

No. 22O154

---

---

IN THE  
**Supreme Court of the United States**

---

NEW HAMPSHIRE, *Plaintiff*,  
v.  
MASSACHUSETTS, *Defendant*.

---

**On Motion for Leave to File Bill of Complaint**

---

**AMICI CURIAE BRIEF OF  
NATIONAL TAXPAYERS UNION FOUNDATION,  
AMERICANS FOR PROSPERITY-NEW  
HAMPSHIRE, AMERICANS FOR TAX REFORM,  
CATO INSTITUTE, CENTER FOR A FREE  
ECONOMY, CENTER FOR FREEDOM AND  
PROSPERITY, FLORIDA TAXWATCH, FREEDOM  
FOUNDATION OF MINNESOTA,  
FREEDOMWORKS FOUNDATION, GOLDWATER  
INSTITUTE, HISPANIC LEADERSHIP FUND,  
INDEPENDENT WOMEN’S LAW CENTER,  
60 PLUS ASSOCIATION, SMALL BUSINESS &  
ENTREPRENEURSHIP COUNCIL, TAX  
FOUNDATION, TAX FOUNDATION OF HAWAII,  
AND TAXPAYERS PROTECTION ALLIANCE  
IN SUPPORT OF PLAINTIFF’S MOTION FOR  
LEAVE TO FILE BILL OF COMPLAINT**

---

JOSEPH D. HENCHMAN\*

*\*Counsel of Record*

122 C Street N.W. #650

Washington, DC 20001

(202) 766-5019

[jbh@ntu.org](mailto:jbh@ntu.org)

*Counsel for Amici Curiae*

December 22, 2020

**TABLE OF CONTENTS**

	Page
TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i> .....	1
SUMMARY OF ARGUMENT.....	7
ARGUMENT.....	9
I. THIS COURT SHOULD GRANT THE MOTION FOR LEAVE TO FILE BECAUSE MASSACHUSETTS HAS INVADED THE SOVEREIGNTY OF ITS FELLOW STATES, TAXING NON- RESIDENTS WITH AN AGGRESSIVE TRAILING NEXUS STANDARD LIKELY TO CAUSE GREAT HARM IF THIS COURT DOES NOT ACT. ....	9
A. Sovereignty is the Key Issue in This Case.....	10
B. Nexus Expires.....	13
C. If Massachusetts Prevails in Their Power Grab, Other States Following Their Lead Will Inflict Needless Economic Damage on Millions of Americans. ....	17
CONCLUSION .....	21

## TABLE OF AUTHORITIES

### Cases

<i>Allied-Signal, Inc. v. Director, Div. of Taxation</i> , 504 U.S. 768 (1992).....	15
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977).....	16
<i>Home Building &amp; Loan Assn. v. Blaisdell</i> , 290 U.S. 398 (1934).....	9
<i>Illinois v. City of Milwaukee</i> , 406 U.S. 91 (1972).....	12
<i>International Shoe Co. v. Washington</i> , 326 U.S. 310 (1945).....	16
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981).....	11
<i>McCullough v. Maryland</i> , 4 Wheat. (17 U.S.) 316 (1819).....	16
<i>Miller Bros. Co. v. Maryland</i> , 347 U.S. 340 (1954).....	16
<i>Moorman Mfg. Co. v. Bair</i> , 437 U.S. 267 (1978).....	16
<i>North Dakota v. Minnesota</i> , 265 U.S. 365 (1923).....	11
<i>Pennsylvania v. West Virginia</i> , 262 U.S. 553 (1923).....	13
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	11
<i>Wisconsin v. J.C. Penney Co.</i> , 311 U.S. 435 (1940).....	16

<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	15
---	----

## Regulations

830 Code Mass. Regs. 62.5A.3.....	10
Ark. Dep’t of Fin. & Admin., Legal Op. No. 2020203 (Feb. 20, 2020), <a href="https://www.ark.org/dfa-act896/index.php/api/document/download/20200203.pdf">https://www.ark.org/dfa-act896/index.php/api/document/download/20200203.pdf</a> .....	19
<i>Massachusetts Source Income of Non-Residents Telecommuting due to the COVID-19 Pandemic</i> , Mass. Dep’t of Revenue, (Oct. 16, 2020), <a href="https://bit.ly/31fgB9r">https://bit.ly/31fgB9r</a> .....	10
Technical Information Release 20-15: <i>Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely Due to the COVID-19 Pandemic</i> (Dec. 8, 2020), <a href="http://tinyurl.com/y47dxdns">http://tinyurl.com/y47dxdns</a> .....	10
WASH. REV. CODE 82.04.220 .....	14

