
U.S. SUPREME COURT UPDATE

U.S. Supreme Court Update

*DEBRA S. **HERMAN** is a partner in the New York City office of the law firm Hodgson Russ LLP. She would like to thank Doran Gittelman, an associate at Hodgson Russ LLP, for his contributions to this month's article.*

Massachusetts Files Brief and New Hampshire Responds with Reply Brief, Plus Six Amicus Briefs filed in *New Hampshire v. Massachusetts;* Court Denies Five SALT Petitions

On October 23, 2020, the State of New Hampshire brought an action before the Court against the Commonwealth of Massachusetts seeking to enjoin Massachusetts from enforcing its new telecommuting regulation against New Hampshire residents, in *New Hampshire v. Commonwealth of Massachusetts* (Docket No. 220154). As the 2020 year came to a close, Massachusetts filed its brief in opposition and New Hampshire responded with its reply brief, which are covered in this month's issue. In addition, six amicus briefs have been filed in support of New Hampshire's Motion for Leave to File Bill of Complaint, including two briefs amicus curiae of fourteen states (Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, Utah, New Jersey, Connecticut, Hawaii and Iowa), which are also covered in this column.

A brief in opposition was also filed in *Barnette v. HBI, LLC et al* (Docket No. 20-321)[1] , where the lower court found that the purchaser complied with the statutory notice requirements for obtaining a tax deed and such requirements did not violate due process. Also, the Court denied four of the five new petitions covered in last month's column, plus another petition involving the New Jersey

Tax Commissioner's exercise of discretion in imposing alternative apportionment, discussed more fully below.

Finally, we continue to wait the issuance of the Special Master's Reports in the MoneyGram cases: *Delaware v. Pennsylvania,* 220145 and *Arkansas et al. v. Delaware,* 220146. These cases involve a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram official checks.

Massachusetts Brief in Opposition

On December 11, 2020, Massachusetts filed a brief in opposition to New Hampshire's Motion for Leave to File Complaint challenging the Court's original jurisdiction, New Hampshire's standing and alleging that New Hampshire's dormant Commerce Clause and Due Process Clause claims lack merit.

In its opening statement, Massachusetts discusses the origin and purpose of the telecommuting tax regulation at issue in *New Hampshire v. Massachusetts* (Docket No. 220154). The statement also discusses how the Massachusetts Department of Revenue adopted the initial April 21, 2020, temporary emergency tax regulation, in an effort to “maintain 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 might be scattered from the office, and remote-schedules might shift by the day or week.” Massachusetts further explains that the April 21, 2020 temporary emergency regulation maintained the status quo for personal income tax withholding purposes. It notes that “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.”

In addition, Massachusetts explains that 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.” In this regard, it makes clear that “[i]f 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.”

Massachusetts also updates the court on how the Department of Revenue adopted a second temporary emergency regulation on July 21, 2020 to address “reasons for telecommuting that would qualify as pandemic-related,” and ultimately, on October 16, 2020, when a final formal administrative rule (the “Tax Regulation”) was approved. The brief also mentions Massachusetts recent extension of the Tax Regulation on December 8, 2020, until 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.

As a means of a remedy, Massachusetts notes that "[e]very person against whom Massachusetts income tax is assessed may file an abatement request with Massachusetts's Commissioner of Revenue... [and] [a]ny '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."[2] From there, 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."[3] At that point, "Review of any federal questions then may be sought in [the Supreme Court of the United States]."

After explaining the Tax Regulation, and commenting on the availability of administrative and judicial remedies for any taxpayer aggrieved by the Tax Regulation, Massachusetts summarizes New Hampshire's allegations, noting that New Hampshire does not assert that the Tax Regulation "applies to the State itself or otherwise inflicts any specified monetary harm on the State in the form of lost tax revenue or otherwise."

Massachusetts first argument: contesting the Court's original jurisdiction.

Massachusetts leads its opposition by arguing that this case is not appropriate for the Court's original jurisdiction. The brief states that the 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.'"

