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**U.S. Supreme Court Update**

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U.S. SUPREME COURT UPDATE

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**Supreme Court Denies New Hampshire's Motion and Finds No Standing in Affordable Care Act Suit and New York 'Opioid Stewardship Payment' Tax Injunction Act Case**

**\*34** In *California v. Texas* (Docket No. 19-840), the Supreme Court ruled that Texas and 17 other states, plus two individual plaintiffs, lack standing to question the constitutionality of The Patient Protection and Affordable Care Act (the 'Act'). Specifically, the Court found that the Plaintiffs did not show that the injury they will suffer or have suffered is "fairly traceable" to the 'allegedly unlawful conduct' by enforcement of the Act's minimum essential coverage provision, as required by [Article III of the U.S. Constitution](#). We review the Court's decision on standing and the dissenting opinion.

As we went to press, the Supreme Court issued its order declining to determine whether Massachusetts's telecommuting regulation violates the U.S. Constitution in *New Hampshire v. Commonwealth of Massachusetts* (Docket No. 220154). Motion for leave to file the bills of complaint were denied, June 28, 2021. The order provides that Justice Thomas and Justice Alito would grant the motions. In this issue, we cover the final briefs filed in the case, the brief amicus curiae of the United States, together with supplemental briefs filed by New Hampshire and Massachusetts of significance. Massachusetts informed the Court that the Commonwealth Court's COVID-19 state of emergency ended on June 15, 2021, which triggered the sunset of the state's telecommuting regulation that was at the heart of the case.

We also cover amicus briefs filed by the National Taxpayers Union Federation and Chamber of Commerce in *Healthcare Distribution Alliance v. James* (Docket No. 20 – 1611). The issue in that case is whether the New York Opioid Stewardship Act's payment is a 'tax' within the meaning of the Tax Injunction Act, [28 U.S.C. § 1341](#).

Pending before the court is *Olson v. Minnesota Commissioner of Revenue* (Docket No. 20 – 1583), where the Court is asked whether issuance of the Minnesota Tax Commissioner's tax order by ordinary mail meets constitutional requirements of procedural due process under the Due Process Clause of the U.S. Constitution.

**\*\*2** Also, the Special Master issues its report in the MoneyGram cases: *Delaware v. Pennsylvania*, 220145 and *Arkansas et al. v. Delaware*, 220146. We will discuss the reports in the next issue.

Finally, the Court has denied Seneca County New York's petition for writ of certiorari in *Seneca County, New York v. Cayuga Indian Nation of New York* (Docket No. 20 – 1210), where the County challenged the Second Circuit's ruling that tribal sovereign immunity from suit bars the County from pursuing tax enforcement foreclosure actions against a federally recognized tribe for the nonpayment of real property taxes on properties purchased in the open market.

### **California v. Texas: Individual Plaintiffs and States Have No Standing to Challenge ACA's Minimum Mandate**

In a 7 – 2 opinion, in *California v. Texas* (Docket No. 19-840), the Court found that Texas and 17 other states, plus two individuals, lacked standing to challenge the constitutionality of the Patient Protection and Affordable Care Act (the 'Act').

#### **Background.**

The Act, as enacted in 2010, required most Americans to obtain minimum essential health insurance coverage.<sup>1</sup> The Act imposed a monetary penalty, scaled according to income, upon individuals who failed to obtain coverage.<sup>2</sup> The Act required that those subject to a penalty must include it with their annual federal income tax return.<sup>3</sup> In 2017, as a part of the Tax Cuts and Jobs Act of 2017, P.L. 115 – 97, the U.S. Congress nullified the penalty by setting its amount at \$0.00 beginning tax year 2019 (the '2017 Amendment'). Prior to the 2017 Amendment, the Internal Revenue Service implemented the minimum mandate provisions of the Act by requiring individuals to report whether they carried minimum coverage on their annual federal income tax return.