## Other Authorities

Adam B. Thimmesch, <i>The Tax Hangover: Trailing Nexus</i> , 33 VA. TAX. REV. 497 (2014).....	14, 15
Andrew Moylan & Andrew Wilford, “Don’t Let COVID Remote Work Become a Tax Trap,” NTUF Issue Brief (Apr. 24, 2020), <a href="https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap">https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap</a> .....	17
Bloomberg Tax, <i>2019 Survey of State Tax Departments</i> (2019).....	14

Elaine S. Povich, *Remote Work Boom Complicates State Income Taxes*, Stateline (Oct. 2, 2020) ..... 18

Jared Walczak, *Teleworking Employees Face Double Taxation Due to Aggressive “Convenience Rule” Policies in Seven States*, Tax Foundation (Aug. 13, 2020) ..... 18

Jon Chesto, “Governor Sununu plans to sue Massachusetts next week over plan to tax housebound N.H. commuters,” *Boston Globe* (Oct. 16, 2020) ..... 11

Paul Williams, *Justices Should Block Mass. Telework Tax Rule, Prof Says*, Law360 (Dec. 2, 2020) ..... 13, 18

Statement of Governor John Sununu, “NH to Challenge MA Taxation of NH Remote Workers In US Supreme Court,” Oct. 16, 2020 ..... 11

No. 22O154

---

---

IN THE  
**Supreme Court of the United States**

---

NEW HAMPSHIRE, *Plaintiff*,  
v.  
MASSACHUSETTS, *Defendant*.

---

**On Motion for Leave to File Bill of Complaint**

---

**AMICI CURIAE BRIEF OF NATIONAL  
TAXPAYERS UNION FOUNDATION,  
AMERICANS FOR PROSPERITY-NEW  
HAMPSHIRE, AMERICANS FOR TAX  
REFORM, CATO INSTITUTE, CENTER FOR A  
FREE ECONOMY, CENTER FOR FREEDOM  
AND PROSPERITY, FLORIDA TAXWATCH,  
FREEDOM FOUNDATION OF MINNESOTA,  
FREEDOMWORKS FOUNDATION,  
GOLDWATER INSTITUTE, HISPANIC  
LEADERSHIP FUND, INDEPENDENT  
WOMEN'S LAW CENTER, 60 PLUS  
ASSOCIATION, SMALL BUSINESS &  
ENTREPRENEURSHIP COUNCIL, TAX  
FOUNDATION, TAX FOUNDATION OF  
HAWAII, AND TAXPAYERS PROTECTION  
ALLIANCE IN SUPPORT OF PLAINTIFF'S  
MOTION FOR LEAVE TO FILE BILL OF  
COMPLAINT**

---

## INTEREST OF *AMICI CURIAE*<sup>1</sup>

The National Taxpayers Union Foundation, Americans for Prosperity-New Hampshire, Americans for Tax Reform, Cato Institute, Center for a Free Economy, Center for Freedom and Prosperity, Florida TaxWatch, Freedom Foundation of Minnesota, FreedomWorks Foundation, Goldwater Institute, Hispanic Leadership Fund, Independent Women's Law Center, 60 Plus Association, Small Business & Entrepreneurship Council, Tax Foundation, Tax Foundation of Hawaii, and Taxpayers Protection Alliance submit this brief as *amici curiae* in support of Plaintiff's Motion for Leave to File Bill of Complaint in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

Americans for Prosperity-New Hampshire (AFP-NH) is a broad-based grassroots outreach organization dedicated to driving long-term solutions to the country's biggest problems. AFP-NH activists

---

<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for *Amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *Amici* represents that all parties were provided ten days' notice of *Amici's* intention to file this brief and have granted consent to the filing of the brief.

engage the public on key issues and encourage them to take an active role in building a culture of mutual benefit, where people succeed by helping one another. It is committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFP-NH has followed the controversy at issue in this case from the outset and provided testimony before the Massachusetts Department of Revenue, Rulings and Regulations Bureau during the regulatory approval process.