Massachusetts alleges that "[t]his 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."[4] First, "look[ing] to 'the nature of the interest of the complaining State,'" (quoting *Massachusetts,* 308 U.S. at 18), the case lacks a claim of sufficient "seriousness and dignity," [5] [and] "Second, there is a forum 'where the issues tendered may be litigated, and where appropriate relief may be had.'"

The brief continues by outlining two sub-arguments in support of its first main argument that the case is inappropriate for the Court's original jurisdiction: (1) Massachusetts has not invaded New Hampshire's sovereign or quasi sovereign interest; and (2) the issues presented by this case are better suited for resolution through the ordinary processes for challenging state taxes, subject to the Court's review of federal questions.

With respect to the first sub-argument, Massachusetts alleges that this case involves only a temporary tax regulation that maintains the status quo, and "[s]uch 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."

Massachusetts specifically argues that "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.'" Massachusetts also recounts how the Court has declined to exercise its original jurisdiction in other disputes between sovereigns which it argues the Court should do here, primarily on the basis that "Massachusetts 'is not injuring' New Hampshire itself."

With respect to its second sub-argument, Massachusetts maintains that "this is not a case where 'an adequate remedy can only be found' in an original action, . . . [r]ather, 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."

Massachusetts raises their remedies as considerations weighing in favor of declining original jurisdiction. "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."[6] Massachusetts's appellate courts routinely decide constitutional challenges brought via abatement proceedings "... [a]nd, where the claim of illegality rests on a federal constitutional provision, the case may ultimately reach this Court on certiorari review."[7]

Massachusetts's second argument: New Hampshire's lack of standing.

Massachusetts questions New Hampshire's standing. Specifically, Massachusetts alleges that New Hampshire's complaint is "not properly justiciable." In its brief, it makes clear that to establish standing, the plaintiff "must have 'suffered an injury in fact' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical,' and that is 'fairly . . . trace[able] to' Massachusetts's conduct and redressable by this Court."[8]

Massachusetts claims that "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." Instead, "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...'" which according to Massachusetts, does not exist. Compl. ¶ 52. Per Massachusetts, "New Hampshire's sovereignty actually exists; it still may, and does set its own tax policy to govern its residents and those who do business in the State." The brief adds that "New Hampshire's miscellaneous further alleged injuries bear little scrutiny."

In this regard, Massachusetts maintains that "[d]espite 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." In short, Massachusetts asserts that "New Hampshire has failed to allege any cognizable injury to the State itself" as the harms are not "'clearly' alleged 'facts demonstrating' an impending, concrete injury."

Massachusetts's third argument: New Hampshire's dormant Commerce Clause and Due Process Clause claims lack merit.

Massachusetts responds to New Hampshire's Commerce Clause and Due Process Clause challenges stating that "the 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." Here, Massachusetts argues that, its "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." Per Massachusetts, "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."

Massachusetts touts that it "supports major urban centers that offer employment opportunities and wages on a scale not generally available elsewhere," as well as "Earned Sick Time and Paid Family and Medical Leave laws, and the most generous unemployment benefits in the Nation," which are available to individuals regardless of residence. This, it claims, is in addition to "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."

According to Massachusetts, "[i]n light of these substantial benefits, taxation under the temporary regulation readily passes muster under the dormant Commerce Clause [under the Court's *Complete Auto Transit* test] 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)."

With respect to the first prong of the *Complete Auto Transit* test, the brief states that 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...' creates a connection that is much more than minimal," meeting the requirements of substantial nexus.

With respect to the second prong of the *Complete Auto Transit* test, Massachusetts argues that the tax is "'fairly apportioned' because it is both internally and externally consistent." First, it argues that the tax is internally consistent because it is structured so that if every state were to impose an identical tax, no multiple taxation would result." Or, stated differently, "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." Second, it argues that the tax is 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.'"

The brief also concludes that "[t]he temporary regulation also readily satisfies *Complete Auto*'s third prong, which prohibits discrimination against interstate commerce," namely because "the regulation taxes nonresidents and residents equally." Lastly, Massachusetts claims that the tax is "fairly related to the services provided by Massachusetts;" thereby satisfying the fourth prong of the *Complete Auto Transit* test, "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."

