

NEW YORK TAX APPEALS TRIBUNAL
BEFORE ADMINISTRATIVE LAW JUDGE JESSICA DiFIORE

DTA # 830517 and DTA # 830681

EDWARD A. and DORIS ZELINSKY,

Petitioners-Taxpayers

BRIEF OF THE PETITIONERS-TAXPAYERS
EDWARD A. AND DORIS ZELINSKY

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Dated: June 14, 2023

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QUESTIONS PRESENTED

- 1) As a matter of state law, can New York tax the income the petitioner-taxpayer earned working exclusively from his Connecticut home from March 15, 2020 through December 31, 2020 (“the COVID-19 period”) ?
- 2) On the facts of this case, do the Due Process and dormant Commerce Clauses of the U.S. Constitution forbid New York from taxing the income the petitioner-taxpayer earned working exclusively from his Connecticut home from March 15, 2020 through December 31, 2020 (“the COVID-19 period”)?
- 3) On the facts of this case, do the Due Process and dormant Commerce Clauses of the U.S. Constitution forbid New York from taxing the income the petitioner-taxpayer earned on his days working at his Connecticut home in 2019 and in the first two and one-half months of 2020 (“the pre-COVID period”)?

PRELIMINARY STATEMENT

In March of 2020, Governor Andrew Cuomo shut down New York State to combat COVID-19, the greatest public health crisis of modern times. The Governor ordered all New York businesses to reduce their “in-person workforce at any location by 100%.” Businesses failing to comply with the Governor’s shut down order faced the stiff penalties of Public Health Law § 12-1. New York now takes the remarkable position that it may tax the income of a nonresident employee who worked at home in Connecticut when New York law prohibited him from working at his New York office. This remarkable position is as wrong as it sounds. Such taxation violates both New York’s own law and the U.S. Constitution.

Professor Edward A. Zelinsky, the taxpayer in these cases, is a Connecticut resident who Governor Cuomo mandated to work at home because of COVID-19. A professor at Yeshiva University’s Benjamin N. Cardozo School of Law in Manhattan, Professor Zelinsky is one of the nation’s most widely-cited tax scholars. In 2019 and for the first two and one-half months of 2020, Professor Zelinsky commuted into Manhattan three days a week to teach when Cardozo held classes. On the rest of his work days during this initial, pre-COVID period, Professor Zelinsky undertook his legal research and writing as well as administrative tasks at his home in Connecticut. When COVID-19 hit, Professor Zelinsky was required to transition to fully remote work to stop the virus. For this COVID-19 period from March 15, 2020 through December 31, 2020, Professor Zelinsky never set foot in New York.

Professor Zelinsky challenges the Department of Taxation and Finance’s refusal to provide income tax refunds for both 2019 and 2020. The Department claims that the “convenience of the employer” doctrine permits it to tax all of Professor Zelinsky’s Cardozo

salary earned in 2019 and 2020 – including the salary earned at home when Professor Zelinsky could not work at Cardozo due to COVID-19 restrictions. As a result of these restrictions, Professor Zelinsky had no New York office from March 15, 2020 through December 31, 2020 and did not (and could not) commute to work from his Connecticut home to New York.

Consider first New York's denial of an income tax refund for the COVID-19 period from March 15, 2020 through December 31, 2020. New York's denial of a refund for this COVID-19 period is wrong for three reasons.

First, as a matter of state law, New York's own regulations do not permit taxation of Professor Zelinsky's income earned at home in Connecticut starting on March 15, 2020. New York law permits taxation of a nonresident employee's income only if the nonresident spends some days in New York. But, after March 15, 2020, Professor Zelinsky spent no days in New York. Governor Cuomo effectively padlocked Professor Zelinsky's New York office.

In addition, New York's own regulations do not permit taxation of a nonresident employee's income if the nonresident employee works out-of-state for his employer's necessity. Professor Zelinsky worked at home starting on March 15, 2020 for Cardozo's dire necessity. If Professor Zelinsky (and other Cardozo faculty members) had not worked at home teaching classes on Zoom, Cardozo would have ceased operations because of the Governor's shut down order.

Moreover, New York's case law only taxes a nonresident's income if the nonresident had a New York office available to him. For the last nine and one-half months of 2020, Professor Zelinsky had no New York office or classroom available to him because Governor Cuomo closed Cardozo and Cardozo complied with the Governor's COVID-19 shut-down order.

The Tribunal should grant Professor Zelinsky's state law refund request for the last nine and one-half months of 2020 to avoid the need to consider Professor Zelinsky's constitutional claim for this COVID-19 period. *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J. concurring).