Americans for Tax Reform (ATR) is a non-profit 501(c)(4) organization that represents the interests of the American taxpayers at the federal, state, and local levels. ATR believes in a system in which taxes are simpler, flatter, more visible, and lower than they are today. ATR educates citizens and government officials about sound tax policies to further these goals. Digital Liberty is a project of Americans for Tax Reform that advocates for free market technology, telecommunications, and internet policy. We advocate against onerous regulations that stifle innovation and work to eliminate antiquated regulations that hold back the development and adoption of new technology. Digital Liberty believes that free markets and consumer choice – not state and federal bureaucrats – should determine the future of American technology, work and the internet landscape.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the



foundation of liberty. To those ends, Cato conducts conferences, files *amicus* briefs, and publishes books, studies, and the annual *Cato Supreme Court Review*.

The Center for a Free Economy is a 501(c)(4) non-profit based in Alexandria, VA. It educates the public and policymakers about free market issues such as but not limited to: taxation, healthcare, spending, regulation, and trade. CFE engages in policy advocacy campaigns by itself as well as in coalition with like-minded non-profit organizations.

The Center for Freedom and Prosperity (CF&P) was founded in 2000 to promote tax competition, financial privacy, and fiscal sovereignty. CF&P analyzes economic issues, briefs lawmakers and the media on the benefits of limited government, and educates citizens on the need for competitive markets.

Florida TaxWatch Research Institute, Inc., d/b/a Florida TaxWatch, Inc, is an independent, nonpartisan, nonprofit (501(c)(3)) taxpayer research institute & government watchdog for forty years, Florida TaxWatch works to improve the productivity and accountability of Florida government. Its research recommends productivity enhancements and explains the statewide impact of fiscal and economic policies and practices on residents and businesses. Florida TaxWatch is supported by voluntary, tax-deductible donations and private grants, and does not accept government funding. Donations provide a solid, lasting foundation that has enabled Florida TaxWatch to bring about a more effective, responsive government that is more accountable to, and productive for, the residents it serves since 1979.

The Freedom Foundation of Minnesota is an

independent, non-profit educational and research organization that actively advocates the principles of individual freedom, personal responsibility, economic freedom, and limited government.

FreedomWorks Foundation is a non-profit, non-partisan grassroots organization dedicated to upholding free markets and constitutionally limited government. Founded in 2004, FreedomWorks Foundation is among the largest and most active right-leaning grassroots organizations, amplifying the voices of millions of activists both online and on the ground.

The Goldwater Institute was established in 1988 as a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings, and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, the Institute litigates cases and files *amicus* briefs when its or its clients' objectives are directly implicated.

The Hispanic Leadership Fund is a non-partisan advocacy organization dedicated to strengthening working families by promoting common-sense public policy solutions that advance individual liberty, opportunity, and prosperity for all Americans.

Independent Women's Law Center ("IWLC") is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes policies that advance women's interests by

expanding freedom, encouraging personal responsibility, and limiting the reach of government. IWLC supports this mission by advocating—in the courts, before administrative agencies, in Congress, and in the media—for equal opportunity, individual liberty, and respect for the American constitutional order. As an organization that cares about the interests of working women and supports flexible work-from-home options, IWLC is concerned that the state of Massachusetts is imposing taxes on former Massachusetts commuters who now work from home and are no longer entering the state to perform labor.

60 Plus Association is a nonpartisan seniors advocacy group with a free enterprise, less government, and fewer taxes view towards issues important to seniors and future generations.

The Small Business & Entrepreneurship Council (SBE Council) is an advocacy, research and educational organization that works to promote entrepreneurship and protect small business vitality and growth. For 25 years, SBE Council has promoted innovative initiatives and policy to enable startup activity and small business competitiveness, and a policy ecosystem that lowers barriers to entrepreneurial opportunity and success.

