bill of complaint because New Hampshire's bill of complaint raises issues of serious importance and no alternative forum exists for resolving its claims. In the alternative, the Court should grant leave to file a bill of complaint because Article III requires the Court to exercise its original jurisdiction over disputes between two States.

I. The Bill of Complaint Presents Issues of Serious Importance that Warrant the Court's Original Jurisdiction.

This Court examines two factors when deciding whether to exercise its original jurisdiction. First, the Court looks to "the nature of the interest of the complaining State, focusing on the seriousness and dignity of the claim." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (citations omitted). Second, the Court explores "the availability of an alternative forum in which the issue tendered can be resolved." *Id*. Both factors support exercising jurisdiction here.

A. New Hampshire's Strong Interest and the Seriousness and Dignity of Its Claims Warrant the Exercise of the Court's Original Jurisdiction.

1. New Hampshire has a strong interest in eliminating the Tax Rule, for multiple reasons. *First*, the Tax Rule infringes on New Hampshire's sovereign right to control its own tax and economic policies and

undermines the strategy New Hampshire has deliberately employed to provide current and prospective businesses and residents with the New Hampshire Advantage. New Hampshire has never imposed an income tax on its residents.[1] *See* N.H. Dep't of Revenue, *Taxpayer Assistance—Overview of New Hampshire Taxes*, https://bit.ly/2ET6i2T. This longstanding policy choice is a fundamental part of the New Hampshire Advantage central to its sovereign identity, which distinguishes New Hampshire regionally and nationally.

By unlawfully levying an income tax on a sizable percentage of New Hampshire residents—on income earned *in New Hampshire*—Massachusetts 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. The Tax Rule directly contradicts New Hampshire's tax policies and effectively negates the express financial incentive (tax savings) that fuels New Hampshire's successful competition for capital and labor resources. A State's decision about whether and how it collects revenue is "an action undertaken in its sovereign capacity." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992). In that sovereign capacity, New Hampshire has set its own revenue collection policies for the benefit of its citizens. Moreover, New Hampshire has a sovereign

[1] New Hampshire does impose a tax on interest and dividend income, *see* N.H. Rev. Stat. Ann. ch, 77 (2016), but does not impose an income tax on residents or nonresidents' individual earned income.

duty to protect the "economic and commercial interests" of its citizens. *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 609 (1982). This, too, it accomplishes through its sovereign policy choices.

The New Hampshire Advantage is not merely an abstract concept. New Hampshire's sovereign policy choices have helped boost per capita income, decrease unemployment, and create a competitive advantage that motivates businesses and individuals to choose New Hampshire as their homes. New Hampshire has the seventh-highest median household income of any State at $74,057 per household. U.S. Bureau of the Census, *Median Household Income by State*, https://bit.ly/34XJd8t. This median household income is significantly higher than Maine, Rhode Island, Vermont, and the national average, and is comparable to Connecticut and Massachusetts, which also rank in the top ten. *Id.*

Importantly, New Hampshire's competitive and successful tax policies have not adversely impacted its ability to provide important public services to its citizens. For example, New Hampshire's public education systems have been ranked the sixth highest quality in the nation by Education Week, *see* Education Week, *Quality Counts 2020, State Grades on Chance for Success: 2020 Map and Rankings*, (Jan. 21, 2020), https://bit.ly/3lNyiVm, and New Hampshire ranks in the top ten highest spending per pupil among all states, *see* U.S. Bureau of the Census, *2018 Public Elementary-Secondary Education Finance Data*, Table 11 (Apr. 14, 2020), https://bit.ly/2SZsifV.

Similarly, in both 2018 and 2019, New Hampshire had the second-lowest average unemployment rate in New England and, respectively, the second-lowest and third-lowest unemployment rates nationally. *See* U.S. Bureau of Labor Statistics, *Regional and State Unemployment – 2019 Annual Averages*, Table 1 (Mar. 4, 2020), https://bit.ly/3lJa1jy. In both years, New Hampshire's average employment rate was significantly lower than the national average. *See id.*

New Hampshire's sovereign policy choices, and the advantageous economic landscape they create, are essential to New Hampshire's economic vitality. Numerous top companies from diverse business sectors call New Hampshire home. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Top Companies*, https://bit.ly/34QTwes. New Hampshire's tax policies are also central to its efforts to motivate businesses to relocate to or expand within the State. *See* N.H. Division of Economic Development, N.H. Dep't of Business and Economic Affairs, *Why New Hampshire*, https://bit.ly/3lFTRHy.

The tax policies at the core of the New Hampshire Advantage have likewise succeeded in encouraging individuals and families to move to the State. Tens of thousands of people move to New Hampshire each year. Lori Wright, Univ. of New Hampshire, New Hampshire Agricultural Experiment Station, *Migration is Biggest Driver of Population Change in New Hampshire* (Nov. 19, 2019), https://bit.ly/33KHK63. In 2018, more than 20,000

people moved to New Hampshire from Massachusetts alone. U.S. Bureau of the Census, *State to State Migration Flows*, Table 1 (July 20, 2020), https://bit.ly/3dwuzZL.

A significant number of those new residents continue to work for Massachusetts-based employers, and many explicitly cite New Hampshire's tax laws as a reason why they moved. *See* Kenneth Johnson, *Why People Move to and Stay in New Hampshire*, Univ. of New Hampshire, Carsey School of Public Policy (Summer 2020), https://bit.ly/33pF3GB. Indeed, tax experts agree that New Hampshire's tax policies have been key to "attracting new businesses and . . . generating economic and employment growth." Jared Walczak, *2020 State Business Tax Climate Index* at 8, Tax Foundation (Oct. 21, 2019), https://bit.ly/3dkZszV; *see also* Joe Horvath, *Why New Hampshire Attracts More Wealth and Commerce Than Maine*, Maine Policy Institute (June 22, 2016), https://bit.ly/33R2oBr ("Maine and New Hampshire are similar states," yet "New Hampshire . . . is outperforming Maine" because of "better economic policy").

By reaching across its borders into the wallets of New Hampshire residents, Massachusetts takes direct aim at New Hampshire's policy choices as a sovereign, and the New Hampshire Advantage that has resulted from those choices. Through the Tax Rule, Massachusetts effectively imposes its income tax in a State in which no comparable tax exists. Massachusetts' actions undermine New Hampshire's efforts to maintain attractive economic conditions that motivate new businesses and workers to relocate to

the State and existing businesses to expand within the State.

The Tax Rule also exacerbates the burden on New Hampshire's public services. The COVID-19 pandemic has increased demand for New Hampshire's government services generally, and work-from-home policies mean that tens of thousands of individuals are now exclusively relying on *New Hampshire*'s public services—including police and medical services, taxpayer-supported broadband internet, utilities, roads, and more—rather than Massachusetts'. Yet the Tax Rule ensures that those individuals continue to support public services in *Massachusetts* that they no longer use.

Massachusetts' actions harm the fabric of New Hampshire's communities. In recent years, young people and their families have flocked to New Hampshire to take advantage of the State's favorable policies and high quality of life. This migration is "important to New Hampshire's demographic future." Johnson, *supra*. These new residents bring tremendous energy and a wealth of new ideas to the State and further the State's longstanding culture of innovation in the economic and education sectors. The Tax Rule's attack on New Hampshire's migration incentives puts all these gains at risk.

In short, Massachusetts has taken aim at a defining feature of New Hampshire's sovereign identity through unconstitutional means. For this reason alone, New Hampshire has an existential interest, as a sovereign, in eliminating the Tax Rule.

Second, and relatedly, the Tax Rule harms New Hampshire's ability to recruit individuals to work for its state government. More than 17,000 people work for the State of New Hampshire. Every day, New Hampshire state employees ensure public safety through police, fire, and rescue services, maintain public transportation, operate state courts, run New Hampshire's university system, and much more. Many of the employees who New Hampshire recruits have spouses or other family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New Hampshire). If these families will be forced to pay Massachusetts income taxes regardless where their work is performed, many will choose to live in Massachusetts. New Hampshire has an interest, as a sovereign, in continuing to recruit and retain these individuals and their families.

Finally, the Tax Rule endangers public health in New Hampshire. In March 2020, through his executive order, Governor Baker sent millions of workers home. As a result, tens of thousands of New Hampshire residents who had been traveling to Massachusetts to work were required to perform their duties from New Hampshire. And even now, when governments have rolled back many pandemic-related restrictions, working from home remains best practice for thousands of New Hampshire residents. For these residents, this shift in location is not merely a matter of preference or convenience, but rather required or encouraged by the government or their employers to protect the public health.

If these residents had *chosen* to work at home prior to the pandemic, any income they earned while working in New Hampshire would not be taxed as Massachusetts income. Under the Tax Rule, however, income earned for work performed entirely within New Hampshire is taxed as *Massachusetts* source income. And while the Tax Rule purportedly applies solely to remote work resulting from "Pandemic-Related Circumstances," that term is defined so broadly that *any person* who transitions to working from home for *any reason* while the Tax Rule is in effect remains subject to Massachusetts income tax for work performed in New Hampshire. *See* Tax Rule, 830 CMR 62.5A.3(2) (defining "Pandemic-Related Circumstances" 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 830 CMR 62.5A.3 is in effect").

In other words, the Tax Rule both penalizes individuals who are working from home at the direct request of the Massachusetts Governor and, more generally, disincentivizes *all* individuals from pursuing alternative work arrangements at a time when health officials continue to stress the importance of social distancing and other restrictions on in-person interactions. Massachusetts has suggested that the Tax Rule is merely designed to maintain the status quo until the pandemic abates. This suggestion is belied by the definition of "Pandemic-Related Circumstances" in the Tax Rule, which inevitably

sweeps up workers who are remote for reasons entirely unrelated to the pandemic. Thus, while Massachusetts paints the Tax Rule as a stopgap measure designed to bridge a finite period of uncertainty, it in fact reflects an aggressive attempt to impose Massachusetts income tax within the borders of a coequal sovereign. The pandemic in no way alters this fact.