In response to the 2017 Amendment, Texas and 17 other states brought this lawsuit against the United States and 35 government officials. Two individuals also subsequently joined the suit, which collectively with Texas and the 17 states are referred to as the 'Petitioners.' The Petitioners claim that without the penalty the Act's minimum essential coverage requirement is unconstitutional. As explained by the Court, 'they say neither the Commerce Clause nor the Tax Clause (nor any other enumerated power) grants Congress the power to enact it. See U.S. Const. Art. I, §8. They also argue that the minimum essential coverage requirement is not severable from the rest of the Act. Hence, they believe the Act as a whole is invalid.'

In 2012, the Court upheld the constitutionality of the individual coverage mandate by characterizing the penalty for not complying as a 'tax' that Congress had the right to impose under its taxing power.<sup>4</sup>

#### **Opinion of the Court.**

Justice Breyer delivered the opinion of the Court, in which Chief Justice Roberts and Justice Thomas, Justice Sotomayer, Justice Kagan, Justice Kavanaugh and Justice Barrett joined. Justice Thomas filed a concurring opinion and Justice Alito filed a dissenting opinion in which Justice Gorsuch joined.

**\*\*3** As explained by the Court, 'the U.S. Constitution gives federal courts the power to adjudicate only genuine 'Cases' and 'Controversies.' Art. III, §2. That power includes the requirement that litigants have standing. A plaintiff has standing only if he can 'allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'<sup>5</sup> Per the Court, 'neither the individual nor state [P]laintiffs have shown that the injury they will suffer or have suffered is 'fairly traceable' to the 'allegedly unlawful conduct' of which they complain.'

With respect to the two individual Plaintiffs, the Court explains that they claim a particularized individual harm in the form of payments they have made or will make each month to carry the minimum essential coverage required under the Act. The Court explains that 'even if we assume that this pocketbook injury satisfies the injury element of Article III standing . . . the [P]laintiffs nevertheless fail to satisfy the traceability requirement.' In short, as further explained by the Court, '[t]heir problem lies in the fact that the statutory provision, while it tells them to obtain that coverage, has no means of enforcement.' Specifically, due to the 2017 Amendment, which zeroed out the penalty, 'the IRS can no longer seek a penalty from those who fail to comply

‘ and ‘[b]ecause of this, there is no possible Government action that is causally connected to the plaintiff’s injury – the costs of purchasing health insurance.’

With respect to the state Plaintiffs, the Court also found that they have failed to show that they have alleged an ‘injury fairly traceable to the defendant’s allegedly unlawful conduct.’ As explained by the Court, the state Plaintiffs claim twotypes of pocketbook injuries: (1) an indirect injury in the form of increased use of (and therefore cost to) state-operated medical insurance programs; and (2) a direct injury resulting from a variety of increased administrative and related expenses required by the minimum coverage provision, plus other provisions of the Act. The Court concludes that the costs of serving new enrollees is not directly traceable to any actual or possible unlawful Government conduct in enforcing the minimum mandate under the Act. According to the Court, it ‘need only examine the initial factual premise of their claim to uncover another factual premise of their claim to uncover another fatal weakness: The state plaintiffs have failed to show that the challenged minimum essential coverage provision, without any prospect of penalty, will harm them by leading more individuals to enroll in these programs.’ As for the costs, the Court finds that it is other provisions of the Act, not the minimum essential coverage provisions, that imposes such direct costs. Therefore, the majority of the Court concludes that ‘[t]he Government’s conduct in question is therefore not ‘fairly traceable’ to enforcement of the ‘allegedly unlawful’ provision of which the [P]laintiffs complain.’

**\*\*4** Justice Thomas addresses Justice Alito’s dissent. Justice Thomas disagrees that the Court should find standing through ‘inseverability.’ His primary argument in support is that the Plaintiffs did not raise such argument below nor in their opening brief before the Court. Furthermore, Justice Thomas argues that ‘standing through inseverability could only be a valid theory of standing to the extent it treats inseverability as a merits exercise of statutory interpretation.’