The Tax Foundation is a non-partisan, non-profit research organization founded in 1937 to educate taxpayers on tax policy. Based in Washington, D.C., the Tax Foundation seeks to make information about government finance more accessible to the general public, with analysis guided by the principles of sound tax policy: simplicity, neutrality, transparency, and stability.

The Tax Foundation of Hawaii is a non-partisan, non-political 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance. By educating and encouraging the efficient and effective use of public funds (our tax dollars) to operate government and deliver public services, and by tracking changes in tax law and how taxpayer dollars are used, Tax Foundation of Hawaii promotes a well-informed public that understands the impact of our tax system and can more effectively participate in pressing for greater government efficiency and accountability.

The Taxpayers Protection Alliance (TPA) a rapid-response taxpayer and consumer advocacy organization dedicated to educating the public through the research, analysis and dissemination of information on the government's effects on the economy. TPA, through its network of taxpayers and consumers, holds politicians accountable for the effects of their policies on the size, scope, efficiency and activity of government and offer real solutions to runaway deficits and debt.

Because *Amici* have testified and written extensively on the issues involved in this case, because this Court's decision may be looked to as authority by the many courts considering this issue, and because any decision will significantly impact taxpayers and tax administration, *Amici* have an institutional interest in this Court's ruling.

---

## SUMMARY OF ARGUMENT

Tens of millions of Americans have been telecommuting regularly this year for the first time ever. Next April, many of those Americans will be surprised to learn something that tax professionals generally understand: if you work somewhere for more than a few days, you will owe income tax in that jurisdiction. National Taxpayers Union Foundation and other *Amici* are working to increase awareness of this and Congressional action that may mitigate it.

Massachusetts, however, seeks another type of surprise: abruptly expanding the scope of its income tax to cover people who used to commute to Massachusetts but currently work in another state, due to the pandemic. Disregarding precedents from this Court that cabin state taxation to residents and to the value earned within a state's borders, Massachusetts cites emergency as the justification for a new rule – once nexus, always nexus – that is so sweeping in its scope that it would allow state taxes to be imposed on former Massachusetts commuters wherever they may be in the world today. Massachusetts's action expands the taxation of non-residents beyond what is constitutionally permissible.

The abrupt change in policy by Massachusetts is a power grab that harms taxpayers and intrudes on the sovereign powers of New Hampshire. Massachusetts will not give a fair or timely hearing for these claims, which are pure questions of law justiciable by this Court. This Court should allow New Hampshire the opportunity to make its case.

---

## ARGUMENT

### **I. THIS COURT SHOULD GRANT THE MOTION FOR LEAVE TO FILE BECAUSE MASSACHUSETTS HAS INVADED THE SOVEREIGNTY OF ITS FELLOW STATES, TAXING NON-RESIDENTS WITH AN AGGRESSIVE TRAILING NEXUS STANDARD LIKELY TO CAUSE GREAT HARM IF THIS COURT DOES NOT ACT.**

“Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved.” *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 425 (1934).

Citing emergency, Massachusetts is asserting the power to tax the continuing income of non-residents who engage in no activity in Massachusetts, if the non-residents commuted to Massachusetts prior to the COVID-19 pandemic. Like most states, Massachusetts imposes its income tax on residents and on the in-state income of non-residents. Since March, approximately 123,000 New Hampshire residents who formerly commuted to Massachusetts have ceased doing so due to restrictions and health guidance surrounding the ongoing COVID-19 pandemic. These individuals are not Massachusetts residents nor are they in Massachusetts as they earn income, but Massachusetts seeks to tax 100 percent of the income earned for individuals spending 0 percent of their time in the state. Specifically, the regulation gives taxpayers the apportionment choice of (1) work days spent in Massachusetts vs. other states for the period January 1, 2020 through February 29, 2020, or

(2) the calculation used on the taxpayer's 2019 return. See 830 Code Mass. Regs. 62.5A.3(3)(b).