Yet, the pandemic continues to take its toll on Granite Staters. More than 9,000 New Hampshire residents have contracted the virus and more than 450 have died from it. *See* N.H. Dep't of Health & Human Servs., *COVID-19*, https://bit.ly/36s2jG4. New Hampshire has a direct interest in protecting its citizens from the continued spread of the virus by incentivizing residents to work from home. *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) (a core "function" of the State is to "guard the public health" of its citizens); *see also North Dakota v. Minnesota*, 263 U.S. 365, 373 (1923) ("This Court has entertained [claims] by one state to enjoin . . . another" when the latter state's actions are "dangerous to the health of the inhabitants of the former.").

The Tax Rule undermines that interest by penalizing New Hampshire residents for following public health requirements and recommendations and incentivizing New Hampshire residents to travel across state borders. New Hampshire has a strong interest in challenging the Tax Rule for this reason as well.

These serious harms to New Hampshire demonstrate the need for this Court's original jurisdiction. This action "precisely 'implicates serious and important concerns of federalism fully in accord with the purposes and reach of [this Court's] original jurisdiction.'" *Wyoming v. Oklahoma*, 502 U.S. at 451 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981)) (exercising original jurisdiction over challenge to Oklahoma law under the Commerce Clause). Indeed, this Court has not hesitated to entertain original actions over challenges by States to another State's taxes. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398 (U.S. 1992) (exercising original jurisdiction over a suit brought by Massachusetts and other states to challenge a New Hampshire tax); *Maryland v. Louisiana*, 451 U.S. at 756 (exercising original jurisdiction over a State challenge to a Louisiana tax). This case is equally important.[2]

2. New Hampshire's claims also are "serious" and directly tied to New Hampshire's fundamental interests as a sovereign. *Mississippi v. Louisiana*, 506 U.S. at 739. New Hampshire brings two claims—

[2] Although the Tax Rule expires on December 31, 2020, that will not moot this case. The legitimacy of the 2020 tax would still be at issue. Moreover, Massachusetts has already extended the rule twice over the vocal opposition of New Hampshire officials and residents, and it will surely do so again. *See Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (case not moot when issue is "capable of repetition, yet evading review"). Further, the mere existence of this aggressive incursion into New Hampshire's sovereign jurisdiction, if allowed to stand, will cast a shadow over the New Hampshire Advantage in the future.

under the Commerce Clause and the Due Process Clause—and it is likely to prevail on both challenges.

The Commerce Clause gives Congress the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. But the clause also has been read as "contain[ing] a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). This construction serves the Commerce Clause's purpose of "preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Id.* at 179-80.

A State's taxation of nonresidents will survive scrutiny under the Commerce Clause only if it meets four requirements. The State's tax must be (1) "applied to an activity with a substantial nexus with the taxing State"; (2) "fairly apportioned"; (3) non-discriminatory—*i.e.*, it must not "discriminate against interstate commerce"; and (4) "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). If any of these prongs is not satisfied, the state tax will be found unlawful under the Commerce Clause. *See, e.g., Connecticut v. New Hampshire*, 1992 WL 12620398, at *21-38 (Special Master finding that New Hampshire tax violated the Commerce Clause).

The Tax Rule fails all four prongs. It fails the first prong because when a New Hampshire resident is performing work entirely within New Hampshire, Massachusetts lacks the requisite minimum connection with either the worker or her activity. *Allied-Signal, Inc.*, 504 U.S. at 777-78. "Substantial nexus" requires that "there must be a connection to the *activity itself*, rather than a connection only to the actor the State seeks to tax." *Id.* at 778 (emphasis added). The Tax Rule, in contrast, imposes a tax based solely on the location of the employer regardless of the work being done and where. Indeed, that is its very point: to recapture income on activity that *used to be* performed in Massachusetts. Because the Tax Rule purports to tax nonresidents on income earned from activity lacking any connection with Massachusetts, no "substantial nexus" exists.

The Tax Rule also fails the second prong of *Complete Auto*'s test, which requires that a tax must be "fairly apportioned." This "ensure[s] that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260 (1989), *abrogated on other grounds by Wynne*, 135 S. Ct. at 1798. This prong is not satisfied "whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it." *Oklahoma Tax Comm'n*, 514 U.S. at 184. The test, in other words, rejects the possibility of double taxation.

Through the Tax Rule, Massachusetts imposes a tax on activity that is occurring *in New Hampshire*. New Hampshire has the authority and prerogative to tax that income. That New Hampshire has decided not to exercise this authority over its own citizens is not a license for Massachusetts to do so; the mere possibility of double taxation is forbidden under the Commerce Clause. *See, e.g., Evco v. Jones*, 409 U.S. 91, 94 (1972) (state tax on the proceeds of out-of-state sales violated the Commerce Clause where it created a "risk of a double tax burden"). Simply put, "there is no practical or theoretical justification" allowing Massachusetts to "export tax burdens and import tax revenues." *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. 358, 374 (1991). Indeed, "[t]he Commerce Clause prohibits this competitive mischief." *Id.*

For similar reasons, the Tax Rule fails *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. In *Wynne*, this Court struck down a comparable Maryland tax scheme that "had the potential to result in discriminatory double taxation of income earned out of state and created a powerful incentive to engage in intrastate rather than interstate economic activity." 135 S. Ct. at 1795. The Court supported its conclusion with reference to similar invalidations in *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), noting that "[i]n all three of these cases, the Court struck down a state tax scheme that might have resulted in the double taxation of income earned out of the State and that discriminated in favor of intrastate

over interstate economic activity." *Wynne*, 135 S. Ct. at 1795.

In *Wynne*, this Court applied the Commerce Clause's "internal consistency" test to strike down the burdensome tax scheme. The Court stated that "[t]his test, which helps courts identify tax schemes that discriminate against interstate commerce, 'looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.'" *Id.* at 1802 (quoting *Oklahoma Tax Comm'n*, 514 U.S. at 179). The complex Massachusetts tax scheme under the Tax Rule fails the internal consistency test. If every state imposed a regime like the Tax Rule, a taxpayer who confined her activity to one State would pay a single tax on her income to the State where she was a resident and in which she earned the income. By contrast, the taxpayer who ventured across state lines to earn her income would pay a double tax on such income, one to her State of residence and another to the State in which she earned the income. As a result, "interstate commerce would be taxed at a higher rate than intrastate commerce." *Id.* at 1791. And if every State passed a rule similar to the Tax Rule, the free movement of workers, goods, and services across state borders would suffer, as individuals would be less inclined to move between States or accept flexible working assignments. The Commerce Clause prevents precisely this type of "economic Balkanization." *Id.* at 1794.

Finally, the Tax Rule fails *Complete Auto*'s fourth prong, which requires the state tax to be "fairly related to the services provided by the State." 430 U.S. at 279. This prong mandates that "the measure of the tax be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a just share of state tax burden." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citation omitted). Under the Tax Rule, New Hampshire residents are taxed as though they are travelling to and working in Massachusetts—even if they never set foot in the State. The Tax Rule thus is not in "proper proportion" to New Hampshire residents' "activities within [Massachusetts] and, therefore, to their consequent enjoyment of the opportunities and protections which the State has afforded in connection with those activities." *Id.* (citation omitted). Because Massachusetts' tax is not "assessed in proportion to a taxpayer's activities or presence in a State," the Tax Rule unconstitutionally requires New Hampshire residents to "shoulder[] [more than their] fair share." *Id.* at 627.

The Tax Rule violates the Due Process Clause for similar reasons. Due process "centrally concerns the fundamental fairness of governmental activity." *N.C. Dep't of Rev.*, 139 S. Ct. at 2219. The Court has long recognized that the Due Process Clause prohibits a State from "tax[ing] value earned outside its borders." *Allied-Signal Inc.*, 504 U.S. at 778 (1992). That is because the "seizure of property by the State under pretext of taxation when there is no jurisdiction

or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co.*, 347 U.S. at 342.

To survive a challenge under the Due Process Clause, there must be "'some definite link, some minimum connection, between a [S]tate and the person, property or transaction it seeks to tax.'" *Allied-Signal Inc.*, 504 U.S. at 777 (quoting *Miller Brothers Co.*, 347 U.S. at 344-45). In the case of a tax on an activity, "there must be a connection to the *activity itself*, rather than a connection only to the *actor*, the State seeks to tax." *Id.* at 778 (emphasis added). In addition, the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Moorman Mfg. Co.*, 437 U.S. at 273 (citation omitted). If the connection is too attenuated, the state tax will violate the Due Process Clause. *See id.*

The Tax Rule violates these fundamental requirements of due process. It requires no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer. Put differently, the Tax Rule simply bears no "fiscal relation to [the] protection, opportunities and benefits given by the state." *Wisconsin*, 311 U.S. at 444. New Hampshire residents earning a living from home offices in New Hampshire are not protected by Massachusetts police, fire, and rescue services, do not seek education or housing opportunities provided by Massachusetts, and do not enjoy the benefits of Massachusetts roads, public transportation, or utilities. They do not "earn" income "in

Massachusetts" any more than an outsourced customer service operator in a foreign country "earns" income "in the United States" by working for a U.S.-based employer. The Tax Rule violates the Due Process Clause too.