Massachusetts closes its brief in opposition noting that "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." *citing* Br. 29. Massachusetts clarifies in its brief that the regulation in fact "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." This connection according to Massachusetts "is more than sufficient to satisfy the Due Process Clause's two requirements."

Indeed, Massachusetts claims that "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...' and 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."[9]

New Hampshire's Reply Brief

On December 22, 2020, New Hampshire filed a brief in support of its motion for leave to file a bill of complaint, in reply to Massachusetts' arguments raised in its brief in opposition. In the reply, New Hampshire enumerates three ways in which Massachusetts has downplayed the seriousness of its claims — contending that that Tax Regulation does not impede any tax policy New Hampshire desires to implement, contending that the Tax Regulation merely maintains the status quo because Massachusetts continues to impose an income tax on nonresidents solely for Massachusetts source income, when "[i]n fact, Massachusetts has radically redefined what constitutes Massachusetts sourced income in order to tax earnings or work performed entirely outside its borders", and contending that the Tax Regulation "addresses a temporary problem," noting that it has since been extended indefinitely. Likewise, the reply brief calls to attention the *amici* which highlight that the issue disputed is one "of national importance certain to survive the current pandemic."

New Hampshire argues that the "seriousness of this dispute" warrants the Court's original jurisdiction.

Responding on the merits, New Hampshire comments that its "tradition of rejecting broad-based taxation of its residents is an essential element of its sovereign identity," and thus, the Tax Regulation invades New Hampshire's sovereign and quasi-sovereign interests. New Hampshire argues that the attack on Massachusetts sovereign identity, "is not as Massachusetts suggests, limited only to a small subset of residents." Instead, New Hampshire claims that this "unconstitutional tax is extracting hundreds of millions of dollars from over one hundred thousand New Hampshire residents — more than 15 percent of the state's workforce."

New Hampshire also distinguishes the present case from *Pennsylvania v. New Jersey*[10] , where Pennsylvania sued New Jersey to recover tax credits Pennsylvania gave to its residents for income taxes paid to New Jersey. New Hampshire argues that "[b]ecause Pennsylvania's tax credits reimbursed its residents for taxes paid to New Jersey, Pennsylvania residents *were not harmed* by New Jersey's taxes on out-of-state residents. In contrast, here, New Hampshire claims "Massachusetts is imposing state taxes on *New Hampshire* residents that New Hampshire does not impose. New Hampshire does not reimburse its residents for these out-of-state taxes. Thus, it argues, that "these are precisely the type of 'quasi-sovereign' interests that make this Court's original jurisdiction appropriate." New Hampshire also makes clear in its brief that the harm is also not speculative, but actual, and "strikes at the heart of New Hampshire's sovereign interests, imposes a large tax on a substantial portion of New Hampshire's population, and threatens a core principle of what it means to live and work in New Hampshire."

New Hampshire also claims that no alternative forum exists, contrary to Massachusetts' assertions, and that the "Court has never refused to exercise its original jurisdiction because an action *could* be filed that *might* raise the same issues," noting further that there must be a "*pending action* to which adjudication could be deferred."[11] As stated in the reply, "Massachusetts identifie[d] no pending action to which this Court should defer." However, the reply is clear that even if an abatement action were brought, it would not provide New Hampshire with an "adequate remedy." New Hampshire clarifies that it "seeks a declaratory judgment that the Tax Rule unconstitutionally requires New Hampshire residents to pay taxes on income earned outside of Massachusetts," which does not require the fact-finding conducted in an individual taxpayers' abatement request, warranting the exercising of original jurisdiction.

New Hampshire argues it has standing.