The regulation is “temporary” by its own terms but has been repeatedly extended. It was adopted on an emergency basis on April 21, 2020, retroactive to March 10, 2020 and to expire automatically on July 21, 2020. On July 21, Massachusetts proposed a formal regulation that would extend effectiveness to the earlier of December 31, 2020 or 90 days after the end of the Massachusetts state of emergency. This rule was adopted on October 16, 2020. See 830 Code Mass. Regs. 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>. On December 8, 2020, the Department again modified the end date to be 90 days after the end of the Massachusetts state of emergency, effective immediately. See 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), <http://tinyurl.com/y47dxdns>; 830 Code Mass. Regs. 62.5A.3(1)(d) (emergency regulation), <http://tinyurl.com/yxzfq3z8>.

#### **A. Sovereignty is the Key Issue in This Case.**

Massachusetts, in the name of maintaining the status quo, has invaded the sovereignty of its fellow states by improperly expanding its tax powers to encompass income earned in other states by non-residents of Massachusetts. This pure question of law is justiciable as a live controversy capable of judicial redress and is therefore properly resolved as a matter

of original jurisdiction between the two states.

Prior to Massachusetts issuing its regulation, New Hampshire authorities attempted to avert controversy through negotiations and other diplomatic overtures. See Plaintiff Brief at 14 (describing attempts by the New Hampshire Attorney General's office and New Hampshire Department of Business & Economic Affairs to persuade Massachusetts not to issue its regulation); Cf. *North Dakota v. Minnesota*, 265 U.S. 365, 372-73 (1923) (“[Original] jurisdiction is therefore limited generally to disputes which, between states entirely independent, might be properly the subject of diplomatic adjustment.”). The conflict precipitated by Massachusetts's action has been described by the Boston press as a “*border war* between Massachusetts and New Hampshire.” See Jon Chesto, “Governor Sununu plans to sue Massachusetts next week over plan to tax housebound N.H. commuters,” *Boston Globe* (Oct. 16, 2020) (emphasis added). See also Statement of Governor John Sununu, “NH to Challenge MA Taxation of NH Remote Workers In US Supreme Court,” Oct. 16, 2020 (“The Commonwealth has launched a direct attack on the New Hampshire Advantage. . . .”); cf. *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983) (“The 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.”).

While New Hampshire has a cognizable direct “interest in protecting its citizens from substantial economic injury presented by imposition” of the tax, *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981), a decisive factor for exercise of this Court's jurisdiction



is the lack of “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.” *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972). That is the case here. Massachusetts incorrectly frames this case as little more than the collection of tens of thousands of individual suits for refund by New Hampshire telecommuters, with Massachusetts tribunals standing ready to give such claims a fair hearing.

This case is not the equivalent of New Hampshire standing in the shoes of its residents facing a Massachusetts tax bill; it is New Hampshire resisting Massachusetts’s new and aggressive form of trailing nexus designed to invade the sovereignty of sister states. The issue is the obligation that Massachusetts is imposing on non-residents, and its associated civil and criminal penalties for non-compliance, not merely the dollar amounts in dispute in particular cases. The appropriate remedy is not just a refund of amounts assessed but limiting the scope of what Massachusetts is now claiming as its sovereign tax powers. If this Court directs New Hampshire residents to instead pursue refund claims in Massachusetts courts, that would be the equivalent of blessing a system in which New Hampshire residents can seek financial redress but Massachusetts will face no risk of sanction for its conduct for many years, if ever. New Hampshire can voice opposition to this power grab and violation of its state sovereignty in a way that its residents seeking refund suits cannot.

Massachusetts has never before claimed the power to tax non-residents for their intrastate activity in another state, and whether “temporary” or

permanent, this is a sharp change from the relationships between sovereign states that existed before. A dramatic policy change such as this, with the potential to affect the many Americans who formerly commuted between states but now telecommute from one location, is “a matter of grave public concern in which the state, as the representative of the public, has an interest apart from that of the individuals affected,” thus warranting this Court’s exercise of original jurisdiction. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

### **B. Nexus Expires.**

“Imagine, once you have nexus, you always have nexus. What is this, trailing nexus on steroids?,” is how eminent Professor Richard Pomp evaluated the Massachusetts regulation. Paul Williams, *Justices Should Block Mass. Telework Tax Rule, Prof Says*, Law360 (Dec. 2, 2020).

Massachusetts argues that the New Hampshire residents in question have nexus now because they *had* nexus in the pre-pandemic period. See Defendant’s Brief at 24 (“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.”). In doing so, Massachusetts has expanded the taxation of non-residents beyond what is constitutionally permissible.