B. No Alternative Forum Exists to Resolve These Issues.

The Court also should exercise its original jurisdiction over this case because there is no "alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Under federal law, this Court has "exclusive jurisdiction" over "all controversies between two or more States." 28 U.S.C. §1251(a). This statutory command is inflexible. As the Court has explained, any argument that another court could hear a dispute between two States "founders on the uncompromising language of 28 U.S.C. §1251(a), which gives to this Court 'original and *exclusive* jurisdiction of all controversies between two or more States." *Mississippi v. Louisiana*, 506 U.S. at 77 (quoting 28 U.S.C. §1251(a)) (emphasis in original). Simply put, this Court is the *only* forum in which New Hampshire can bring its claims. *Id.*; *see also Nebraska v. Colorado*, 136 S. Ct. 1034, 1034 (2016) (Thomas, J., dissenting) ("Federal law is unambiguous: If there is a controversy between two States, this Court—and only this Court—has jurisdiction over it.").

In addition, to New Hampshire's knowledge, there are no other cases in which this issue is currently being litigated. *Wyoming v. Oklahoma*, 502 U.S. at 451-52 (finding original jurisdiction because

"no pending action exists to which we could defer adjudication on this issue"). Nor is any federal district court likely to take up this issue. That is because the Tax Injunction Act generally prohibits "district courts" from "enjoin[ing], suspend[ing] or restrain[ing] the assessment, levy or collection of any tax under State law." 28 U.S.C. §1341. This law, however, "by its terms only applies to injunctions issued by federal district courts" and thus is inapplicable to this original action. *Maryland v. Louisiana*, 451 U.S. at 745 n.21.

It is possible that an individual from New Hampshire might challenge the Tax Rule through the administrative remedies provided by Massachusetts. *See* M.G.L.c. 62C, §§37, 39. But this is not a sufficient alternative. Again, to New Hampshire's knowledge, no such suit has occurred, which weighs heavily in favor of this Court's original jurisdiction. *See Wyoming v. Oklahoma*, 502 U.S. at 451-52 (examining whether there were any "pending action" raising the issues). There also are clear disincentives to bringing such a challenge, as it would have to be litigated through the Massachusetts administrative process and in a Massachusetts court, and any taxpayer who might bring the claim would either have to refuse to pay the tax in question and risk incurring tax penalties or pay the tax and hope that it can be recouped at the end of the litigation. And even if an individual taxpayer did challenge the tax, this would not help the tens of thousands of New Hampshire residents who lack the means to bring such a suit.

More fundamentally, however, any such challenge would not redress New Hampshire's own

injuries. As explained, the Tax Rule is causing injuries specific to the State of New Hampshire—not just to individual taxpayers—and this Court is the *only* forum in which New Hampshire can bring its claims. This Court has original jurisdiction over disputes between the States precisely to avoid one State deciding these types of issues through its own courts. Indeed, "one of the most crying evils" of the Articles of Confederation was their failure to guarantee an adequate forum for peacefully resolving interstate disputes. *Rhode Island v. Massachusetts*, 37 U.S. 657, 728 (1838). The Founders deemed this Court's original jurisdiction over such disputes as "essential to the peace of the union." The Federalist No. 80, at 535 (A. Hamilton) (Cooke, ed., 1961). The Court should exercise its original jurisdiction over this interstate dispute.

II. Alternatively, the Court Should Hear the Case Because the Court's Original Jurisdiction Over Interstate Disputes Is Mandatory.

In the alternative, the Court should grant leave to file the bill of complaint because the Court lacks discretion to decline review in cases within its original jurisdiction that arise between two or more States.

The Constitution establishes this Court's original jurisdiction in mandatory terms. Article III states that "[i]n all cases . . . in which a State shall be [a] Party, the supreme Court *shall* have original Jurisdiction." U.S. Const., art. III, § 2, cl. 2 (emphasis added). As Chief Justice John Marshall long ago explained, the Supreme Court has "no more right to

decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). Ever since, this Court "has cautioned" that "[j]urisdiction existing, . . . a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

The Court's original jurisdiction over disputes between States is also "exclusive." 28 U.S.C. §1251(a). If this Court does not exercise jurisdiction over a controversy between two States, "then the complaining State has no judicial forum in which to seek relief." *Arizona v. California*, 140 S. Ct. 684, 685 (2020) (Thomas, J., dissenting). "Denying leave to file in a case between two or more States is thus not only textually suspect, but also inequitable." *Id.*

This Court has relied on "policy considerations" for "transforming its mandatory, original jurisdiction into discretionary jurisdiction." *Nebraska v. Colorado*, 136 S. Ct. at 1035 (Thomas, J., dissenting). And it has invoked its "increasing duties with the appellate docket," *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976), and its "structur[e] . . . as an appellate tribunal," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 498 (1971). But the Court has "failed to provide any analysis of the Constitution's text to justify [its] discretionary approach." *Arizona v. New Mexico*, 140 S. Ct. at 685 (Thomas, J., dissenting). A proper textual analysis of this question compels the

conclusion that this Court's original jurisdiction over these types of disputes is not discretionary.

Stare decisis does not support retaining this flawed approach. "The doctrine is at its weakest when [the Court] interpret[s] the Constitution . . . because only this Court or a constitutional amendment can alter [such] holdings." *Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2177 (2019). The Court's treatment of original jurisdiction as discretionary has not created "reliance interests." *Id.* at 2179. And, moreover, the Court's caselaw lacks "consistency" with the Court's long-recognized requirements that courts have a virtually unflagging duty to exercise the jurisdiction granted to them. *Sprint Commc'ns, Inc.,* 571 U.S. at 77.

Because the Court's discretionary approach is "at odds with the statutory text" of 28 U.S.C. §1251(a) and is based on "policy judgments that are in conflict with the policy choices that Congress made," the doctrine "bears reconsideration." *Nebraska*, 136 S. Ct. at 1035 (Thomas, J., dissenting). The Court should grant the motion for leave to file the bill of complaint.

CONCLUSION

For these reasons, New Hampshire respectfully requests that the Court grant the Motion for Leave to File a Bill of Complaint.

Respectfully submitted,

Gordon J. MacDonald
Attorney General
Daniel E. Will
Solicitor General
Samuel R.V. Garland
Assistant Attorney General
NEW HAMPSHIRE
DEPARTMENT OF JUSTICE
33 Capitol Street
Concord, NH 03301
(603) 271-3658
daniel.will@doj.nh.gov
samuel.garland@doj.nh.gov

Patrick N. Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

J. Michael Connolly
James F. Hasson
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423

Counsel for Plaintiff
State of New Hampshire

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Orig. No. 154

In the Supreme Court of the United States

STATE OF NEW HAMPSHIRE,
Plaintiff,
v.
COMMONWEALTH OF MASSACHUSETTS,
Defendant.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts

Elizabeth N. Dewar*
State Solicitor
Julie E. Green
Daniel J. Hammond
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
bessie.dewar@mass.gov
(617) 963-2204
**Counsel of Record*

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New Hampshire here objects to Massachusetts's temporary regulation maintaining the pre-pandemic status quo for sourcing non-resident employees' income from their work for Massachusetts businesses during Massachusetts's COVID-19 state of emergency. As this Court has long recognized, its original jurisdiction should not encompass such "a collectivity of private suits . . . for taxes withheld from private parties." *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (per curiam). To accept such mine-run tax disputes, which the affected taxpayers themselves may pursue through the established administrative and judicial remedies, "would be to assume a burden which the grant of original jurisdiction cannot be regarded as compelling this Court to assume and which might seriously interfere with the discharge by this Court of its duty in deciding the cases and controversies appropriately brought before it." *Massachusetts v. Missouri*, 308 U.S. 1, 19 (1939). The Court should deny leave to file the complaint for the further reasons that it fails to satisfy Article III's standing requirements and does not state a viable dormant Commerce Clause or due process claim.

STATEMENT

1. On March 10, 2020, in response to a novel and highly contagious respiratory virus that has infected millions, overwhelmed public health systems, and now killed hundreds of thousands of people in the United States, the Governor of Massachusetts declared a

state of emergency in the Commonwealth.[1] On March 23, 2020, he ordered all non-essential businesses to cease in-person operations for two weeks, but encouraged them to continue operating remotely if feasible.[2] That order was extended on March 31, April 28, and May 15.[3] The Commonwealth thereafter began a phased reopening that continues to this day.[4] Massachusetts's neighboring states, too, took measures to curb transmission of the virus, including limiting businesses' in-person operations and encouraging employers to allow employees to work remotely.[5]

A sudden transition to work-from-home amidst this emergency not only upended businesses' operations and their employees' daily lives, but also posed innumerable logistical and legal quandaries, including in state taxation. For example, would a business heretofore operating solely in Rhode Island, that had always withheld Rhode Island taxes for its employees no matter where they resided, suddenly be

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[1] Governor Charles D. Baker, *Declaration of a State of Emergency to Respond to COVID-19* (Mar. 10, 2020), tinyurl.com/y3m4bsnt.

[2] Governor Charles D. Baker, COVID-19 Order No. 13 (Mar. 23, 2020), tinyurl.com/rog8pj7.

[3] Office of Governor Charlie Baker & Lt. Governor Karyn Polito, *COVID-19: Essential Services* (2020), tinyurl.com/tkqn3px (collecting orders).

[4] *See* Mass. Dep't of Health, *COVID-19 Updates and Information* (2020), tinyurl.com/yy7coqc6.

[5] *See, e.g.*, N.H. Emerg. Order No. 17 (Mar. 26, 2020), tinyurl.com/yyku2fkw; R.I. Exec. Order No. 20-14 (Mar. 28, 2020), tinyurl.com/y22baznm.

required to withhold Massachusetts taxes for employees newly working from home across the border in Massachusetts? *Cf.* Mass. Gen. Laws ch. 62B, § 2. Should a Massachusetts business employing non-residents cease withholding Massachusetts tax for those employees if the employees were suddenly working from home outside the Commonwealth? *Cf. id*.