New Hampshire claims that it has standing in its own right and as "*parens patriae" (*which means standing exists when there is a "quasi –sovereign interest" in the outcome). Regarding standing in its own right, New Hampshire maintains that it "has alleged injuries in fact that can be traced to the Tax Rule." Specifically, New Hampshire argues that the Tax Regulation "attacks New Hampshire's sovereign identity by imposing an income tax where none exists." It also, per the reply brief, "undermines New Hampshire's sovereign interest and overrides New Hampshire's objective of promoting economic growth and financial security by attracting businesses and workers with such an important financial incentive." The reply adds that a "State's sovereignty is invaded for standing purposes when it cannot 'change [its] laws to avoid injury from amendments to another sovereign's laws *and* achieve [its] policy goals.'"

In regard to standing as *parens patraie*, New Hampshire asserts that it has a quasi-sovereign interest in protecting the "health and well-being—both physical and economic—of its residents," and "in not being discriminatorily denied its rightful status within the federal system." Furthermore, Massachusetts argues that the Tax Regulation impinges on those interests by creating "'increased costs aggregating millions of dollars per year' on 'a great many citizens' in New Hampshire who are not 'likely to challenge the tax directly.'" It also argues the impingement occurs, "by overriding its decision not to tax its residents on the income they earn."

New Hampshire argues that this dispute presents serious claims on the merits.

New Hampshire argues that its claims are not only serious, but also correct. In furtherance of that point, New Hampshire explains how the Tax Regulation fails all four prongs of the *Complete Auto Transit* test. The reply notes that first, the Massachusetts tax is not applied to an "activity" with a "substantial nexus" with the taxing State. Second, it argues that "the tax is not 'fairly apportioned' because Massachusetts is not taxing its 'fair share' of activities occurring entirely in New Hampshire." Third, it argues that "the Tax Rule discriminates against interstate commerce by discouraging the free movement of workers across state lines," and fourth and finally, it alleges that the Tax Regulation "taxes activities in New Hampshire that *currently* are not 'reasonably related to . . . the activities or presence of the taxpayer in the State.'" For similar reasons, New Hampshire adds that the Tax Regulation also violates the Due Process Clause in that "[t]here is *currently* no 'fiscal relation to [the] protection, opportunities and benefits given' by Massachusetts to the activities it is *currently* taxing."

Six *Amici Curiae* Briefs Submitted in *New Hampshire v. Commonwealth of Massachusetts*

Brief *amicus curiae* of Professor Edward A. Zelinsky.

Professor Edward A. Zelinsky of the Benjamin N. Cardozo School of Law of Yeshiva University submitted a brief as *amicus curiae* in support of New Hampshire's motion on December 10, 2020, highlighting the constitutional principles which inform remote taxation of non-resident individuals. In his brief, Professor Zelinsky addresses the various states (including in detail New York) which tax non-residents on income earned remotely, arguing that such extraterritorial taxation "violates both the Due Process and Commerce Clauses." He adds, "[t]he constitutional requirement that a state tax only nonresidents' properly apportioned incomes earned within the taxing state's borders comports with basic federalism values as well as common sense: Otherwise, a cash-strapped legislature will always seek a free lunch served by a sister state's residents." He also notes that "ordinary taxpayers have no practical remedy to the problem of unconstitutional state taxation of their remote working salaries," because of the burden and cost of the administrative and state court process. According to Professor Zelinsky, Congress "has proved incapable of solving the problem of unconstitutional state income taxation of nonresidents' incomes... and [the] Court is the only practical forum available."

In fact, the Court is the only forum who "can delineate the boundaries of state authority in the context of a modern, integrated and digital national economy." After discussing litigation surrounding New York's convenience rule, which similar to the Tax Regulation imposes tax on employees working remotely, Professor Zelinsky comments that the problem of extraterritorial state income taxation pre-dated the Covid-19 crisis and has been "exacerbated by the surge of remote work" and will grow further even after the Covid-19 crisis ends.

Brief *amicus curiae* of Southeastern Legal Foundation.