#### **The dissent.**

Justice Alito, with whom Justice Gorsuch joins, dissents with the majority of the Court’s opinion. Per the dissent, what does the Court do when faced with ‘the daunting problem of a ‘tax’ that does not tax’? The answer: ‘Instead of defending the constitutionality of the individual mandate, the Court simply ducks the issue and holds that none of the Act’s challengers, including the 18 States that **\*36** think the Act saddles them with huge financial costs, is entitled to sue.’

The dissenting opinion argues that Texas and the other Plaintiffs have standing, as they have shown ‘that they suffer concrete and particularized financial injuries that are traceable to conduct of the Federal Government. The ACA saddles them with expensive and burdensome obligations, and those obligations are enforced by the Federal Government.’ Specifically, the dissent maintains that the reporting requirements in §§6055 and 6056 are enforceable by the Federal Government, and noncompliance can result in heavy penalties. Thus, the dissenting justices conclude that the financial injuries are ‘fairly traceable to the challenged conduct.’

The dissent also finds the majority’s traceability analysis as a ‘flat out misstatement of the law.’ The dissent argues that ‘a plaintiff’s standing (and thus the court’s [Article III](#) jurisdiction) does not require a demonstration that the defendant’s conduct is in fact unlawful.’ Furthermore, as explained by Justice Alito, even ‘[a]fter imposing an obstacle that the States should not have to surmount to establish standing, the Court turns around and refuses to consider whether the States have cleared that obstacle.’

The dissent, having found standing, then considers the merits of the lawsuit — whether the individual mandate is unlawful and whether it is inseverable from the provisions that burden the states. The dissent finds that the mandate cannot be sustained under the Commerce Clause or the Necessary and Proper Clause, nor as a lawful exercise of Congress’ taxing power when the penalty is set at \$0.00. It also finds that the individual mandate is inseverable from the provisions burdening the state Plaintiffs.

#### **New Hampshire v. Massachusetts: Brief Amicus Curiae of the United States, New Hampshire’s Supplemental Brief and Massachusetts’s Supplemental Brief**

As noted above, the Acting Solicitor General filed an amicus brief expressing the views of the United States, which New Hampshire responded to by filing a Brief in Opposition. The state of Massachusetts followed by filing its own supplemental brief, which informs the court of the sunset of the telecommuting regulation that is at the heart of the lawsuit.

### **Brief amicus curiae of the U.S.**

**\*\*5** In response to the Court's request, the Acting Solicitor General filed an amicus brief, in *New Hampshire v. Commonwealth of Massachusetts* (Docket No. 220154), expressing the United States' views on whether the Court should hear, as a matter of original jurisdiction, the complaint filed by New Hampshire against Massachusetts. As previously discussed in this article, New Hampshire's motion for leave to file a bill of complaint seeks to enjoin Massachusetts from enforcing its emergency tax regulation, which requires New Hampshire residents telecommuting to Massachusetts due to the COVID-19 pandemic to treat their income as Massachusetts source income. The United States maintains that the Court should deny New Hampshire's motion, because the case is inappropriate for the Court's original jurisdiction.

In its opening statement, the United States establishes that Massachusetts' emergency tax regulation represents a departure from its traditional practice of taxing nonresidents only on the portion of their income 'received for services performed in Massachusetts.' With the promulgation of the emergency regulation on April 21, 2021, Massachusetts requires nonresidents who were working in Massachusetts immediately prior to the State's COVID-19 state of emergency, but who are 'performing services from a location outside Massachusetts due to a Pandemic-related Circumstance' to treat income earned for those services as Massachusetts' source-income. The brief highlights that the Massachusetts rule only covers the period from March 10, 2020 to 90 days after the Governor of Massachusetts ends the State's COVID-19 state of emergency.