On April 21, 2020, Massachusetts's Department of Revenue issued guidance to address these and other questions arising from the COVID-19 emergency. *See Technical Information Release 20-5: Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic* (Apr. 21, 2020) ("Apr. TIR"), tinyurl.com/ycq8bpwb (describing emergency regulation regarding personal income taxes as well as guidance on other tax issues). In short, the Department maintained the pre-pandemic status quo for tax filing obligations and thereby sought to avoid uncertainty and spare employers additional compliance burdens amidst the unprecedented circumstances, when record-keeping employees themselves might be scattered from the office, and remote-work schedules might shift by the day or week.

As the guidance explained, Massachusetts residents are generally taxed on all their income from all sources. Mass. Gen. Laws ch. 62, § 2; *see* Apr. TIR, Part II. For non-residents, if their Massachusetts-based gross income exceeds $8,000, *see* Mass. Gen. Laws ch. 62C, § 6, they are taxed on their gross income from sources within the Commonwealth, including "income derived from or effectively connected with . . . any trade or business, including any employment

carried on by the taxpayer in the commonwealth," Mass. Gen. Laws ch. 62, § 5A(a). If non-residents have income from sources both within Massachusetts and elsewhere, various apportionment formulas apply to determine how much of their income is sourced to Massachusetts. 830 Code Mass. Regs. 62.5A.1(5)(a)-(e), 62.5A.2 (addressing income based on, *e.g.*, miles traveled or commissions). For hourly or salaried workers, the formula determines Massachusetts-source income by using either the exact amount of pay received for services performed in Massachusetts, or, if such a determination is impossible, by taking the employee's gross income multiplied by the fraction of the employee's total working days spent working in Massachusetts. *Id*. at 62.5A.1(5)(a). Thus, a New Hampshire resident working in Boston two days per week and from home three days per week for a $50,000 salary has Massachusetts-source income of $20,000. *See id*.

The April 21 emergency regulation maintained the status quo for personal income tax withholding purposes. Non-resident employees who worked in Massachusetts before the state of emergency would continue to be taxed in the same proportion as during the immediate pre-pandemic period, regardless whether they continued commuting to the Commonwealth to do their work, or performed the same work remotely from home or another location, or varied their location by the day or week. *See* Apr. TIR, Part II. Accordingly, Massachusetts businesses could simply continue withholding as before, without need for continual changes due to fluctuating remote-work circumstances over the course of the declared emergency. *See id*.

The regulation similarly reduced disruption for out-of-state employers with Massachusetts-resident employees who were suddenly working from home due to the COVID-19 emergency. If a Massachusetts-resident employee continued to be required to pay income tax to that other state under a similar emergency-related sourcing rule, the employee would be eligible for a Massachusetts tax credit for taxes owed to the other state. *Id.* (citing Mass. Gen. Laws ch. 62, § 6(a)). The emergency rule made explicit that such an out-of-state employer was therefore "not obligated to withhold Massachusetts income tax for the employee to the extent that the employer remains required to withhold income tax with respect to the employee in such other state." *Id.*

The Department also maintained the status quo on a host of other fronts. Its guidance clarified, for example, that out-of-state companies would not newly be required to collect Massachusetts sales and use taxes solely based on the fact that "one or more employees that previously worked in another state . . . are working remotely from Massachusetts" due to the pandemic. *Id.*, Part III. Similarly, such employees' presence in Massachusetts would not subject a company to Massachusetts corporate excise tax, increase the Massachusetts apportionment of the tax, or deprive a corporation of the protections of the Interstate Income Act of 1959, 15 U.S.C. §§ 381-84. Apr. TIR, Part IV.

And finally, the Department advised that the status quo would continue for Massachusetts's new Paid Family and Medical Leave program, which requires employers to contribute on a per-employee

basis to a trust fund to pay for the program. *See* Mass. Gen. Laws ch. 175M, § 6. No such contributions would be newly required for a Massachusetts resident who previously worked outside Massachusetts but was temporarily working from home due to another state's declared emergency. Apr. TIR, Part V. But non-resident employees for whom such contributions were already required based on their work in Massachusetts would remain covered by the program during the emergency. *See id.*

On July 21, 2020, the Department of Revenue issued revised guidance providing certain additional details, including about the reasons for telecommuting that would qualify as pandemic-related. *Technical Information Release 20-10: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic* (July 21, 2020), tinyurl.com/y5hre3c2. The same day, the Department commenced notice-and-comment proceedings on a regulation codifying the emergency income tax rule, to be effective until the earlier of December 31, 2020 or 90 days after the Governor declared the emergency over. 830 Code Mass. Regs. 62.5A.3 (as proposed July 21, 2020), tinyurl.com/y4gxmwmo.

Following comment and a hearing on the proposal, the Department published a final regulation on October 16, 2020. 830 Code Mass. Regs. 62.5A.3 (Oct. 16, 2020), tinyurl.com/y4kmbkud. The regulation applied to services performed from the start of Massachusetts's declared COVID-19 state of emergency on March 10, 2020, until the earlier of either December 31, 2020 or 90 days after the

Governor gave notice of the emergency's end. *Id.* at 62.5A.3(1)(d).

With the COVID-19 emergency continuing, on December 8, 2020, the Department issued an emergency regulation extending the rule until 90 days after the Governor gives notice of the emergency's end. *Technical Information Release 20-15: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic* (Dec. 8, 2020), tinyurl.com/y47dxdns; 830 Code Mass. Regs. 62.5A.3(1)(d) (emergency regulation), tinyurl.com/yxzfq3z8.[6] The Department also initiated notice-and-comment proceedings on a proposed regulation likewise extending the rule. 803 Code Mass. Regs. 62.5A.3 (as proposed Dec. 8, 2020), tinyurl.com/y3s5fkjm. The rule is otherwise unchanged. *See id.*

2. Massachusetts's temporary rule provides that "all compensation received for services performed by a non-resident 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 subject to personal income tax under M.G.L. c. 62, § 5A and personal income tax withholding pursuant to M.G.L. c. 62B, § 2." 830 Code Mass. Regs. 62.5A.3(3)(a). The rule defines "Pandemic-Related Circumstances" to include "(a) a government order issued in response to the

[6] All citations hereinafter to 830 Code Mass. Regs. 62.5A.3 are to this emergency regulation now in effect.

COVID-19 pandemic, (b) a remote work policy adopted by an employer in compliance with federal or state government guidance or public health recommendations relating to the COVID-19 pandemic, (c) the worker's compliance with quarantine, isolation directions relating to a COVID-19 diagnosis or suspected diagnosis, or advice of a physician relating to COVID-19 exposure, or (d) 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 830 CMR 62.5A.3 is in effect." *Id.* at 62.5A.3(2).

For taxpayers who previously apportioned their income based on the number of days they worked in the Commonwealth prior to the COVID-19 emergency, the final temporary rule makes explicit that such apportioning shall continue. 830 Code Mass. Regs. 62.5A.3(3)(b). The rule gives such taxpayers a choice of yardsticks for apportioning their income during the emergency: based on either "(1) the percentage of the employee's work days spent in Massachusetts during the period January 1 through February 29, 2020," or "(2) 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." *Id.*

As in the earlier emergency regulation, the temporary final rule reiterates that an out-of-state employer of a Massachusetts resident who is newly

telecommuting from Massachusetts due to the pandemic is not obligated to withhold Massachusetts income tax for that employee "to the extent the employer remains required to withhold income tax with respect to the employee in such other state." 830 Code Mass. Regs. 62.5A.3(4). Withholding Massachusetts tax is unnecessary, the rule notes, because such employees would continue to be eligible for a Massachusetts credit for income taxes paid to the other state. *Id.* (citing Mass. Gen. Laws ch. 62, § 6(a)).

3. Every person against whom Massachusetts income tax is assessed may file an abatement request with Massachusetts's Commissioner of Revenue. Mass. Gen. Laws ch. 62C, § 37. The Commissioner, upon review, "shall abate the tax, in whole or in part," if he "finds that the tax is excessive in amount or illegal." *Id.* Any "person aggrieved" by the Commissioner's disposition may file an appeal to the Appellate Tax Board, an independent adjudicatory board empowered to conduct evidentiary review and order abatement of any improperly assessed tax. *Id.* at § 39. A party aggrieved by a Board decision may appeal directly to Massachusetts's Appeals Court, Mass. Gen. Laws ch. 58A, § 13, and may also seek direct or further appellate review in Massachusetts's Supreme Judicial Court, Mass. R. App. P. 11, 27.1. Review of any federal questions then may be sought in this Court.

4. Despite the availability of these administrative and judicial remedies for any taxpayer aggrieved by Massachusetts's temporary rule, the State of New Hampshire filed the instant motion for leave to file a bill of complaint on October 19, 2020.

The proposed complaint alleges two claims against Massachusetts. First, it alleges that Massachusetts's temporary rule violates the dormant Commerce Clause, because it purportedly taxes New Hampshire residents on income "lacking any connection with Massachusetts," over which "New Hampshire has the authority and prerogative to tax," Bill of Complaint ("Compl.") ¶¶ 91, 93; creates a "possibility of double taxation," Compl. ¶ 93; and taxes New Hampshire residents "as though they are travelling to and working in Massachusetts—even if they never set foot in the State," Compl. ¶ 100. Second, the complaint alleges that the regulation violates the Due Process Clause of the Fourteenth Amendment for lack of any "definite link" or "minimum connection" between Massachusetts and the taxed income. Compl. ¶ 107 (quotation omitted).