On December 17, 2020, the Southeastern Legal Foundation ("SLF") submitted a brief as *amicus curiae* in support of New Hampshire, contending that "Massachusetts has run roughshod over the Due Process Clause by imposing an income tax on New Hampshire residents employed by Massachusetts corporations. This is despite the fact that New Hampshire residents have not – and cannot – commute to the Commonwealth of Massachusetts for work during the COVID-19 pandemic." According to SLF, "Massachusetts' extraterritorial tax law fails to satisfy the 'minimum contacts' standard that limits state authority to tax out-of-state persons under the Due Process Clause.[12] Moreover, the law directly undermines the State of New Hampshire's decision *not* to impose income taxes on its residents." This, "'harm[s] the fabric of New Hampshire's communities' and has imposed serious economic injuries on thousands of Massachusetts residents," says SLF. In its brief, SLF cites to the Court's decision in *Shaffer v. Heitner*[13] to support its position that Massachusetts fails to meet the "minimum contacts" standard under the Due Process Clause.

Brief *amicus curiae* of the Buckeye Institute.

The Buckeye Institute submitted a brief as *amicus curiae* in support of New Hampshire on December 18, 2020, arguing a violation of Due Process and claiming that "[i]f Massachusetts' Tax Rule is permitted to stand, it opens the door for other States to seek to balance their budgets on the backs of nonresidents, which would inevitably impede the free flow of labor and capital across State borders, impermissibly burdening interstate commerce and discouraging mutually beneficial remote work arrangements between companies and their employees." The Buckeye Institute discusses the impact that the Massachusetts rule has on Ohioans and how it "threatens [the] continuing cross-border employment arrangements and the mutual economic vitality they bring." If the Massachusetts rule is upheld, the Buckeye Institute fears that "other States will likely impose similar rules, in turn discouraging employees from working remotely in other States."

In its discussion of the case, the Institute notes that the pandemic accelerated a shift that was already in motion and here to stay. Indeed, individuals frequently worked from home, and some were even "super commuters," which the Institute describes as "workers who commute hundreds of miles several times a week frequently across state lines." The remote workers and super commuters, the Institute states share relative affluence, making on average 20-30% more than a traditional worker. How states tax these individuals will have "a significant impact on how the post-pandemic economy operates," says the Institute. The Institute also raised in its brief its claims that Ohio's H.B. 197, a measure recently signed into law that was designed to address various aspects of COVID-19, like the Tax Regulation, unconstitutionally imposes extraterritorial taxation, but at the municipal level.

The Institute notes that "[b]y granting New Hampshire's Motion for Leave to File a Bill of Complaint, this Court can address the cross-state municipal taxation issues occasioned by the Ohio legislation and prevent further confusion over the allowable limits of jurisdictions to tax nonresidents in the post-pandemic economy."

Brief *amicus curiae* of Ohio, Arkansas, Indiana, Kentucky, Louisiana, Missouri, Nebraska, Oklahoma, Texas, and Utah.

On December 21, 2020, Ohio and nine other states filed a brief as *amici curiae* in support of New Hampshire, asserting that the Court's original jurisdiction in cases between states is mandatory and not discretionary. According to the *amici*, both "[t]he Constitution and statutory law both require this Court to hear and decide all original interstate disputes." Citing to 28 U.S.C. §1251(a)28 U.S.C. §1251(a), the *amici* reiterates that "[t]he Supreme Court *shall* have original and *exclusive* jurisdiction of all controversies between two or more States..." and comments that "nothing in §1251(a) confers any discretion not to decide interstate disputes." Nor does the *amici* believe there is any "reason to think that Congress *wanted* to give the Court discretion to decline jurisdiction over interstate disputes." To a similar end, the *amici* adds that "*stare decisis* does not justify the Court in refusing to carry out its duty to resolve interstate disputes." In light of this, Ohio and the nine *amici* states urge the Court to "hold that it lacks power to deny leave to file a bill of complaint in an interstate dispute."

Brief *amicus curiae* of National Taxpayer Union Foundation *et al.*

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 filed an *amici curiae* brief in support of New Hampshire on December 22, 2020. The *amici* argue in part that the abrupt change in Massachusetts' tax policy is a "power grab that harms taxpayers and intrudes on the sovereign powers of New Hampshire." The brief maintains that "Massachusetts will not give a fair or timely hearing for these claims, which are pure questions of law justiciable by this Court." As a result, the *amici* ask the Court to allow "New Hampshire the opportunity to make its case." The *amici* stress that Massachusetts "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."