When a business has engaged in a sufficient level of activity to create nexus for corporate income tax purposes, in all but a few states nexus lasts for just that taxable year. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 33-37 (reporting that in nearly all states, nexus ends upon the end of the calendar year of the nexus-creating activity; in Mississippi, nexus ends upon the cessation of the nexus-creating activity); Adam B. Thimmesch, *The Tax Hangover: Trailing Nexus*, 33 VA. TAX. REV. 497, 504 (2014) (estimating that 35 states continue business tax nexus past cessation of nexus-creating activity). When state tax officials were asked if nexus continues, or trails, for an additional year, no state acknowledged that to be the case although three states gave equivocal answers. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 33-37 (California, Georgia, Hawaii). *See also* WASH. REV. CODE 82.04.220 (“[A] person who also had a substantial nexus with this state during the immediately preceding calendar year under RCW 82.04.067 . . . is taxable under this chapter for the current calendar year in its entirety.”). Similarly, for sales tax, while half the states enforce nexus for an entire year in the year of a nexus-creating activity, only two states (Missouri and Rhode Island) continue nexus into the subsequent year with five other states including Massachusetts giving equivocal guidance. *See* Bloomberg Tax, *2019 Survey of State Tax Departments* (2019) at 358-62.

Massachusetts’s regulation in this case therefore goes far beyond what any of its sister states have done with respect to trailing nexus. In all but a handful of states, nexus expires in the same year as the nexus-

creating activity with a few carrying it into the next year and a few having it expire with the cessation of the nexus-creating activity. Massachusetts's regulation continues nexus past the cessation of nexus-creating activities (for the New Hampshire telecommuters, circa March 2020), past the end of the year, to essentially whenever Massachusetts would like to end it. The regulation presently ends nexus 90 days after a yet-to-be-issued declaration by the Governor of Massachusetts.

As Massachusetts has changed the effective end date several times on its own initiative without agreement with any other state, Massachusetts evidently believes it can unilaterally set the end date for nexus for non-residents who once commuted to the state, or perhaps even let it last forever if it so wished. While some scholars defend a one-year period of "nexus latency," *see, e.g.* Thimmesch, 33 VA. TAX REV. at 542 ("A twelve-month period may thus make sense as a matter of administrative convenience."), longer periods mean "compliance costs can more quickly overcome the benefits of participating in a state's market." *Id.*

Extended and indefinite periods of trailing nexus raise obvious Due Process Clause and Commerce Clause concerns, concerns that New Hampshire should be permitted to have Massachusetts answer for in a neutral judicial forum. *See, e.g., Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777-78 (1992) ("In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation."); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S.

286, 294 (1980), *citing International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) (“[T]he Due Process Clause “does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.”); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272-73 (1978) (holding that the Due Process Clause requires state taxation of interstate business to (1) involve a minimal connection between activities and the taxing state and (2) that the income attributed to the state be rationally related to the values connected with the taxing state); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 278 (1977) (holding that a valid state tax on interstate commerce is one that “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.”); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 342 (1954) (“It is a venerable if trite observation that 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.”); *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940) (“That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return.”); *McCullough v. Maryland*, 4 Wheat. (17 U.S.) 316, 429 (1819) (“All subjects over which the sovereign power of a state extends, are objects of taxation; but

those over which it does not extend, are, upon the soundest principles, exempt from taxation.”).

**C. If Massachusetts Prevails in Their Power Grab, Other States Following Their Lead Will Inflict Needless Economic Damage on Millions of Americans.**

The number of Americans regularly telecommuting has jumped this year from 5 million to over 50 million, and interstate telecommuting will be far more common after the pandemic has abated than it was before. An analysis by the National Taxpayers Union Foundation estimated at least 2.1 million Americans that previously crossed state lines for work are now working from home in accordance with public health guidelines. *See, e.g.*, Andrew Moylan & Andrew Wilford, “Don’t Let COVID Remote Work Become a Tax Trap,” NTUF Issue Brief (Apr. 24, 2020), <https://www.ntu.org/foundation/detail/dont-let-covid-remote-work-become-a-tax-trap>. Many of these workers and the businesses that employ them are unaware of, or are unprepared to deal with, the exposure to new tax jurisdictions this can create. Some states have reciprocity agreements to ease compliance, and NTUF is working with many other organizations to spread awareness and evaluate congressional action that may avoid unnecessary burdens. *See id.*