New Hampshire does not allege that the temporary rule applies to the State itself or otherwise inflicts any specified monetary harm on the State in the form of lost tax revenue or otherwise. *See, e.g.*, Compl. ¶ 9. Rather, New Hampshire alleges, the temporary rule "disrespects New Hampshire's sovereignty" and its sovereign choice not to impose its own income tax on its residents. *Id.* Moreover, the complaint contends, the temporary rule "undermines an incentive for businesses to locate capital and jobs in New Hampshire" and thereby "reduc[es] economic growth" by unspecified amounts, "weakens efforts to recruit individuals to work for [its own] state government," and somehow "penaliz[es] workers for following public health guidance." *Id.*

ARGUMENT

I. This case is not appropriate for the Court's original jurisdiction.

This Court has long recognized that its "delicate and grave" original jurisdiction should be exercised only "when the necessity [i]s absolute and the matter itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). The Court "make[s] case-by-case judgments as to the practical necessity of an original forum in this Court," including in cases involving the Court's exclusive jurisdiction. *Texas v. New Mexico*, 462 U.S. 554, 570 (1983). Such discretion is necessary because, "[a]s our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 497 (1971) (noting "the frequency" of "clash[es] over the application of state laws concerning taxes" in particular). Entertaining all such cross-border disputes "would unavoidably . . . reduc[e] the attention [the Court] could give to those matters of federal law and national import" as to which it is "the primary overseer[]" through its "role as the final federal appellate court." *Id.* at 498-99.

This case falls outside the category of "appropriate cases" for exercise of this Court's original jurisdiction under the two main criteria the Court considers in exercising its discretion. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). First, "look[ing] to 'the nature of the interest of the complaining State,'" *id.* (quoting *Massachusetts*, 308 U.S. at 18), the case lacks a claim of sufficient "seriousness and dignity," *id.* (quoting

Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)). At bottom, New Hampshire is "merely litigating as a volunteer the personal claims of its citizens" who are employed in Massachusetts, *Pennsylvania*, 426 U.S. at 665, and the claimed "threatened invasion" of its own rights is not "of serious magnitude and . . . established by clear and convincing evidence," *Maryland v. Louisiana*, 451 U.S. 725, 736 n.11 (1981) (quoting *New York v. New Jersey*, 256 U.S. 296, 309 (1921)). Second, there is another forum "where the issues tendered may be litigated, and where appropriate relief may be had." *Milwaukee*, 406 U.S. at 93. The questions presented here can and should be litigated through the established processes for review of state taxation questions, subject to this Court's usual appellate review of all federal questions.[7]

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[7] This Court should decline New Hampshire's invitation to reconsider this discretionary approach to original jurisdiction, *see* Br. 32-34, for which New Hampshire provides no "special justification," *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) (quotation omitted). The Court has declined a recent spate of such invitations, in disputes ranging from a state animal welfare law's alleged effect on egg prices elsewhere, Brief for Plaintiffs, *Missouri v. California*, No. 148 Orig., 13 n.1 (Dec. 4, 2017), to claimed failings of a state's scheme for taxing out-of-state LLCs' in-state activities, Brief for Plaintiff, *Arizona v. California*, No. 150 Orig., 36 (Feb. 28, 2019), to an opioid manufacturer's and its board's roles in fueling the opioid crisis, Brief for Plaintiff, *Arizona v. Sackler*, No. 151 Orig., 15-19 (July 31, 2019). "It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies." *Arizona v. New Mexico*, 425 U.S. 794, 798 (1976) (quoting *Wyandotte*, 401 U.S. at 497).

A. Massachusetts has not invaded New Hampshire's sovereign or quasi-sovereign interests.

This putative case concerns only a temporary emergency rule maintaining the status quo on sourcing income for non-resident employees who are suddenly telecommuting to their Massachusetts jobs from elsewhere amidst the COVID-19 pandemic. Such a tax complaint, in essence brought on behalf of a discrete subset of residents rather than to redress an injury to the State itself, is precisely the type the Court has long held unsuitable to its original jurisdiction.

The Constitution confers original jurisdiction on this Court "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *North Dakota v. Minnesota*, 263 U.S. 365, 372-73 (1923); *see* U.S. Const. art. III, § 2, cl. 2. "'Before this [C]ourt can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence." *North Dakota*, 263 U.S. at 374 (quoting *New York*, 256 U.S. at 309); *see also Mississippi*, 506 U.S. at 77 (describing the "model" dispute as one "of such seriousness that it would amount to *casus belli* if the States were fully sovereign" (quotation omitted)); *see, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657, 721-31 (1838) (boundary dispute).

In examining whether such a serious threatened invasion of a state's rights exists, the Court has long held that "'the State must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest.'" *Kansas v. Colorado*, 533 U.S. 1, 8 (2001) (quoting *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387, 396 (1938)); *see also*, *e.g.*, *Oklahoma v. Atchison, Topeka, & Santa Fe Ry. Co.*, 220 U.S. 277, 286-89 (1911). Although States' "'quasi-sovereign' interests which are 'independent of and behind the titles of its citizens, in all the earth and air within its domain,'" may support exercise of original jurisdiction, "this principle does not go so far as to permit resort to [the Court's] jurisdiction in the name of a State but in reality for the benefit of particular individuals." *Oklahoma ex rel. Johnson*, 304 U.S. at 393-94 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). Otherwise, "if, by the simple expedient of bringing an action in the name of a State, this Court's original jurisdiction could be invoked to resolve what are, after all, suits to redress private grievances, [the Court's] docket would be inundated," and "the critical distinction, articulated in Art. III, S. 2, of the Constitution, between suits brought by 'Citizens' and those brought by 'States' would evaporate." *Pennsylvania*, 426 U.S. at 665-66.

Applying these principles, the Court has repeatedly turned away cases like the one here. Most similarly, in *Pennsylvania v. New Jersey*, the Court declined to accept jurisdiction of cases brought to recover commuter taxes assessed against the plaintiff-States' residents by New Jersey and New Hampshire. 426 U.S. at 661-66. New Hampshire's tax had recently

been held unconstitutional, *Austin v. New Hampshire*, 420 U.S. 656 (1975), and both challenged taxes were alleged to have imposed pecuniary losses on the plaintiff-States themselves in the form of tax credits for residents' income taxes paid to other states. *Pennsylvania*, 426 U.S. at 661-63. But the commuter taxes had not directly "inflicted any injury upon the plaintiff States" themselves, and "[n]othing required [them] to extend a tax credit to their residents for income taxes paid to" other states. *Id.* at 664. And the Court rejected Pennsylvania's attempt to cast the lawsuit as a *parens patriae* suit on behalf of its residents generally, because "a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Id.* at 665.

The Court also declined to exercise original jurisdiction over a purported clash between sovereigns in *Massachusetts v. Missouri*, where both States claimed the right to tax a Massachusetts domiciliary's estate. 308 U.S. at 14-15. The Court found no conflict between the States themselves, however, because, among other reasons, the property at issue was "amply sufficient to answer the claims of both States," and the States' differing choices about how to tax the estate were not "mutually exclusive." *Id.* at 15-16. In the absence of an actual conflict between the States themselves, Massachusetts was not entitled to "invoke [the Court's] jurisdiction for the benefit of" its own residents. *Id.* at 17. *See also, e.g.*, *Arizona v. New Mexico*, 425 U.S. 794, 797-98 (1976) (per curiam) (declining to exercise jurisdiction over dispute regarding energy tax alleged to discriminate against

interstate commerce, in part because the tax's "legal incidence [wa]s on the utilities").

Likewise here, Massachusetts "is not injuring" New Hampshire itself. *Massachusetts*, 308 U.S. at 15. Contrary to New Hampshire's contentions, Massachusetts's temporary rule simply does not threaten New Hampshire's unquestioned sovereign authority to determine its *own* income tax policy. While New Hampshire complains that Massachusetts is "reaching across its borders" to tax New Hampshire residents newly telecommuting to their jobs in Massachusetts, Br. 18, Massachusetts has *always* taxed the Massachusetts-source income of non-residents who work at Massachusetts businesses, *see supra* at 3-4, just as other states in turn tax Massachusetts residents' income from those states, *see, e.g.*, Conn. Gen. Stat. § 12-700(b). New Hampshire cites no authority whatsoever for the proposition that routine taxation by one state of cross-border activity by the residents of another constitutes "an aggressive incursion into [another state's] sovereign jurisdiction" warranting this Court's jurisdiction. Br. 24 n.2; *see also* Br. 15 (citing only *Wyoming v. Oklahoma*, 502 U.S. 437, 541 (1992), for the unremarkable proposition that "[a] State's decision about whether and how it collects revenue is 'an action undertaken in its sovereign capacity'"). Rather, "[e]ach State has enacted its legislation according to its conception of its own interests" with respect to income taxation, and the two States' choices are not "mutually exclusive." *Massachusetts*, 308 U.S. at 15-17.

To be sure, taxes on cross-border personal income have been held unconstitutional—including for discriminating against interstate commerce, *see, e.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1792 (2015)—but no such case strikes down a tax or invokes this Court's original jurisdiction on grounds that one state taxing another's residents somehow attacks the latter's very sovereignty. And for good reason: Granting States inherent standing as sovereigns to contest every allegedly unconstitutional or otherwise unlawful tax on a subset of their residents "would interpose" this Court as the "virtually continuing monitor[] of the wisdom and soundness of state fiscal administration, contrary to the more modest role Article III envisions for federal courts." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (quotations omitted) (declining to recognize Article III standing for state taxpayers "simply by virtue of their status as taxpayers").