According to the National Taxpayers Union Foundation *et al.,* "[t]his 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." The *amici* succinctly note that "nexus expires" and that by relying on nexus created in the pre-pandemic period, "Massachusetts has expanded the taxation of non-residents beyond what is constitutionally permissible." Letting Massachusetts's regulation stand, the *amici* claims will "encourage other states to follow its lead in creating just such a risk of multiple taxation with its 'once nexus, always nexus' standard."

Brief *amicus curiae* of New Jersey, Connecticut, Hawaii, and Iowa.

New Jersey, Connecticut, Hawaii, and Iowa submitted a brief *amicus curiae* on December 22, 2020 in support of New Hampshire, offering their perspective as credit granting states, and asserting that the importance of the claim and lack of alternative forum requires the Court's exercise of original jurisdiction. On the merits, the *amici* argue that the challenged state tax violates the Constitution because it is not fairly apportioned. From a policy perspective, the *amici* note that each of the *amici* States “provide a credit to residents for taxes paid to other States—to mitigate the risk of double taxation.” As a result, the “*[a]mici* are thus sacrificing *billions* of dollars in tax revenue on account of these unconstitutional state laws—and this Court is the only forum that can remedy their harms.” The *amici* comment that Massachusetts, along with five other States (Arkansas, Delaware, Nebraska, New York, and Pennsylvania) “reach beyond their borders to directly tax out-of-state residents for the income they earn working remotely from their States of residence.” This “affects not only New Hampshire and Massachusetts but the other States who levy such taxes, every State whose residents pay them... (the States' financial wellbeing)” “and all employees who work from home—even part-time—for businesses in those six States.”

The *amici* argue that the issue is not temporary, but instead will remain consequential in the future and these laws will “remain on the books... [and their] impact will continue to be great after the emergency concludes.” The *amici* continue to discuss how there is no sufficient alternative forum, noting that “States have independent interests in the resolution of this matter that are distinct from the interests of individual taxpayers—based on the harm either to their sovereign decision not to levy an income tax (as in New Hampshire) or to their revenues (amici States),” warranting the exercising of original jurisdiction. The *amici* offer additional insight towards the end of its brief, commenting that “[g]iven the billions of dollars of income tax credits and many more billions of dollars of projected budget shortfalls due to COVID- 19 that are involved, political resolution is practically impossible.”

Brief in Opposition filed in Challenge to Nebraska's Tax Sales Notice Requirements

On January 4, 2021, HBI, LLC et al., Respondents in *Barnette v. HBI, LLC* (Docket No. 20-321) filed a brief in opposition to Barnette's petition for writ of certiorari. The case was presented to the Court to review the decision of the Supreme Court of Nebraska which upheld a quiet title action by a private investor who obtained a tax deed. Petitioner challenged the lower court's holding, asserting in its petition that Nebraska's statutory scheme for tax sales is an unconstitutional violation of due process because the property owner did not receive sufficient notice, and/or because any notice was in fact defective. The Petitioner also challenged the Supreme Court of Nebraska's use of *Jones v. Flowers* in its questions presented, asking whether it should only apply to land containing homes, and asked the Court to consider “the potential windfall incentive of the party providing notice, and the magnitude of the owner's deprivation, when balancing ‘all the circumstances' to determine if attempts at notice are reasonable and what ‘one desirous of actually informing the absentee' would use.” In its brief in opposition, Respondents assert that *Jones* did not only apply to land containing homes, and that the record “contained insufficient evidence as to the incentive of the party providing notice and the magnitude of the owner's deprivation in order for the Nebraska Supreme Court to consider whether there was a 'windfall incentive.'"