After summarizing New Hampshire's allegations and requests for relief –including 'an injunction preventing Massachusetts from enforcing the rule and requiring it to refund all funds collected under the rule' – the United States enumerates three reasons that the Court's exercise of its original jurisdiction would be inappropriate in this case: (1) 'New Hampshire does not invoke the types of interests that would warrant such an exercise,' (2) New Hampshire residents subjected to the Massachusetts tax can raise and litigate the issues New Hampshire wishes to present, and (3) New Hampshire's constitutional claims would be better considered with complete factual records regarding affected individuals and interpretations of the tax regulation from Massachusetts courts.

### **The United States' first argument: the Court's original jurisdiction is discretionary, not obligatory.**

The United States acknowledges that the Court has 'original and exclusive jurisdiction of all controversies between two or more States,'<sup>6</sup> but, contrary to the arguments advanced by New Hampshire and its amici, it contends that the Court's original jurisdiction is only obligatory in certain cases.

The brief notes the Court's historical reluctance to invoke original jurisdiction, highlighting the Court's assertion that 'original jurisdiction should be invoked only 'sparingly,' when absolute necessity dictates.'<sup>7</sup> Accordingly, the United States concludes that the Court's exercise of original jurisdiction in disputes between states is discretionary, not obligatory. The brief argues that the Court's interpretation finds support in the structural limits on the Court's ability to assume the role of a trial judge, the Court's duty to attend to its appellate docket, and the doctrine of stare decisis.

### **The United States' second argument: the 'seriousness' of the dispute does not warrant the Court's original jurisdiction.**

**\*\*6** The United States questions the seriousness of the dispute. The brief notes that, in deciding whether to invoke its original jurisdiction, the Court considers both the nature of the complaining state's interest, examining the 'seriousness and dignity of

the claim,<sup>6</sup> and whether an alternate forum where the issue may be litigated exists. The \*37 United States argues that both of these factors weigh against the Court exercising original jurisdiction in this case.

The United States maintains the Court has established that ‘[t]he model case for invocation of [its] original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.’<sup>8</sup> The brief states that the Court has most often exercised its original jurisdiction in disputes between states ‘sounding in sovereignty and property’ or contractual disagreements. The United States emphasizes that New Hampshire’s interests do not fall into these categories, implying that they do not justify the exercise of the Court’s original jurisdiction.

The United States acknowledges that New Hampshire has an interest in its ‘power to create and enforce a legal code,’<sup>9</sup> including its tax laws; however, the brief highlights New Hampshire’s failure to identify any precedential support for its claim that a state taxing nonresident employees violates the sovereign interests of the employees’ state of residence. Contrary to New Hampshire’s assertion, the United States argues ‘an independent tax obligation falling on a State’s residents generally is not an injury to that State’s own sovereign prerogatives.’<sup>10</sup> The United States also views New Hampshire’s contention as problematic due to its lack of limiting principle, which could burden the Court’s ability to attend to its appellate docket.

The United States similarly disposes of New Hampshire’s claim that the rule incentivizes individuals to act in ways that may harm the state. The brief establishes that the Court generally requires the complaining state to show ‘the injury for which it seeks redress was *directly* caused by the actions of [the defendant] State.’<sup>11</sup> The United States argues that New Hampshire’s claimed harms – that Massachusetts tax regulation effectively negates the tax incentives for individuals and businesses to move to the State, harms the State’s ability to recruit people to work for the state government, and endangers the public health by reducing the tax incentives to work from home during the pandemic – fail to meet this standard and are at best indirect or incidental results of Massachusetts’ tax regulation.

The United States also argues that New Hampshire’s constitutional claims are derivative of the claims of its individual residents affected by the regulation. As such, the United States asserts that these individually affected residents would be more appropriate plaintiffs to bring the claims, and they could petition the Court to review the same issues after proceeding through Massachusetts administrative and judicial channels. Additionally, the United States suggests allowing New Hampshire to bring these claims would override congressionally established process under the Federal Tax Injunction Act, which ‘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. The United States suggests that Massachusetts offers such a remedy in its courts.