Second, even if New York law permitted the taxation of Professor Zelinsky's Cardozo salary during the COVID-19 period starting on March 15, 2020, as a matter of federal constitutional law, the Due Process and dormant Commerce Clauses do not permit New York's taxation of this salary. The U.S. Constitution requires New York to tax a nonresident like Professor Zelinsky by properly apportioning his income between the states in which he worked and by avoiding extraterritorial taxation of the income the nonresident earned out-of-state. By taxing Professor Zelinsky's income earned in Connecticut during the COVID-19 crisis, New York fails to apportion and instead taxes extraterritorially Connecticut source income Professor Zelinsky, a nonresident, earned at home beyond New York's borders. On these facts, the Due Process and dormant Commerce Clauses forbid this taxation. Indeed, it is difficult to envision a more unconstitutional tax than an income tax levied by a state which affirmatively forbade the nonresident taxpayer from using his office for the period in question.

Third, *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004), does not apply to the income Professor Zelinsky earned at home starting on March 15, 2020. The facts of *Zelinsky* bear no relation to the facts of the COVID-19 crisis of 2020. *Zelinsky* emphasizes Professor Zelinsky's "voluntary choice" in 1994 and 1995 to work at home. But starting on March 15, 2020, Governor Cuomo gave Professor Zelinsky no choice but to work at home. *Zelinsky* is not good law.

Turning to 2019 and the first two and one-half months of 2020, two of the claims applicable to the COVID-19 period also apply to this earlier pre-COVID period. *First*, as a constitutional matter, New York can only tax a nonresident like Professor Zelinsky by properly apportioning his income between the states in which he works and by avoiding extraterritorial taxation of the income the nonresident earns out-of-state. By taxing Professor Zelinsky's income earned in Connecticut during 2019 and the first two and one-half months of 2020, New York fails to apportion. Instead, New York taxes extraterritorially Connecticut source income Professor Zelinsky, a nonresident, earned for this pre-COVID period at home beyond New York's borders. Such unapportioned, extraterritorial taxation of a nonresident violates the Due Process and Commerce Clauses as applied to the facts of this case.

Second, just as *Zelinsky* does not apply to the COVID-19 period starting on March 15, 2020, *Zelinsky* does not apply to the pre-COVID period of 2019 and the first two and one-half months of 2020. *Zelinsky* has been eroded by subsequent decisions of the U.S. Supreme Court, by criticism of *Zelinsky* from judges of the Court of Appeals, by criticism from commentators, and by subsequent events, namely, the post-COVID emergence of remote work as a central and widespread feature of American life. Just as *Zelinsky* is not good law for the COVID period, it is not good law for the earlier, pre-COVID period.

Consequently, Professor Zelinsky should receive the income tax refunds he requests for 2019 and 2020.

STATEMENT OF FACTS¹

Facts Common to 2019 and 2020

Edward A. and Doris Zelinsky are residents of Connecticut.² Edward A. Zelinsky is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan (“Cardozo”).³ He had New York source income in both 2019⁴ and 2020.⁵

Doris Zelinsky is the spouse of Edward A. Zelinsky.⁶ She signed the New York state nonresident joint income tax returns for 2019 and 2020 along with Professor Zelinsky.⁷ Doris Zelinsky had no New York source income in either year.⁸

The Zelinskys were the taxpayers in *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003), cert. denied, 541 U.S. 1009 (2004).⁹

Professor Zelinsky’s tasks for Cardozo included preparing for and teaching classes,

¹ The facts of the case are established by the parties’ stipulations and the petitioners’ exhibits. These are exhibit 1, the affidavit of Dean Melanie Leslie of the Cardozo School of Law; exhibit 2, § V(E) of the Benjamin N. Cardozo Governance Rules; and exhibits 3 through 6, the petitioners’ Requests for Admissions and the Division’s Verified Statements in Reply.

² Stipulation of Facts, DTA # 830861 (hereinafter, “2020 Stipulation”) at ¶ 1; Stipulation of Facts, DTA # 830517 (hereinafter, “2019 Stipulation”) at ¶ 1.

³ *Id.*

⁴ 2019 Stipulation at ¶ 1.

⁵ 2020 Stipulation at ¶ 1.

⁶ 2019 Stipulation at ¶ 3; 2020 Stipulation at ¶ 3.