New Hampshire's other claimed harms to its sovereign and quasi-sovereign interests are neither "of serious magnitude" nor "established by clear and convincing evidence." *Maryland*, 451 U.S. at 736 n.11 (quoting *New York*, 256 U.S. at 309). New Hampshire speculates—without claiming knowledge of a single actual instance—about possible harms to its efforts to attract new businesses or residents to relocate to the State, Compl. ¶¶ 54-63, 65, or recruit prospective state employees, Compl. ¶¶ 67-69. New Hampshire posits that such new recruits—although by definition not themselves subject to the temporary regulation—might have "family members who work for Massachusetts employers (and may seek to work from home at least part time if they move to New

Hampshire)," and might "choose to live in Massachusetts" as a result of this temporary rule, Compl. ¶ 69. Even aside from the plain defects in this chain of speculation as a factual matter, *see infra* at 27-28, the mere abstract possibility that one state's temporary tax measure during a declared emergency might temporarily and indirectly disadvantage another state's recruitment efforts to an unspecified degree falls far short of the grave injury required. *Cf. Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 443-44, 450-51 (1945) (finding "matters of grave public concern" to Georgia's entire economy and citizens from alleged conspiracy to disadvantage its ports via discriminatory freight rates 39% higher than elsewhere).

Indeed, New Hampshire's speculation regarding its recruitment efforts does not even rise to the level of the "makeweight" proprietary claims that this Court has refused to accept as a basis for exercising its original jurisdiction. Such past claims at least involved *some* demonstrated injury to the States themselves, albeit minor. *See, e.g.*, *id.* at 450-51 (accepting case, but dismissing as "makeweight" Georgia's claims as proprietor of "a railroad and as the owner and operator of various public institutions"); *Tennessee Copper*, 206 U.S. at 237 (accepting pollution case affecting broad area of Georgia, but declining to consider "makeweight" proprietary claim based on small area of land owned by Georgia itself). Here, by

contrast, New Hampshire has not alleged even a single occurrence of harm to its recruitment efforts.[8]

So too founders New Hampshire's claim that Massachusetts's temporary rule will harm public health because it somehow "penalizes individuals who are working from home" and "disincentivizes *all* individuals from pursuing alternative work arrangements." Compl. ¶ 76. Massachusetts's temporary rule does not put a thumb on the scale in favor of, or against, working from home. It simply taxes non-residents' Massachusetts employment income in the same proportion as during the immediate pre-pandemic period, whether they continue traveling into the Commonwealth to do their work throughout the emergency, or do the same work remotely from home or another location, or vary their location by the day or week depending on the circumstances. *See* 830 Code Mass. Regs. 62.5A.3(3). Because their tax burden will thus be the same regardless of whether they follow public health recommendations, Massachusetts's temporary measure does not slant their decision either way; it instead simply reduces disruption and uncertainty during this evolving crisis.

And this case does not involve the type of state injury at issue in the three original cases on which New Hampshire principally relies. Br. 23. First, *Wyoming v. Oklahoma* concerned an Oklahoma law

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[8] For reasons discussed below, New Hampshire's further assertion of an "exacerbate[d]" burden on its own public services due to its residents' payment of taxes to Massachusetts, Compl. ¶ 64, is likewise of no weight at all. *See infra* at 29 n.11.

that newly required Oklahoma coal-fired generating plants to use at least 10% Oklahoma coal as opposed to their prior near-complete reliance on Wyoming coal, and thereby inflicted on Wyoming itself a documented, "undisputed," "direct injury in the form of a loss of specific tax revenues" from Wyoming's coal severance taxes. 502 U.S. at 444-45, 448. New Hampshire alleges no such "direct injury" to its fisc here.

Maryland v. Louisiana is also inapposite. There, a Louisiana tax on gas extracted from beneath the Gulf of Mexico, structured to fall almost entirely on out-of-state companies and their customers, discriminatorily exacted hundreds of millions of dollars in taxes annually from companies and consumers in more than 30 states, including the plaintiff-States themselves as "substantial consumers of natural gas." 451 U.S. at 729-34 & n.7, 736-37 & n.12, 743-44. It was "clear" that the plaintiff-States' own costs had "increased as direct result of" the disputed tax, "directly affect[ing them] in a substantial and real way," *id.* at 737; jurisdiction on *parens patriae* grounds was appropriate as well because the tax "affect[ed] the general population of [the plaintiff] State[s] in a substantial way," *id.* at 737-39; and the United States had even intervened as a plaintiff on behalf of its distinct federal interests in administering the area beneath the Gulf of Mexico, *id.* at 744-45. Massachusetts's temporary rule inflicts no such substantial injuries, either on the State itself or on its "general population," and does not implicate broader federal interests warranting this Court's original jurisdiction. *See Pennsylvania*, 426 U.S. at 665-66; *see also* Brief for the United States as Amicus Curiae, *Arizona v. California*, No. 150 Orig., at 6-16 (Dec. 9,

2019) (invitation brief opposing, for reasons likewise applicable here, Arizona's motion for leave to file a complaint against California regarding California's taxation of non-resident LLCs).

Finally, New Hampshire's reliance on a dispute over its taxation of its nuclear plant is similarly unavailing. *See* Final Report of the Special Master, *Connecticut v. New Hampshire*, No. 119 Orig., 1992 WL 12620398 (U.S. Dec. 30, 1992). There, the Special Master found jurisdiction over the suit appropriate where the plaintiff-States had demonstrated that New Hampshire's allegedly discriminatory tax had been passed on to both the plaintiff-States themselves and their citizens generally as consumers of the plant's electricity. *Id.* at *16-17. Again, New Hampshire alleges no such injury directly affecting the pocketbooks of either the State itself or its general population.

In sum, Massachusetts's tax measure temporarily maintaining the status quo for sourcing non-residents' income from work for Massachusetts businesses does not present a matter of "grave public concern" warranting this Court's exercise of original jurisdiction. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923) (accepting dispute over state law threatening to cut off gas service to millions of people).

B. The issues presented by this case are better suited for resolution through the ordinary processes for challenging state taxes, subject to this Court's review of federal questions.

The Court should deny New Hampshire's motion for leave to file its complaint for the further reason that this is not a case where "an adequate remedy can only be found" in an original action. *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). Rather, established administrative and judicial remedies available to aggrieved taxpayers provide "an appropriate forum in which the Issues tendered here may be litigated," *Arizona*, 425 U.S. at 797—indeed, a more appropriate forum.

Where litigation in the lower federal or state courts is an alternative means for adjudicating a dispute, this Court has often declined jurisdiction—even in cases that, unlike this one, "plainly present[ed] important questions of vital national importance." *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 112-14 (1972) (declining to accept case in part because of "the availability of the federal district court as an alternative forum"); *see also, e.g.*, *Arizona*, 425 U.S. at 796-97 (declining jurisdiction over constitutional challenge to electrical energy tax, where taxed Arizona utilities had filed suit in New Mexico state court). These decisions reflect the Court's recognition that it must refrain from exercising the full "breadth of the constitutional grant of this Court's original jurisdiction" when not "necessary" to do so, "lest [the Court's] ability to administer [its] appellate docket be impaired." *Gen. Motors*, 406 U.S. at 113 (quotation

omitted); *see also Texas*, 462 U.S. at 570 (exercise of original jurisdiction should be "with an eye to promoting the most effective functioning of this Court within the overall federal system").

These considerations weigh in favor of declining jurisdiction here. New Hampshire residents affected by the temporary rule may seek abatement, and, if unsuccessful before both Massachusetts's Commissioner of Revenue and the Appellate Tax Board, are entitled to file an appeal directly in Massachusetts's Appeals Court. Mass. Gen. Laws ch. 62C, § 37; ch. 58A, § 13. Massachusetts's appellate courts routinely decide constitutional challenges brought via abatement proceedings. *See, e.g.*, *Geoffrey, Inc. v. Comm. of Revenue*, 899 N.E. 2d 87, 92-93 (Mass. 2009). And, where the claim of illegality rests on a federal constitutional provision, the case may ultimately reach this Court on certiorari review. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); *Wynne*, 135 S. Ct. at 1787.

New Hampshire misses the mark with its contention that these remedies are insufficient, because even a successful abatement request "would not help . . . [its] residents who lack the means to bring such a suit," Br. 31. In the direct appellate review of Board decisions just discussed, Massachusetts's appellate courts decide questions of law for the entire Commonwealth, and New Hampshire's contention is false at the administrative level as well. While as-applied relief from the Board initially benefits only the petitioner who advanced the claim, such a finding serves as "applicable precedent," both for the Commissioner in assessing the challenged tax and for

the Board in evaluating subsequent abatement requests. *General Dynamics Corp. v. Bd. of Assessors of Quincy*, 444 N.E. 2d 1266, 1268 (Mass. 1983). Moreover, while there is no class-action mechanism for abatement proceedings, in certain circumstances Massachusetts courts have discretion to entertain an action brought by one or more taxpayers seeking a declaration that a tax provision is illegal. *See DeMoranville v. Comm'r of Revenue*, 927 N.E. 2d 448, 452 (Mass. 2010) (describing relevant factors for waiving exhaustion, including whether "the issue is important or novel or recurrent"; whether "the decision will have public significance, affecting the interests of many besides the immediate litigants"; and whether "the case reduces to a question of law without dispute as to the facts").