### **The United States’ third argument: the nature of New Hampshire’s Commerce Clause and Due Process claims advises against exercising original jurisdiction.**

\*\*7 The United States responds to New Hampshire’s Commerce Clause and Due Process Clause challenges by asserting that the regulation directly impacts New Hampshire residents, not the State. As such, the United States argues the Commerce Clause and Due Process Clause claims ‘are more appropriately raised by the directly affected individuals.’<sup>12</sup>

The brief further argues that Commerce Clause and Due Process Clause challenges to Massachusetts’s imposition of personal income tax on New Hampshire residents would ‘benefit from a more developed factual record and from an authoritative construction of the rule...by Massachusetts courts.’ The United States maintains that the Court can ‘forbear proceeding’ on an action where it can exercise original jurisdiction ‘until all the facts are before [the Court] on the evidence.’<sup>13</sup> The brief asserts that such forbearance is appropriate in ‘cases involving ‘intricate questions’ of ‘far-reaching importance,’’ including allocating income among jurisdictions.<sup>14</sup> The brief reemphasizes that Massachusetts courts \*38 are better-suited to perform the ‘case-by-case analysis of [the] purposes and effects of [income allocation]’ required to resolve Commerce Clause and due process challenges, because such resolution may ‘depend on individual variations among taxpayers and other factual determinations.’

For example, the brief explains that for an interstate tax to be permissible under the Commerce Clause it must ‘(1) appl[y] to an activity with a substantial nexus with the taxing State, (2) [be] fairly apportioned, (3) . . . not discriminate against interstate commerce, and (4) [be] 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)).’ However, the United States highlights that whether the tax is ‘fairly related’ to services provided by Massachusetts could vary based on the ‘specific nature of the employee’s job.’ Similarly, whether the tax is ‘fairly apportioned’ could vary based on ‘the particular relationship of income apportionment to how the individual taxpayer divides his time.’

The United States also claims that the Court’s evaluation of Commerce Clause and Due Process Clause challenges may ‘depend on how Massachusetts interprets the rule and other relevant provisions of state law.’ The brief argues that Massachusetts’ state court rulings on questions raised by the regulation’s language – including: (1) ‘what period qualifies as ‘immediately prior’ to the pandemic state of emergency; and (2) ‘does the regulation’s ‘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?’ – would substantially assist the Court in any resolution of the issues presented by New Hampshire.

**\*\*8** Additionally, while the United States concedes that New Hampshire residents telecommuting to Massachusetts will rely on New Hampshire’s police and fire protection services, it argues that New Hampshire residents’ ‘work also may continue to depend on and benefit from services provided by Massachusetts’ including ‘computer services that . . . store their work product, courts that enforce contracts, and financial institutions and transactions necessary to the work.’ In short, the United States argues ‘a telecommuting employee’s physical location . . . need not map precisely onto the location of the governmental services needed to support that employee’s work.’

Finally, while New Hampshire claims the Court should address the questions presented due to the nationwide increase in telecommuting and the many state nonresident allocation laws, the United States asserts ‘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 Massachusetts rule is set to expire and applies to a limited number of employees. If the Court were to hear the case, the United States argues, its decisions regarding New Hampshire’s Commerce Clause and Due Process Clause claims may not address those questions in the similar, yet distinct, contexts of permanent telecommuting or telecommuting unrelated to a global pandemic.

### **New Hampshire’s Supplemental Brief**

On June 7, 2021, New Hampshire filed a supplemental brief in support of its motion for leave to file a bill of complaint, in response to the United States’ arguments raised in its amicus brief. In the reply, New Hampshire challenges the United States’ arguments against the Court exercising original jurisdiction – contending that (1) the United States misconstrues the seriousness of the dispute at issue, (2) the *possibility* that individual New Hampshire residents *may* challenge the rule in Massachusetts courts does not warrant the Court declining to exercise its original jurisdiction, (3) ‘there is no need for factual development in Massachusetts proceedings,’ and (4) the Court should reevaluate its discretionary application of its original jurisdiction. Based on the foregoing arguments, New Hampshire reaffirms that its ‘case satisfies the criteria for the exercise of original jurisdiction’ and concludes its motion should be granted.