⁷ *Id.*

⁸ *Id.*

⁹ 2019 Stipulation at ¶ 2; 2020 Stipulation at ¶ 2.

meeting with students, preparing and grading examinations, writing recommendations for students, and conducted scholarship research and writing.¹⁰ Professor Zelinsky's major and equally important tasks for Cardozo were teaching and legal scholarship.¹¹ "When Professor Zelinsky worked on his legal scholarship at his home in Connecticut in 2019 and 2020, he was performing an important task for Cardozo."¹² TaxProf Blog has identified Professor Zelinsky as one of the nation's most cited-tax scholars.¹³

For both 2019 and 2020, Professor Zelinsky, on his joint New York nonresident tax return, reported all of his Cardozo salary as taxable to New York.¹⁴ Subsequently, Professor Zelinsky and Mrs. Zelinsky filed amended returns requesting refunds of state income taxes paid to New York.¹⁵ The Department of Revenue and Finance rejected these requested refunds.¹⁶

¹⁰ 2019 Stipulation at ¶ 5; 2020 Stipulation at ¶ 5.

¹¹ Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 4; § V(E) of the Benjamin N. Cardozo Governance Rules (exhibit 2) ("each faculty member shall, on a regular basis...[p]repar[e]...scholarly works for publication").

¹² Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 6.

¹³ Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 9).

¹⁴ 2019 Stipulation at ¶ 4; 2020 Stipulation at ¶ 4.

¹⁵ 2019 Stipulation at ¶ 8; 2020 Stipulation at ¶ 16.

¹⁶ 2019 Stipulation at ¶ 10; 2020 Stipulation at ¶ 18.

Facts Specific to 2019

To teach his classes in 2019, Professor Zelinsky commuted from his home in Connecticut to Manhattan for 84 days.¹⁷ The remainder of his work time in 2019 for Cardozo (143 days) was spent at his home in Connecticut, performing legal scholarship (researching and writing) and performing administrative tasks.¹⁸

Reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, in 2019 his scholarship was cited by the Supreme Courts of Utah and Israel and by two U.S. Courts of Appeals. *See Steiner v. Utah State Tax Comm'n*, 449 P.3d 189, 197 n. 10 (2019); *Municipal Property Tax Director of Haifa v. Hadrad*, Supreme Court of Israel, No. 3012/18 (sitting date: 1/21/2019); *Teets v. Great-West Life & Annuity Ins. Co.*, 919 F.3d 1232, 1241 n. 6 (10th cir. 2019); *Gaylor v. Mnuchin*, 919 F.3d 420, 432 (7th cir. 2019).¹⁹

Further reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, in 2019 he published the following articles: *CalSavers and ERISA: An Analysis of Howard Jarvis Taxpayers Association v. The California Secure Choice Retirement Savings Program*, Chapter 5 in David Pratt (ed.), *NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION* (2019); *Comparing Wayfair and Wynne: Lessons for the Future of the Dormant Commerce Clause*, 22 *CHAPMAN L. REV.* 55 (2019); *Wynne and the Double Taxation of Dual*

¹⁷ 2019 Stipulation at ¶ 9; Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 9); testimony of Edward A. Zelinsky, Transcript of Hearing, April 25, 2023 at pages 20-21.

¹⁸ *Id.*

¹⁹ 2019 Stipulation at ¶ 6; Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 7).

State Residents, 92 STATE TAX NOTES 31 (April 1, 2019); *Continuing the Debate on the Johnson Amendment*, 162 TAX NOTES 1017 (March 4, 2019).²⁰

Facts Specific to 2020

The coronavirus changed employment and educational patterns in 2020.²¹ Interstate remote work expanded in the years subsequent to 2003 when *Zelinsky* was decided and then burgeoned further during the COVID-19 pandemic.²²

From January 21, 2020 until March 15, 2020, Professor Zelinsky taught his classes in person at the Cardozo Law School by commuting from Connecticut three days a week to Manhattan to teach at Cardozo.²³

Effective as of March 20, 2020, Governor Cuomo mandated that “[a]ll businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize.”²⁴ Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020). *See also* Executive Order 202.8 (March 20, 2020), amending Order No. 202.6 to provide that “[e]ach employer shall reduce the in-person workforce at any location by 100% no later than March 22 at 8 pm.”²⁵ *See also* Public Health

²⁰ 2019 Stipulation at ¶ 7; Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 8).

²¹ 2020 Stipulation at ¶ 8.

²² 2020 Stipulation at ¶ 9.

²³ 2020 Stipulation at ¶ 10.

²⁴ 2020 Stipulation at ¶ 11.