And these alternative forums are more "appropriate" for adjudicating the individual claims of New Hampshire taxpayers than the State's attempt at an aggregate action in this Court. *Arizona*, 425 U.S. at 797. Although Massachusetts's temporary rule readily withstands scrutiny under this Court's dormant Commerce Clause and due process precedents, *see infra* Part III, those precedents do leave some leeway for taxpayers to argue that the regulation is unconstitutional as applied to their particular circumstances, despite their physical presence working in Massachusetts in the immediate pre-pandemic period. *See infra* at 34-35. The Board is well suited to make these highly fact-specific determinations in considering individual taxpayers' abatement requests and to determine what portion of their income, if any, is properly sourced to Massachusetts. An aggregate action in this Court, by

contrast, cannot possibly encompass the full panoply of such fact-finding. *See Gen. Motors*, 406 U.S. at 114-16 (declining jurisdiction over air pollution case in part due to "localized," fact-specific "nature of the remedy" that might "be necessary, if a case for relief [were] made out").[9]

Thus, this Court should decline to exercise its original jurisdiction not only for lack of injury to the State of New Hampshire itself, but also because of "the availability of another forum . . . where the issues tendered may be litigated, and where appropriate relief may be had." *Arizona*, 425 U.S. at 796-97 (quoting *Milwaukee*, 406 U.S. at 93).

II. New Hampshire does not have standing.

New Hampshire's complaint is also ill-suited to this Court's docket for the further reason that it is not "properly justiciable" at all. *Louisiana*, 176 U.S. at 15.

As in any federal court, plaintiffs in this Court must establish standing. *Wyoming*, 502 U.S. at 447; *Maryland*, 451 U.S. at 735-36. They must have "suffered an injury in fact" that is "concrete and particularized" and "actual or imminent, not

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[9] In addition, only Massachusetts courts could possibly avoid the necessity of reaching the constitutional questions presented by ruling on any potential state-law grounds instead. *See, e.g.*, *Comm'r of Revenue v. Oliver*, 765 N.E.2d 742, 746 (Mass. 2002) (rejecting Commissioner's argument that non-resident's pension payments from his former Massachusetts employer were Massachusetts-source income, because the taxpayer did not work in Massachusetts during the years the pension payments were received and "tax statutes are to be strictly construed").

conjectural or hypothetical," and that is "fairly . . . trace[able] to" Massachusetts's conduct and redressable by this Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (quotations omitted). The Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact'"; "'[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). And, "at the pleading stage, the plaintiff must clearly . . . allege facts demonstrating each element." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quotation omitted).

Just as New Hampshire's complaint fails to present the sort of grave injury to the State itself required for exercise of this Court's original jurisdiction, so too do its allegations fall short on standing. New Hampshire does not allege that the State itself will lose tax revenue as a result of Massachusetts's temporary rule maintaining the status quo. *Cf. Wyoming*, 502 U.S. at 448-51. Rather, New Hampshire's principal claimed injury is purportedly to its very sovereignty: that taxing a New Hampshire resident's income under Massachusetts's sourcing rule harms New Hampshire itself by "overrid[ing] New Hampshire's sovereign discretion over its tax policy[.]" Compl. ¶ 52. As explained already, no such injury to New Hampshire's sovereignty actually exists: it still may, and does, set its own distinct tax policy to govern its residents and those who do business in the State. *See supra* at 14-17; *Massachusetts*, 308 U.S. at 15-16 (no "justiciable controversy between the States" where each sought to,

and each could, tax the same estate according to each State's respective rules).

New Hampshire's miscellaneous further alleged injuries bear little scrutiny. The assertions that Massachusetts's temporary rule will hinder New Hampshire in recruiting new state employees, Compl. ¶¶ 67-70, or attracting to the State other new residents or businesses important to its economic growth, Compl. ¶¶ 54-63, 65, cannot meet New Hampshire's "'substantially more difficult'" burden in establishing standing where its "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," and thus "hinge[s] on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan*, 504 U.S. at 561-62 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)).

In particular, New Hampshire posits that a prospective recruit *may* have "family members who work for Massachusetts employers (and *may* seek to work from home at least part time if they move to New Hampshire)"; *may* therefore be subject to Massachusetts's temporary rule; and *may* therefore choose not to move to New Hampshire. Compl. ¶ 69 (emphasis added). But New Hampshire has not met its "burden . . . to adduce facts showing that those choices have been or will be made in such manner as to produce causation[.]" *Lujan*, 504 U.S. at 562. Despite the fact that this rule has been in existence for almost 8 months, New Hampshire does not claim to have knowledge of even a single instance in which a new recruit, new business, or new resident has chosen

not to move to New Hampshire due to Massachusetts's temporary rule's potential effects on spouses or other family members employed in Massachusetts. Moreover, this speculation makes little sense even on its own terms. Regardless of how family members may be taxed, the wages of the hypothetical new recruit would still become tax-free upon taking employment in New Hampshire as a resident of the State—thus retaining the very incentive New Hampshire celebrates.[10] New Hampshire's alleged harm thus rests on "unfettered choices made by independent actors not before" this Court, whose actions "the courts cannot presume . . . to predict." *Lujan*, 504 U.S. at 562 (quotation omitted). Such speculative harm is far from "*certainly impending*." *Clapper*, 568 U.S. at 409 (quotation omitted).

Finally, as already explained, New Hampshire's claimed injury to public health is no injury at all. By simply maintaining the pre-pandemic status quo, the temporary rule results in the same tax liability regardless of whether New Hampshire residents continue traveling to their workplaces or begin working remotely. It therefore neither "penalizes" nor "disincentivizes" making either choice, Compl. ¶ 76, and is instead neutral. *See supra* at 19. New Hampshire thus has not "clearly" alleged "facts demonstrating" an impending, concrete injury under

[10] The logic of New Hampshire's further assertion that Massachusetts's temporary rule will even dampen efforts to convince "existing businesses to expand within the State," Compl. ¶ 63, goes completely unexplained and is difficult to fathom.

this theory. *Spokeo*, 136 S. Ct. at 1547 (quotation omitted).[11]

In short, in attempting to litigate "a collectivity of private suits," *Pennsylvania*, 426 U.S. at 666, New Hampshire has failed to allege any cognizable injury to the State itself. The case is thus not justiciable at all.

III. New Hampshire's dormant Commerce Clause and due process claims lack merit.

New Hampshire has further failed even to state a claim on which relief could be granted—let alone a claim of sufficient "seriousness." *Milwaukee*, 406 U.S. at 93. The Constitution does not bar Massachusetts from adapting its income sourcing rules to respond to the temporary COVID-19 emergency, because the Constitution does not "imprison[] the taxing power of the states" within a single rigid formula for attributing income to a geographic source. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940). The

[11] New Hampshire similarly baselessly asserts that the temporary rule "exacerbates the burden on New Hampshire's public services" amidst the pandemic by "ensur[ing] that those individuals continue to support public services in *Massachusetts* that they no longer use," Compl. ¶ 64. A New Hampshire resident's continued payment of income taxes to Massachusetts while temporarily telecommuting has no effect on New Hampshire's public services, because such payments neither cause a greater burden on public services on top of those imposed by the pandemic itself, nor diminish New Hampshire's (non-wage-based) tax revenue to fund such services. These allegations therefore do not establish harm "fairly . . . trace[able] to" Massachusetts's temporary rule. *Lujan*, 504 U.S. at 560.

Court has long recognized that states have wide latitude to select different formulas and has consistently refused to mandate any one formula as a matter of constitutional law, under either the dormant Commerce Clause or the Due Process Clause. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 278-80 (1978). Massachusetts's approach falls well within this latitude, because it neither causes discriminatory double taxation (or indeed any double taxation), *cf. Wynne*, 135 S. Ct. at 1803-04, nor is unfair or irrational in light of the substantial "'protection, opportunities and benefits'" provided by Massachusetts to all Massachusetts employees, *Allied-Signal, Inc. v. Director, Division of Taxation*, 504 U.S. 768, 778 (1992) (quoting *Wisconsin*, 311 U.S. at 444), including those suddenly newly working remotely for the pendency of an emergency.

The "protection, opportunities, and benefits" available to Massachusetts employees—whether performing their work at their Massachusetts workplace or temporarily at their home office in New Hampshire—go far beyond the local police and fire protection emphasized by New Hampshire, Compl. ¶ 33. Massachusetts supports major urban centers that offer employment opportunities and wages on a scale not generally available elsewhere. *See* Compl. ¶ 55 (acknowledging Massachusetts's high median income). Massachusetts also provides protections benefiting employees regardless of their state of residence, such as its high minimum wage,[12] its

[12] *See* U.S. Dep't of Labor, Wage & Hour Division, *Consolidated Minimum Wage Table* (Oct. 1, 2020),

Earned Sick Time and Paid Family and Medical Leave laws,[13] and the most generous unemployment benefits in the Nation.[14] And non-resident employees also enjoy greater job security as a result of the public services provided by Massachusetts that support and promote the businesses in which those non-residents are employed, including Massachusetts's legal system, its roads and infrastructure, and its police and fire protection of Massachusetts workplaces. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (noting the "usually forgotten advantages conferred by the State's maintenance of a civilized society"); *Wayfair*, 138 S. Ct. at 2096 (describing ways in which "creating a dream home" requires state and local governments).

In light of these substantial benefits, taxation under the temporary regulation readily passes muster under the dormant Commerce Clause because it (1) "is applied 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 provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

The first requirement, "substantial nexus," is "closely related to the due process requirement that there be some definite link, some minimum

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tinyurl.com/y2l28ckn (currently $12.75 per hour, as compared with, for example, New Hampshire's $7.25).

[13] Mass. Gen. Laws ch. 149, § 148C; ch. 175M §§ 1 *et seq*.

[14] *See* U.S. Dep't of Labor, *Comparison of State Unemployment Laws 2019*, at 3-11 (2019), tinyurl.com/y37f9o5p.

connection, between a state and the person, property or transaction it seeks to tax." *Wayfair*, 138 S. Ct. at 2093 (quotations and citations omitted). The employee's choice to work for a Massachusetts employer—including, as required by the regulation, "performing such services in Massachusetts" until "immediately prior to the Massachusetts COVID-19 state of emergency," 830 Code Mass. Regs. 62.5A.3(3)(a)—creates a connection that is much more than minimal. *Cf. Wayfair*, 138 S. Ct. at 2092-96 (abrogating physical presence requirement for obligation to collect sales tax).