In its statement of the case, Respondents disagreed with Petitioner's description of the factual background, and listed corrections to several of Petitioner's alleged misstatements, noting where evidence was not provided in the record to support the Petitioner's claims. After resetting the foundation with its understanding of the factual narrative, Respondents argue that the Petition should be denied because the "questions presented are not supported by the facts... [and Petitioner's] assertion that the Nebraska Supreme Court's decision conflicts with decisions of this Court rests squarely on a mischaracterization of the Nebraska Supreme Court's ruling, which applied this Court's due process rulings to the facts of this case."

Arguing the merits of the case, Respondents claim that the Supreme Court of Nebraska's decision does not run afoul of the governing due process precedent. Respondents cite to cases previously decided by the Court, that provide that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection..." but "does not require that an effort to give notice succeed."[14] Respondents further argue that the language of *Jones* itself, wherein the Court explicitly stated, "we disclaim any 'new rule' that is 'contrary to Dusenbery and a significant departure from Mullane...'" should govern here, and limit the Petitioner from creating "an absolute rule" from their reading of *Jones.* Respondents proceeded to challenge, correct, and distinguish several of the cases raised by Petitioner to support the facets of its due process claim, concluding each time that there is in effect, "no real conflict of opinions" or authority between the courts applying *Jones* and the Supreme Court of Nebraska's decision.

In its final remarks, Respondents assert that the facts of the case are "insufficient to determine whether due process requires consideration of the potential windfall and the magnitude of an erroneous deprivation of property." According to Respondents, this is because "there are no facts in the record to make a determination of whether due process in this case required consideration of the potential windfall to HBI compared to Barnette's deprivation of property..." and because, despite the Nebraska Supreme Court's efforts to balance interests, there was "no evidence demonstrating [Barnette's] property was anything more than a vacant lot," making any windfall "purely speculative." Respondents add that the "Nebraska Supreme Court specifically found that "under the totality of the circumstances presented, [the] attempt at notice was 'desirous of actually informing' Barnette of its intent to apply for a tax deed." For these reasons, Respondents conclude that there is "no compelling reason for granting certiorari and the Petition should be denied." Respondents close their opposition stating that the case also does not merit summary reversal as Petitioner has failed to establish that the lower court's decision is a "constitutional outlier."

Denied Petitions

Harris County v. PRSI Trading, LLC (Docket No. 20-563)[15] . The U.S. Supreme Court declined to review a Supreme Court of Texas's decision which upheld an operator's state ad valorem tax exempt status by holding that a "foreign trade zone," remained activated, notwithstanding that the operator of the sub-zone changed its corporate status, as a result a corporate merger, "until [the U.S. Custom and Border Patrol] reached a final decision on whether a new operator was required," and "only after deactivation was approved by Customs and all inventory was removed [from the subzone]."

Pappas, et al. v. A.F. Moore & Associates, Inc. (Docket No. 20-316)[16] . The Supreme Court denied certiorari requesting review of a U.S. Court of Appeals, Seventh Circuit decision which found that neither the Tax Injunction Act nor comity precluded the taxpayer's Equal Protection Clause federal lawsuit over the alleged disparate valuation of their properties. Petitioners claimed that the tax assessor for Cook County, Illinois violated the Equal Protection Clause of the U.S. Constitution, which they claim entitles owners of similarly situated properly to roughly equal tax treatment by "assessing their properties at the rates mandated by local ordinance while cutting a break tax to other owners of similarly situated property."

The Petitioners brought a refund claim suit in Illinois state court, and later turned to federal court for relief, arguing that "Illinois' procedural rules for challenging property taxes prevent[ed] them from proving their federal constitutional claims." The federal district court disagreed and held that the Tax Injunction Act ("TIA"), 28 U.S. § 1341, barred their federal suit and the Seventh Circuit reversed the district court finding that Illinois law, particularly section 23-15 of the Property Tax Code, 35 ILCS 200/23-15 ("Section 23-15"), "provides no forum for the taxpayers to raise their constitutional claims," inasmuch as "section 23-15 limits taxpayers to challenging only the correctness of the valuation under Illinois law" and "prevents the taxpayers from probing into the Assessor's methodology or intent... they will not be able to prove that his tax assessment violated the Equal Protection Clause."