²⁵ *Id.*

Law §12-1, prescribing penalties for violating public health orders.²⁶

Starting on March 16, 2020, Cardozo complied with Governor Cuomo's Covid-related executive order and closed its doors to all in-person activity.²⁷ From March 16, 2020 through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never came into New York to work.²⁸

Beginning on March 16, 2020, Professor Zelinsky taught from his home in Connecticut and met with Cardozo students and faculty using the internet-based Zoom video conferencing platform.²⁹ He also continued performing legal research and writing for Cardozo at his Connecticut home.³⁰

Starting on March 16, 2020, Professor Zelinsky did not perform any teaching or scholarly duties for Cardozo in Manhattan due to the closure of the law school and New York's restriction on in-person activity.³¹ For the period from March 16, 2020 through December 31, 2020, Professor Zelinsky did not have a classroom or office available to him at the Cardozo campus in Manhattan.³²

Reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, in 2020,

²⁶ *Id.*

²⁷ 2020 Stipulation at ¶ 12.

²⁸ *Id.*

²⁹ 2020 Stipulation at ¶ 13.

³⁰ *Id.*

³¹ 2020 Stipulation at ¶ 14.

³² 2020 Stipulation at ¶ 15.

his scholarship was cited by the U.S. Court of Appeals for the Fourth Circuit in *Stegemann v. Gannett Co.*, 970 F.3d 465 (4th cir. 2020).³³

Further reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, in 2020, he published the following articles: *The Supreme Court Should Hear New Hampshire v. Massachusetts*, 98 TAX NOTES STATE 1179 (2020); *The Proper State Income Taxation of Remote and Mobile Workers*, 12 COLUMBIA J. OF TAX LAW No. 1; *A Tale of Two Bills: Preventing the Double Taxation of Remote Workers*, 97 TAX NOTES STATE 1163 (2020); *CalSavers and ERISA Redux: The District Court's Second Opinion in Howard Jarvis Taxpayers Association v. The California Secure Choice Retirement Savings Program*, in David Pratt (ed.), NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION (2020); *New York's Ill-Advised Taxation of Nonresidents During Covid-19*, 96 TAX NOTES STATE 1001 (2020); *Coronavirus, Telecommuting and the "Employer Convenience" Rule*, 95 STATE TAX NOTES 1101 (2020); *Bill Gates and the Tax Benefits of Private Foundations*, 166 TAX NOTES 1459 (2020); *Applying the First Amendment to the Internal Revenue Code: Minnesota Voters Alliance and the Tax Law's Regulation of Nonprofit Organizations' Political Speech*, 83 ALBANY LAW REV. 1 (2020); *The Taxation of Charitable Endowments' Incomes*, 166 TAX NOTES 401 (2020).³⁴

³³ 2020 Stipulation at ¶ 6; Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 7).

³⁴ 2020 Stipulation at ¶ 7; Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 8).

ARGUMENT

I. No New York tax is due on the income Professor Zelinsky earned for the COVID-19 period from March 15, 2020 through December 31, 2020.

For three reasons, no New York income tax is due on the Cardozo salary Professor Zelinsky earned for the period from March 15, 2020 through December 31, 2020.³⁵

First, as a matter of state law, New York’s own regulations and case law do not permit taxation of Professor Zelinsky’s income earned at home in Connecticut starting on March 15, 2020. The Tribunal should, as a matter of state law, grant Professor Zelinsky his requested refund for the last nine and one-half months of 2020 to avoid the need to confront his constitutional claim for this period. *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J. concurring) *Second*, as applied to the facts of this case, the Due Process and dormant Commerce Clauses forbid New York’s taxation of Professor Zelinsky’s income starting on March 15, 2020, the commencement of the COVID-19 period. Indeed, it is difficult to imagine a more unconstitutional tax than an income tax levied by a state which affirmatively padlocked the nonresident employee’s office for the period in question. *Third*, *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004), is not good law and does not apply to the income Professor Zelinsky earned at home starting on March 15, 2020.

³⁵ This nine and one-half month period, the COVID period, is covered by DTA # 830681, pertaining to the year 2020. The first two and one-half months of 2020 occurred before the COVID crisis. These two and one-half months are addressed *infra* at pages 42-50 along with the pre-COVID year 2019, covered in DTA # 830517. The principal legal difference between the COVID period and the pre-COVID period is that the petitioners raise state law issues only as to the COVID period. The petitioner does not contest that, as a matter of state law, New York’s “convenience of the employer” rule applies to the pre-COVID period, i.e., 2019 and the first two and one-half months of 2020. He does, on an as-applied basis, contest the constitutionality of New York’s taxation for the pre-COVID period.

A. As a matter of state law, New York’s taxation of Professor Zelinsky’s income earned at home starting on March 15, 2020 violates New York’s own regulations and case law.