### **New Hampshire argues the seriousness of the dispute justifies original jurisdiction.**

New Hampshire begins by conceding to the United States’ recognition that the ‘model case’ for the Court’s original jurisdiction is ‘a dispute between the States of such seriousness that it would amount to *casus belli* if the States were fully sovereign.’<sup>15</sup> However, contrary to the United States’ position, New Hampshire asserts ‘this is exactly that case.’ New Hampshire supports

this position by noting that ‘nations regularly ‘resorted to war to protect the economic interests of their citizens,’ ‘and the revolutionary war began partially due to Great Britain’s ‘imposing taxes on us without our consent.’

**\*\*9** Similarly, New Hampshire maintains that the seriousness of the Massachusetts tax regulation is clearly demonstrated by its having ‘taken (and [its continuing] to take) hundreds of millions of dollars from more than 100,000 New Hampshire residents.’ This magnitude warrants the exercise of original jurisdiction, according to the brief, because the ‘Court regularly hears tax disputes of even lesser magnitude and importance than this one, *see* N.H. Br. 23.’

New Hampshire also claims that the United States mischaracterizes the nature of its sovereign interests in describing its deliberate decision to not subject its residents to personal income tax as mere preference. Rather, its brief reinforces that its personal income tax policy enables the State to ‘successfully compete in the market for people, businesses, and economic prosperity. N.H. Br. 1.’ The brief challenges the United States’ assertion that the Court’s exercising original jurisdiction in this dispute would force the Court to choose between hearing similar disputes or attending to its appellate docket, because the seriousness of New Hampshire’s tax policy choice distinguishes the dispute from ‘mine-run tax disputes between States.’

Finally, New Hampshire notes that the United States’ emphasis on the claimed temporary nature of the tax regulation is moot, because ‘New Hampshire residents will still be owed a refund of the unlawful taxes Massachusetts collected,’ even after the regulation expires. New Hampshire concludes its argument by asserting that the Court declining to exercise original jurisdiction would set a dangerous precedent, telling States ‘they can act **\*39** unlawfully toward one another as long as their actions are a ‘temporary’ response to a ‘once-in-a-century’ crisis. U.S. Br. 22.’

**New Hampshire argues the possibility of its individual residents challenging the rule does not preclude the Court from exercising original jurisdiction.**

New Hampshire claims that the United States’ argument that the Court decline to exercise original jurisdiction because a New Hampshire resident could challenge the rule in state court ‘fails on multiple levels.’ First, the brief notes that the United States ‘greatly overestimates the likelihood that individual taxpayers will file such cases,’ because the litigation costs outweigh the potential relief. Second, it argues that even if an individual taxpayer challenged the rule in state court, the case would be unlikely to ‘benefit other taxpayers who decline to sue.’ New Hampshire maintains that such a case would likely be resolved on non-constitutional grounds, and if the constitutional issues reached the Supreme Court, the statute of limitations would likely bar other New Hampshire residents from filing their own suits. Third, the brief asserts that, as it relates to the Court’s declining to exercise original jurisdiction, the ‘mere ‘availability’ of an alternate forum matters ‘only where there is jurisdiction over the *named parties*’ in another court.’<sup>16</sup> New Hampshire, a named party in this dispute, insists it has no other forum to bring its claims, and ‘the fact that an unidentified party *might* bring a lawsuit that *might* protect [its] interests is not enough.’ New Hampshire concludes its second argument by claiming the ‘principles of ‘equity, comity, and federalism,’ U.S. Br. 12, thus are served by *resolving* this dispute in the *only* court with jurisdiction over disputes between the states.’