Second, the tax is "fairly apportioned," because it is both internally and externally consistent. *Jefferson Lines*, 514 U.S. at 185. The tax is internally consistent because, as required, it is structured so that if every state were to impose an identical tax, no multiple taxation would result. *See id.*; *Wynne*, 135 S. Ct. at 1802. Specifically, if every state sourced employment income during this emergency using the pre-pandemic period as the yardstick, there would be no double taxation created and instead simply universal maintenance of the status quo. New Hampshire's complaint that, under the test, telecommuting employees would pay a double tax (one to the state of residence and another to the state of the employer), Br. 27, is mistaken for two reasons. First, the crux of the temporary rule is that it sources employment income to only one location: the state where the employee worked until the pandemic emergency began, *not* the state(s) where the employee was physically located during the emergency. And second, it overlooks that Massachusetts prevents the hypothesized double taxation on residents by offering

them a credit for income taxes paid to other jurisdictions. 830 Code Mass. Regs. 62.5A.3(4) (citing Mass. Gen. Laws ch. 62, § 6(a)); *see Wynne*, 135 S. Ct. at 1805 ("Maryland could remedy the infirmity in its tax scheme by offering, as most States do, a credit against income taxes paid to other States").

The tax is also externally consistent because it is well within the "wide latitude" accorded to States to adopt different formulas for taxing the many activities that cross state lines and thus implicate "division-of-income problems." *Moorman*, 437 U.S. at 274, 278. Amidst a crisis necessitating an abrupt transition to performing many activities remotely, temporarily continuing to tax income from activity that was performed in-state for Massachusetts employers in the immediate pre-pandemic period, and that continues to be performed for those Massachusetts employers during the pandemic either in Massachusetts or remotely or an evolving combination of the two, does not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Jefferson Lines*, 514 U.S. at 185. Nor is there any significant "risk of multiple taxation" that might suggest overreaching, because most states offer their residents credits against income taxes paid to other states. *Goldberg v. Sweet*, 488 U.S. 252, 262-63 (1989) ("limited possibility of multiple taxation" was "not sufficient to invalidate" tax, and actual double taxation would be avoided by credits). Indeed, since New Hampshire itself does not tax such income, no actual double taxation exists here at all. *See Moorman*, 437 U.S. at 280 (declining to strike down tax based on "speculative concerns with multiple taxation"). And in any event, "eliminating all

overlapping taxation would require this Court to establish not only a single constitutionally mandated method of taxation, but also rules regarding the application of that method in particular cases"—such as in a pandemic emergency—which the Court has consistently refused to do. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983); *see also Moorman*, 437 U.S. at 277-80.

While the States thus can and do differ in their approaches to fairly apportioning telecommuters' income both before and during the pandemic, they remain subject to as-applied challenges if the tax is "out of all appropriate proportions to the business transacted" in the state or otherwise produces a "grossly distorted result." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 380 (1991) (quoting *Moorman*, 437 U.S. at 274; further quotations omitted). *See, e.g.*, *Matter of Zelinsky v. Tax Appeals Trib.*, 801 N.E.2d 840, 846-49 (N.Y. 2003) (upholding New York's "convenience of the employer" approach as applied to non-resident professor). Any such showing necessarily requires *application* of the tax to individual facts. *See, e.g.*, *Moorman*, 437 U.S. at 274, 280-81 (noting that otherwise-constitutional apportionment formula may be unconstitutional as applied to a specific taxpayer, but finding no such flaw on the record presented). Accordingly, the proper forum for taxpayers to attempt such a showing would be abatement proceedings, where the requisite factual record can be developed, followed if necessary by litigation in the lower courts to air the issues fully. And in the present moment, with both COVID-19 emergency tax-relief measures and remote-work circumstances evolving across the States, the fact-

dependence of these issues is all the more acute, and this original action all the more inappropriate a vehicle for considering them in the first instance. *See* American Institute of CPAs, *State Tax Filing Guidance for Coronavirus Pandemic* (last updated Dec. 7, 2020), tinyurl.com/sz2e5rw (collecting States' COVID-19 tax measures by date).

The temporary regulation also readily satisfies *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce. 430 U.S. at 279. The regulation taxes non-residents and residents equally, *cf. City of New York v. State*, 730 N.E.2d 920, 930 (N.Y. 2000) (invalidating discriminatory tax imposed on out-of-state commuters but not in-state commuters), and, as described above, does not cause any double taxation under the internal consistency test for "identify[ing] tax schemes that discriminate against interstate commerce," *Wynne*, 135 S. Ct. at 1802.

Fourth and finally, the tax is "fairly related to the services provided" by Massachusetts. *Complete Auto*, 430 U.S. at 279. This inquiry is "closely connected" to the requirement of a substantial nexus between the taxpayer's activities and the taxing state, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981), and simply further requires that "the measure of the tax be reasonably related to the taxpayer's presence or activities in the State," *Jefferson Lines*, 514 U.S. at 200. That requirement is met here because the tax is measured as a percentage of the income from the taxpayer's employment with a Massachusetts employer in proportion to the taxpayer's presence in Massachusetts in the

immediate pre-pandemic period. No more is required. *See, e.g.*, *id.* at 199-200 (upholding sales tax on bus service measured by value of service, even though bus traveled outside Oklahoma, explaining that State is not "limited to offsetting the public costs created by the taxed activity"); *Commonwealth Edison*, 453 U.S. at 626-29.

New Hampshire's due process claim is equally unfounded, because it is premised on the fallacy that the regulation requires "no connection" between Massachusetts and the non-resident taxpayer other than the employer's Massachusetts address, Br. 29. In fact, the regulation requires a significant connection: non-residents must have worked for their Massachusetts employer in person in Massachusetts in the immediate pre-pandemic period and, indeed, are taxed only in direct proportion to the days worked in person versus remotely in that period. 830 Code Mass. Regs. 62.5A.3(3). This connection is more than sufficient to satisfy the Due Process Clause's two requirements in service of answering "'[t]he simple but controlling question . . . whether the state has given anything for which it can ask return.'" *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213, 2220 (2019) (quoting *Wisconsin*, 311 U.S. at 444). First, the taxpayer's pre-existing and continuing Massachusetts employment satisfies the requirement that there "be some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Id.* (quotations omitted). Second, income attributed to Massachusetts under the temporary rule is indeed "rationally related to values connected with the taxing State," because of the substantial "protection, opportunities and

benefits" afforded by Massachusetts to all Massachusetts employees, resident and non-resident alike. *Id.* at 2219-20 (quotations omitted); *see supra* at 30-31. Non-resident employees do not cease to enjoy these Massachusetts advantages—ranging from the employee protections that Massachusetts provides, to the very jobs non-residents hold that Massachusetts has created—when they are working from the safety of home during this temporary emergency.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for leave to file a bill of complaint.

Respectfully submitted,

MAURA HEALEY
Attorney General for the Commonwealth of Massachusetts
Elizabeth N. Dewar*
State Solicitor
Julie E. Green
Daniel J. Hammond
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
bessie.dewar@mass.gov
(617) 963-2204
**Counsel of Record*

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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

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
ADAM C. JED
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SOPAN JOSHI
Assistant to the Solicitor General
MARK B. STERN
ADAM C. JED
Attorneys

MAY 2021

(ORDER LIST: 594 U.S.)

MONDAY, JUNE 28, 2021

CERTIORARI -- SUMMARY DISPOSITIONS

19-1459 POLARIS INNOVATIONS LIMITED V. KINGSTON TECHNOLOGY CO., ET AL.

20-74 IANCU, ANDREI V. LUOMA, EUGENE H., ET AL.

20-314 RPM INTERNATIONAL INC., ET AL. V. STUART, ALAN, ET AL.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States* v. *Arthrex*, *Inc.*, 594 U. S. ___ (2021).

20-853 IANCU, ANDREI V. FALL LINE PATENTS, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Federal Circuit for further consideration in light of *United States* v. *Arthrex*, *Inc.*, 594 U. S. ___ (2021). Justice Alito took no part in the consideration or decision of this petition.

20-7523 BRYANT, JOSEPH M. V. LOUISIANA

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the Court of Appeal of Louisiana, Second Circuit for further consideration in light of *Ramos* v. *Louisiana*, 590 U. S. ___ (2020).

ORDERS IN PENDING CASES

20M99 JOHNSON, JUNE V. WELLS FARGO BANK, N.A., ET AL.

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

20M100 WHITEHEAD, DAVID L. V. USDC WD AR

The motion for leave to proceed as a veteran is denied.

20M101 RICE, RONNIE J. V. VANIHEL, WARDEN

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

20M102 DRAKES, DONTOUR D. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

152, ORIG. MONTANA AND WYOMING V. WASHINGTON

154, ORIG. NEW HAMPSHIRE V. MASSACHUSETTS

The motions for leave to file the bills of complaint are denied. Justice Thomas and Justice Alito would grant the motions.

20-1143 BADGEROW, DENISE A. V. WALTERS, GREG, ET AL.

The motion of petitioner to dispense with printing the joint appendix is granted.

20-7883 O'DONNELL, KATHLEEN M. V. SAUL, COMM'R, SOCIAL SEC.

The motion of petitioner for leave to proceed *in forma pauperis* is denied. Petitioner is allowed until July 19, 2021, within which to pay the docketing fee required by Rule 38(a).

CERTIORARI GRANTED

20-979 PATEL, PANKAJKUMAR S., ET AL. V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted limited to Question 1 presented by the petition.