For three independent reasons, as a matter of state law, New York’s own regulations and case law forbid the state’s income taxation of Professor Zelinsky’s Cardozo salary for the nine and one-half month COVID-19 period starting on March 15, 2020. For this period Professor Zelinsky worked exclusively at his home in Connecticut for Cardozo’s necessity, teaching his classes by Zoom. For this period, Professor Zelinsky did not have a New York office or classroom available to him because Governor Cuomo’s COVID-related executive order closed the state and prohibited Professor Zelinsky from commuting into New York to work at Cardozo.

New York’s own regulations define Professor Zelinsky’s salary for this nine and one-half month period as not derived from New York sources. 20 N.Y.C.R.R. § 132.4(b). In addition, the “convenience of the employer” doctrine does not apply during this nine and one-half month COVID period since Professor Zelinsky’s remote teaching at his Connecticut home was caused by Cardozo’s “necessity,”³⁶ not by anybody’s “convenience.” Moreover, under the relevant cases, a sine qua non of the employer convenience doctrine is the availability to the nonresident employee of a New York office. From March 15, 2020 through December 31, 2020, Professor Zelinsky had no New York office or classroom. *Fass, infra*.

i. Starting in March, 2020, Governor Cuomo shut down New York by a public health executive order.

By Executive Order 202.6, as amended, Governor Andrew Cuomo shut down New York in March, 2020. The Governor’s public health executive order mandated New York employers

³⁶ 20 N.Y.C.R.R. § 132.18 (“services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer.”).

like Cardozo Law School to close their in-state locations and to require their employees like Professor Zelinsky to work remotely from their respective homes:

All businesses and not-for-profit entities in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize.³⁷

Each employer shall reduce the in-person workforce at any location by 100% no later than March 22 at 8 pm.³⁸

Violators of the Governor's executive order were subject to the penalties of Public Health Law § 12-1.

Pursuant to the Governor's COVID-related executive order, Cardozo Law School shut its doors for the balance of 2020. Thus, Professor Zelinsky did not have a New York office or classroom from March 15, 2020 through December 31, 2020 and did not set foot in New York for this nine and one-half month period.

ii. Under 20 N.Y.C.R.R. § 132.4(b), Professor Zelinsky's salary earned starting on March 15, 2020 did not derive from New York sources and is thus not taxable by New York.

20 N.Y.C.R.R. § 132.4(b) defines when income derives from New York sources. This regulation confirms that Professor Zelinsky's Cardozo salary starting on March 15, 2020 did not derive from New York sources and thus is not taxable by New York. Professor Zelinsky worked "wholly without" New York during the entire nine and one-half month COVID period.

³⁷ Governor Andrew Cuomo, Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6 (March 18, 2020).

³⁸ Governor Andrew Cuomo, Executive Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (March 20, 2020), amending Executive Order No. 202.6, 9 N.Y.C.R.R. § 8.202.6. The Governor's order shutting New York remained in effect until June 25, 2021. Executive Order No. 210, 9 N.Y.C.R.R. § 8.210 (June 24, 2021) (rescinding Executive Order No. 202, effective June 25, 2021).

20 N.Y.C.R.R. § 132.4(b), defining New York source income, provides in relevant part that

[c]ompensation for personal services rendered by a nonresident individual *wholly without* New York State is *not* included in [the individual's] New York adjusted gross income, regardless of the fact that payment may be made from a point within New York State or that the employer is a resident individual, partnership or corporation. (emphasis added)

This describes Professor Zelinsky from March 15, 2020 until December 31, 2020. During this COVID-19 period, Professor Zelinsky's services for Cardozo were performed "wholly without New York State"³⁹ since he never set foot in New York for this entire time. Indeed, Governor Cuomo closed Professor Zelinsky's New York office for this period. Consequently, Professor Zelinsky's Cardozo salary for this duration is "not included"⁴⁰ in New York income as this income was not derived from New York sources.

Akin to this case is *Linsley v Gallman*, 38 A.D. 2d 367 (3d Dept. 1972), *affd.* 33 N.Y. 2d 863 (1973). Mr. Linsley, like Professor Zelinsky, was a Connecticut resident. Mr. Linsley was what we today call a "remote worker" or a "telecommuter." For the years in question, Mr. Linsley performed services for his New York employer by "telephone consultation" and never came to New York. *Linsley*, 38 A.D. at 370. Citing the regulation which is now 20 N.Y.C.R.R. § 132.4(b),⁴¹ the appellate court (affirmed summarily by the Court of Appeals) held that none of the payments received by Mr. Linsley from his New York employer were New York source income.

³⁹ 20 N.Y.C.R.R. § 132.4(b).