**New Hampshire argues that factual development in Massachusetts state courts is unnecessary.**

**\*\*10** New Hampshire dismisses the United States’ arguments that the dispute would benefit from both ‘a more developed factual record and from an authoritative construction of the rule . . . by Massachusetts courts.’ While the United States argues ‘it is *possible* that a narrowed rule could constitutionally impose *some* taxes on *some* New Hampshire residents,’ New Hampshire asserts that this argument ignores the broad scope of the rule. Instead, it maintains that ‘a State cannot impose a tax of such far-reaching scope simply because it might be properly applied in a handful of hypothetical circumstances.’<sup>17</sup>

Similarly, New Hampshire states that the United States ‘finds confusion where there is none’ – in claiming the rule’s ambiguity brings up additional, unanswered questions – because neither Massachusetts nor New Hampshire has struggled to interpret the rule’s broad scope. The brief also establishes that Massachusetts has put out ‘specific guidance addressing many of the United

States' questions about the tax rule,' which further counsels against the need to have Massachusetts' courts clarify the rule. New Hampshire adds that the Court can appoint a Special Master in the event that 'some factual development is necessary.'

### **New Hampshire argues that the Court's discretionary approach to its original jurisdiction is erroneous.**

New Hampshire's final argument attributes the United States' decision not to 'defend the Court's discretionary approach to its original jurisdiction on textual grounds' to the Court's precedent being 'at odds with the statutory text.'<sup>18</sup> The brief also undermines the United States' reference to the 'Court's 'structur[e]' and 'histor[y],'' characterizing the considerations as policy choices in conflict with those already made by Congress.

### **Massachusetts's Supplemental Brief**

On June 15, 2021, Massachusetts filed a Supplemental Brief in Opposition of New Hampshire's motion. The purpose of the brief was to bring to the Court's attention that on June 15, 2021, the Commonwealth of Massachusetts's COVID-19 state of emergency ended. As explained by the State, the 'Governor's declaration of an end to the emergency triggers the sunset of the pandemic-related tax regulation New Hampshire seeks to challenge in this Court in the first instance.' The brief further provides that '[t]heregulation's \*40 sunset, while not unexpected in that it is contemplated by the regulation's very terms, underscores the arguments why this dispute fails to rise to the level of grave importance warranting exercise of the Court's original jurisdiction . . . and why any disputes over application of the temporary regulation to taxpayers should be addressed through the ordinary course of state proceedings in the first instance.'

### **Supreme Court Denies Complaint**

On June 28, 2021, the Supreme Court denied New Hampshire's motion for leave to file a bill of complaint in the case. Justices Clarence Thomas and Samuel Alito, Jr. would have granted the motions, per the Order.

### **Amicus Briefs Filed in Challenge to Ruling that New York Opioid Stewardship Payment is a 'Tax' Under the 'Tax Injunction' Act**

\*\*11 As discussed in the last issue, a petition for writ of certiorari in *Healthcare Distribution Alliance v. James* (Docket No. 20 – 1611) asks whether the New York Opioid Stewardship Act's payment (the 'Payment') is a 'tax' within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341 (the 'TIA'). (The TIA forbids federal district courts from 'enjoin[ing], suspend[ing]

or restrain[ing] the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.') The Second Circuit Court of Appeals determined that the annual Payment required of opioid manufacturers and distributors under New York's Opioid Stewardship Act ('OSA') is a 'tax' within the meaning of the TIA, and therefore the United States District Court for the Southern of New York lacked jurisdiction to invalidate or enjoin enforcement of the Payment.

The National Taxpayers Union Foundation filed a brief in support of the Petitioners. The brief asserts that the charge imposed in this case is a penalty, and the Second Circuit is an outlier in concluding that a challenge to the charge is barred by the TIA. The Foundation maintains that 'the conclusion reached by the court below erodes the long relied upon definition of 'tax' and wrongfully invokes the TIA in order to stifle any scrutiny or legal challenge as to its unconstitutionality.' The Foundation further argues that the Second Circuit's conclusion is at odds with the view of New York State Courts.