States generally attribute income tax based on days spent in the state, and Massachusetts’s departure from that standard expands the scope of its tax authority. Under the guise of preserving the status quo, Massachusetts has justified its indefinite and expansive regulation due to provision of “public

services provided by Massachusetts that support and promote the businesses in which those non-residents are employed.” Defendant’s Brief at 31. In other words, if you derive income or other value from an entity with nexus in Massachusetts, you have nexus in Massachusetts. As a result, nexus in Massachusetts is now not only indefinite, it is transmitted from employer to employee.

Massachusetts’s decision to tax the income of people who do not set foot in the state creates grave risk of multiple taxation because states grant credit for taxes paid to another state only based upon the days spent in other states. *See, e.g., Williams, supra* (“Pomp said that if a worker spent some time at a second home in Vermont, both Massachusetts and Vermont could argue that they have the right to tax the income. ‘You have this real risk of multiple taxation,’ he said.”); Jared Walczak, *Teleworking Employees Face Double Taxation Due to Aggressive “Convenience Rule” Policies in Seven States*, Tax Foundation (Aug. 13, 2020) (“When that work is physically performed in New York, everything operates normally: New York taxes the income and so does Vermont, but Vermont offsets liability with a credit for taxes paid on income earned in New York. But if that work is now being performed in Vermont as people work from home, then Vermont no longer regards that work as being performed in New York—for the rather obvious reason that it is not. Meaning, no credit. Meaning, both states’ full income taxes apply.”); Elaine S. Povich, *Remote Work Boom Complicates State Income Taxes*, Stateline (Oct. 2, 2020) (“Zelinsky expects that his situation will become more common post-pandemic. ‘Even if you believe that

the more extreme [work-at-home] predictions are not true,” he said in a phone interview, “we all agree that there is likely to be more work at home and that this is going to be a serious problem. My litigation in 2003 looks kind of quaint when you see what’s going on today. I think it’s very possible that an awful lot of people are going to get caught in a very messy situation.”).

Arkansas officials have taken a similar stand as Massachusetts in subjecting non-resident telecommuters to state income tax. *See* Ark. Dep’t of Fin. & Admin., Legal Op. No. 2020203 (Feb. 20, 2020), <https://www.ark.org/dfa-act896/index.php/api/document/download/20200203.pdf> (“Your client is carrying on an occupation in the state of Arkansas, albeit from an out-of-state location. Although your client performs her work duties in Washington state, those activities impact computer systems and computer users in Arkansas at the [redacted]. Those activities constitute the conduct of an occupation in this state.”). Arkansas and a handful of other states already had expansive “convenience of the employer” rules that recast out-of-state telework as in-state if done merely for the employer’s convenience (which states broadly interpret). Telecommuting employees in those states already faced the risk of multiple states claiming the same days (and dollars) for income tax purposes. Massachusetts at least requires that an employee have been in the state in 2020; in Arkansas now, an employee need not have been in the state *ever*.

Letting Massachusetts’s action stand will encourage other states to follow its lead in creating just such a risk of multiple taxation with its “once



nexus, always nexus” standard. Multiple states will assert nexus over individuals and set up a conflict of different states claiming the same days as work “in” each of their states. The abrupt change in policy by Massachusetts is a power grab that harms taxpayers and intrudes on the sovereign powers of New Hampshire. Massachusetts will not give a fair or timely hearing for these claims, which are pure questions of law justiciable by this Court. This Court should allow New Hampshire the opportunity to make its case.

## CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the motion for leave to file the bill of complaint be granted.

Respectfully submitted,

JOSEPH D. HENCHMAN\*

*\*Counsel of Record*

122 C Street N.W., Suite 650

Washington, DC 20001

(202) 766-5019

[jbh@ntu.org](mailto:jbh@ntu.org)

*Counsel for Amici Curiae*

December 22, 2020