⁴⁰ *Id.*

⁴¹ At the time *Linsley* was decided in 1972, what is now 20 N.Y.C.R.R. § 132.4(b) was then numbered 20 N.Y.C.R.R. § 131.4(b). This is how *Linsley* cites this regulation.

Mr. Linsley, “a nonresident, performed no services in New York for the income in question, nor did he maintain an office or place of business in New York.” *Linsley*, 38 A.D. at 370.

Consequently, New York could not tax Mr. Linsley’s income earned in Connecticut. *Id.*

Professor Zelinsky’s 2020 situation is on all fours with Mr. Linsley’s situation. Like Mr. Linsley, Professor Zelinsky is a Connecticut resident. Mr. Linsley consulted from Connecticut by phone. Professor Zelinsky taught his classes from Connecticut by Zoom. Starting on March 15, 2020, Professor Zelinsky (like Mr. Linsley) had neither “an office or place of business in New York.” *Id.*

The legal conclusion under 20 N.Y.C.R.R. § 132.4(b) is the same in both cases: there was no New York source income because the nonresident rendered his services “wholly without New York State.” Thus, no New York tax is due.

Linsley was followed in *Hayes v. State Tax Commission*, 61 A.D.2d 62 (3d Dept. 1978), another case analogous to Professor Zelinsky’s situation. Mr. Hayes, a Connecticut resident, performed services for his New York employer, CBS, from his home in Connecticut. Like Mr. Linsley and Professor Zelinsky, Mr. Hayes was what today is called a “remote worker” or a “telecommuter.” Mr. Hayes “had no office in New York and performed no services for CBS in New York.” *Id.* at 63. Citing both *Linsley* and the regulation which is today 20 N.Y.C.R.R. § 132.4(b),⁴² the appellate division held that none of Mr. Hayes’ income was taxable in New York since Mr. Hayes never came to New York.

⁴² As observed *supra*, what is now 20 N.Y.C.R.R. § 132.4(b) was previously numbered 20 N.Y.C.R.R. § 131.4(b).

Hayes further held that the employer convenience doctrine does not apply when an individual's activities are conducted entirely outside New York:

[T]he regulations make it plain that services rendered wholly without the State are not taxable in New York. Only when some work is performed within New York may some or all of the income be taxed in New York, and only then should respondent determine if work was performed for the employer's necessity. It is impossible to find a different meaning in the regulations. *Id.*

Thus, the “convenience of the employer” only comes into play when an nonresident spends time in New York – which Professor Zelinsky did not for the COVID-19 period of the last nine and one-half months of 2020 due to Governor Cuomo’s executive order.

iii. Under 20 N.Y.C.R.R. § 132.18, Professor Zelinsky’s remote teaching starting on March 15, 2020 was for his employer’s “necessity.”

For a second reason, the “convenience of the employer” doctrine does not apply to Professor Zelinsky’s Cardozo salary starting on March 15, 2020. In light of Governor Cuomo’s executive order, Professor Zelinsky worked exclusively at his Connecticut home for Cardozo’s business “necessity” rather than for Professor Zelinsky’s personal “convenience.”

The regulations underpinning the “convenience of the employer” rule distinguish out-of-state work performed for the employer’s “necessity” from out-of-state work performed for “convenience.” 20 N.Y.C.R.R. § 132.18. On these facts, starting on March 15, 2020, Professor Zelinsky’s remote teaching from his Connecticut home was for Cardozo’s “necessity,” rather than for anyone’s “convenience.” Thus, the salary attributable to Professor Zelinsky’s remote, out-of-state work for the last nine and one-half months of 2020 is not taxable by New York under New York’s own regulations since Professor Zelinsky taught from home for Cardozo’s necessity.

Governor Cuomo’s executive order, enforced by the penalties of Public Health Law § 12-

1, gave Cardozo no choice but to shut its doors as of March 15, 2020. Hence, Cardozo “of necessity” required Professor Zelinsky to teach at his home by Zoom. Only by having its faculty teach remotely could Cardozo stay in business. Professor Zelinsky’s Zoom teaching from his home during the COVID crisis was a dire necessity for Cardozo. In light of the Governor’s order, the alternative to Professor Zelinsky’s Zoom teaching from his Connecticut home was Professor Zelinsky not teaching at all. Since Professor Zelinsky’s remote teaching was for Cardozo’s “necessity” during the COVID-19 pandemic, the salary attributable to that teaching in Connecticut is not taxable by New York under New York’s own employer convenience regulations. 20 N.Y.C.R.R. § 132.18.

iv. Under the relevant case law, the “convenience of the employer” doctrine does not apply to Professor Zelinsky’s Cardozo salary from March 15, 2020 through December 31, 2020 since he had no New York office or classroom available to him for that nine and one-half month period.