The Chamber of Commerce of the United States of America also filed a brief amicus curiae in support of Petitioners. The Chamber of Commerce asserts that the Second Circuit's 'overbroad reading of the TIA' is 'badly mistaken' and 'threatens judicial



review of punitive state laws.’ According to the Chamber, ‘[w]hile the Second Circuit paid lip service to the rule that an exaction qualifies as a ‘tax’ under the TIA only if its primary purpose is to raise revenue . . . its actual analysis employed a far more expansive definition. In the court of appeals’ view, any exaction whose ‘revenue’s ultimate use is to provide a general benefit to the public’ is presumptively a ‘tax’ for TIA purposes.’ The Chamber also argues that ‘[t]he decision below not only conflicts with text, history, and precedent, it also imperils the nation’s business community.’ The Chamber bases its argument on its litigation experience, which it claims illustrates that ‘states are not shy about trying to evade federal pre-enforcement review by dressing up penal exactions as ‘taxes’ under the TIA ‘ and that the ‘Second Circuit’s sweeping understanding of what constitutes a ‘tax’ in this context is likely to be used in the future to punish unpopular out-of-state businesses unimpeded by the prompt scrutiny of federal courts.’

### Pending Petitions

#### Special Master’s Reports in cases concerning priority to abandoned property still pending.

The Special Master issued its report in the MoneyGram cases: *Delaware v. Pennsylvania*, 22O145 and *Arkansas et al. v. Delaware*, 22O146 which involve a dispute between Delaware and several other states concerning which states have priority rights to claim abandoned, uncashed MoneyGram official checks. We will discuss the report in the next issue of the Journal.

#### Due Process Challenge to Minnesota’s notice of tax order mailing procedures.

**\*\*12** In *Olson v. Minnesota Commissioner of Revenue* (Docket No. 20 – 1583), the Court is asked whether issuance of the Minnesota Tax Commissioner’s tax order by ordinary mail meets constitutional requirements of procedural due process under the Due Process Clause of the U.S. Constitution.

### Denied Petitions

In *Seneca County, New York v. Cayuga Indian Nation of New York* (Docket No. 20–1210), cert. den. June 7, 2021, Seneca County, New York filed a petition for writ of certiorari challenging the Second Circuit’s ruling that tribal sovereign immunity from suit bars the County from pursuing tax enforcement foreclosure actions against a federally recognized tribe for the nonpayment of real property taxes on properties purchased in the open market.

#### Footnotes

- 1 26 U.S.C §5000A(a).
- 2 26 U.S.C §5000A(c).
- 3 26 U.S.C §5000A(b)(2).
- 4 *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 530 (2012).
- 5 *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006).
- 6 28 U.S.C. 1251(a).
- 7 *Mississippi v. Louisiana*, 506 U.S. at 76 (quoting *Wyoming v. Oklahoma*, 502 U.S.437, 450 (1992)).
- 8 *Id.* at 77 (quoting *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983)).
- 9 *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982).
- 10 *Massachusetts v. Missouri*, 308 U.S. 1, 15 (1939); *Florida v. Mellon*, 273 U.S. 12, 16-17 (1927).
- 11 *Pennsylvania v. New Jersey*, 426 U.S. 660, 663 (1976); see *Maryland v. Louisiana*, 451 U.S. 725, 733, 736 (1981); *Wyoming*, 502 U.S. at 442-45, 451.
- 12 Cf. *Pennsylvania v. New Jersey*, 426 U.S. at 665.
- 13 *Kansas v. Colorado*, 185 U.S. 125, 145-47 (1902).
- 14 *Id.* at 145, 147.

- 15     *Mississippi*, 506 U.S. at 77.  
16     *Illinois v. Milwaukee*, 406 U.S. 91, 93 (1972).  
17     *See, e.g., Maryland*, 451 U.S. at 734.  
18     *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035 (2016) (Thomas, J., dissenting).

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