Pisztora et al. v. City of Pittsburgh, Pa. Commw. Ct. (Docket No. 20-359)[17] . Following the decision in *City of Pittsburgh v. Pisztora et al, Pa. Commw. Ct.* Docket No. 897[18] , petitioners filed a writ of certiorari with the Court seeking a "declar[ation] that the Pennsylvania Second Class City Treasurer's Sale and Collection Act (53 P.S. § 27101 *et. seq.*) is unconstitutional because it deprives the citizens of the Commonwealth of Pennsylvania their real property without due process of the law under the 14th Amendment of the United States' Constitution." The Court denied cert. on November 16, 2020 declining to address petitioner's argument that "[t]he Act on its face is unconstitutional as it allows a forfeiture of property without written notice to anyone, including the Petitioners."

Shaffer v. Comm'r of Revenue, Mass. (Docket No. 20-501)[19] . On November 9, 2020, the Court declined to review the decision in *Shaffer v. Comm'r of Revenue, Mass. S. Ct.,* Docket No. SJC-12812[20] , in which the Supreme Judicial Court of Massachusetts was tasked with determining whether intangible assets held in a qualified terminable interest property (QTIP) trust created by a predeceasing spouse in New York are subject to Massachusetts estate tax when the surviving spouse died while domiciled in Massachusetts. The lower court held by affirmation that there was no “constitutional or a statutory barrier to the assessment of Massachusetts estate tax, on the value of the QTIP assets.”

Xpedite Systems v. Director, Div. of Taxation (Docket No. 20-468)[21] . On December 14, 2020, the Court denied Xpedite Systems' petition for a writ of certiorari asking the Court to review the New Jersey commissioner's exercise of discretion and consider the level of deference that should be afforded to the Commissioner to “reapportion the revenues of a company engaged in interstate commerce.”

---

[1] *Barnette v. HBI, LLC et al* (Docket No. 20-321), ruling at Neb. S. Ct., Docket No. S-19-147 (04/10/2020).

[2] Mass. Gen. Laws ch. 62C, § 37; Mass. Gen. Laws ch. 62C, § 39.

[3] Mass. R. App. P. 11, 27.1.

[4] *Mississippi v. Louisiana,* 506 U.S. 73 77 (1992).

[5] *Id*.

[6] Mass. Gen. Laws ch. 62C, § 37; ch. 58A, § 13.

[7] *See, e.g., South Dakota v. Wayfair, Inc*., 138 S. Ct. 2080 (2018); *Wynne*, 135 S. Ct. 1787 (2015).

[8] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 560-61 (1992).

[9] *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, 139 S. Ct. 2213 2220 (2019).

[10] *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976).

[11] *Wyoming v. Oklahoma*, 502 U.S. 437 451-52 (1992).

[12] *Shaffer v. Heitner,* 433 U.S. 186 (1977); *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 2093 (2018).

[13] *Ibid.*

[14] *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 314 (1950); *Dusenbery v. United States*, 534 U.S. 161 170 (2002).

[15] *Harris County v. PRSI Trading, LLC* (Docket No. 20-563), cert. denied, 12/14/2020.

[16] *Pappas, et al. v. A.F. Moore & Associates, Inc.* (Docket No. 20-316), 11/16/2020.

[17] *Pisztora et al. v. City of Pittsburgh, Pa. Commw. Ct.* (Docket No. 20-359), cert. denied, 11/16/2020.

[18] *City of Pittsburgh v. Pisztora et al, Pa. Commw. Ct.* Docket No. 897 C.D. 2017, (11/1/2019).

[19] *Shaffer v. Comm'r of Revenue, Mass.* (Docket No. 20-501), cert. denied, 11/09/2020.

[20] *Shaffer v. Comm'r of Revenue, Mass. S. Ct.,* Docket No. SJC-12812 (07/10/2020).

[21] *Xpedite Systems v. Director, Div. of Taxation* (Docket No. 20-468), cert. denied, 12/14/2020.

END OF DOCUMENT -