For a third independent reason of state law, the “convenience of the employer rule” does not apply to Professor Zelinsky’s Cardozo salary for the nine and one-half months that Cardozo was closed in 2020 pursuant to the Governor’s executive order. Because Cardozo was closed, Professor Zelinsky had no New York office or classroom available to him for the COVID-19 period. Under the relevant case law, the availability of a New York office is a sine qua non for the application of the “convenience of the employer” rule.

The controlling decision is *Fass v. State Tax Commission*, 68 A.D. 2d 977 (3d Dept. 1979). Mr. Fass was a New Jersey resident who published, edited and wrote for hobbyist magazines. *Id.* at 977. To perform his role as an employee, Mr. Fass needed “specialized facilities” including “a firing range” and “a stable and kennel” to investigate products Mr. Fass

wrote about in these magazines. *Id.* These “specialized facilities” “were not available at or near [Mr. Fass’s] employers’ New York City offices.” *Id.* However, such facilities were available at Mr. Fass’s “farm and residence in New Jersey.” *Id.* On his New Jersey work days, Mr. Fass was what we today call a “remote worker” or a “telecommuter.”

The Tax Commission argued that, under the “convenience of the employer” doctrine, the salary Mr. Fass earned working as an employee in New Jersey was taxable in New York. *Id.* The appellate division disagreed, rejecting the application of the employer convenience doctrine to Mr. Fass’s New Jersey income since Mr. Fass’s services “could not have been performed at his employers’ New York City office.” *Id.* at 978. That New York office lacked the “specialized facilities” available at Mr. Fass’s New Jersey home and farm. *Id.*

Like Mr. Fass, Professor Zelinsky for the nine and one-half months starting on March 15, 2020 could not have performed his employment-related services in New York as Cardozo was closed by Governor Cuomo’s executive order. Hence, the “convenience of the employer” doctrine does not apply for the COVID period to Professor Zelinsky just as this doctrine did not apply to Mr. Fass. Neither of them could have performed their employment-related tasks in New York.

Similarly instructive is *Kitman v. State Tax Commission*, 92 A.D. 2d 1018 (3d Dept. 1983). Mr. Kitman was Newsday’s television critic who worked at his home in New Jersey in a specially adapted facility with multiple televisions and other equipment. *Id.* at 1018. Mr. Kitman claimed that his Newsday salary earned on his days worked at his home in New Jersey was taxable only to New Jersey, not to New York. *Id.* at 1019. Applying the “convenience of the employer” rule, the appellate division held Mr. Kitman’s entire Newsday salary taxable in New

York because Newsday could easily have built Mr. Kitman a suitable office in New York at Newsday's headquarters. *Id.* at 1019-20. No "vast renovations would be required" for Newsday to provide at its New York headquarters a facility similar to Mr. Kitman's home office in his New Jersey residence. *Id.* at 1019.

Kitman is instructively distinguishable from Professor Zelinsky's situation. Starting on March 15, 2020, no "renovation" by Cardozo could have provided Professor Zelinsky with a New York office or classroom because Governor Cuomo's executive order blocked Cardozo from opening its doors. Thus, the "convenience of the employer" doctrine, applicable to Mr. Kitman's salary earned in New Jersey, does not apply to Professor Zelinsky's salary, earned in Connecticut from March 15, 2020 on. With little "renovation," Mr. Kitman could have earned his salary in New York at his employer's place of business. In contrast, Professor Zelinsky's employer's place of business was ordered shut starting on March 15, 2020. No renovation by Cardozo could have overcome Governor Cuomo's prohibition on Professor Zelinsky's in-state office during the COVID-19 period.

Brody v. Chu, 141 A.D. 2d 907 (3d Dept. 1988), similarly indicates that, as a matter of state law, the "convenience of the employer" doctrine does not apply to Professor Zelinsky's Cardozo salary starting on March 15, 2020 because no New York office or classroom was available to Professor Zelinsky. The taxpayer in *Brody* was a New Jersey resident who taught at City College in Manhattan. *Id.* at 908. Professor Brody maintained that his office at City College was inadequate so he needed to work at his home office in New Jersey. *Id.* Consequently, Professor Brody apportioned to the Garden State the part of his City College salary reflecting the days he worked at his home in New Jersey. *Id.*

The appellate court, using the employer convenience rubric, held the professor's entire City College salary taxable to New York. *Id.* at 908-09. Critical to the appellate court's application of the "convenience of the employer" doctrine was the fact that Professor Brody "offered no evidence to support a finding that adequate office space could not have been made available to him at the college" in New York. *Id.*

Here, in contrast, the relevant evidence is in the public domain: Executive Order 202.6 as amended. Under that COVID-related public health executive order, Cardozo could not have made available "adequate office space" to Professor Zelinsky in 2020 since Governor Cuomo forbade Cardozo from providing Professor Zelinsky with any office space or classroom for the duration of the COVID-19 crisis. The Governor effectively padlocked Cardozo.

Consider finally *Philips v. New York State Department of Taxation and Finance*, 267 A.D. 2d 927 (3d Dept. 1999). Mr. Philips was a Lehman Brothers bond salesman who lived in Pennsylvania and who executed trades around the clock. *Id.* at 927. He did much of his work from a home office with "25 telephone lines." *Id.* at 927-28. Mr. Philips apportioned part of his Lehman Brothers compensation to Pennsylvania, rather than to New York, based on his days worked at his home office in the Keystone State. *Id.* at 928.

When New York taxed all of Mr. Philips's salary, the Third Department sustained the tax as a matter of employer convenience. *Id.* at 930. The appeals court concluded that "[w]e are not persuaded that Lehman's offices could not be reasonably adapted to serve petitioner's needs." *Id.* at 930. In contrast, under Governor Cuomo's executive order, Cardozo's building "could not be reasonably adapted" for Professor Zelinsky's needs since Cardozo was legally forbidden from opening its doors for Professor Zelinsky's teaching or scholarship.

v. Granting Professor Zelinsky’s state law refund request for the COVID-19 period avoids the need to consider his constitutional claim for this period.

The Tribunal should, as a matter of state law, grant Professor Zelinsky his requested refund for the last nine and one-half months of 2020. A refund to Professor Zelinsky based on state law would avoid the need to consider his constitutional claim for this period. *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J. concurring), *Williams v. Beemiller, Inc.* 33 N.Y.3d 523, 544-545 (2019) (Fahey, J. dissenting) (*Ashwander* is “foundational,” “we interpret statutory provisions before reaching constitutional questions”).

vi. Conclusion

For three independent reasons, as a matter of state law, from March 15, 2020 through December 31, 2020, New York cannot tax Professor Zelinsky’s Cardozo salary. First, during this COVID-19 period, Professor Zelinsky worked “wholly without New York State.” Thus, his salary was not New York source income under New York’s own regulations, 20 N.Y.C.R.R. § 132.4(b). Second, Professor Zelinsky’s remote work at home for Cardozo during this time was for Cardozo’s “necessity,” not for anyone’s convenience. 20 N.Y.C.R.R. § 132.18. Third, during this COVID period, due to the Governor’s executive order, Professor Zelinsky did not have a New York office or classroom available to him. Under the relevant case law, the availability of a New York office is a sine qua non for the application of the “convenience of the employer” doctrine. *Fass, supra*.

Any one of these three arguments, by itself, requires New York to refund the New York state income tax assessed by New York for the period from March 15, 2020 through December 31, 2020. Cumulatively, these three arguments leave no doubt that, as a matter of state law,

Professor Zelinsky is not taxable on his Cardozo salary for the last nine and one-half months of 2020. Such a state law-based refund would eliminate the need to consider Professor Zelinsky's constitutional claim for this period, discussed next. *Ashwander, supra*.

B. As a matter of federal constitutional law, the Due Process and dormant Commerce Clauses as applied to the facts of this case forbid New York from taxing the income Professor Zelinsky earned in Connecticut starting on March 15, 2020.

i. Five overlapping federal constitutional principles underpin this as-applied challenge to New York's taxation of the Cardozo salary Professor Zelinsky earned at his home for the COVID-19 period starting on March 15, 2020.⁴³

a) The dormant Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3, requires that income must be fairly apportioned to the states in which it is earned. *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008) ("The Commerce Clause forbids the States to levy...unfairly apportioned taxation."); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (a state tax must be "fairly apportioned" to the taxing state); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948) (New York "gross receipts tax" must be "fairly apportioned" to business done in New York); *Tenn. Gas Pipeline Co. v. Urbach*, 96 N.Y. 2d 124, 133 (2001) ("The central purpose of fair apportionment is to ensure that each State taxes only its fair share of an interstate transaction and to minimize the likelihood that an interstate transaction will be improperly burdened by multiple taxation.") (internal citation and quotation marks omitted).

b) While a state can tax a resident's worldwide income, under the Due Process Clause,

⁴³As discussed *infra*, these constitutional rules also govern the pre-COVID period though the facts are different for the pre-COVID period and the COVID period. *See infra* pages 42-48.

U.S. Constitution, Amend. XIV, § 1, a state can only tax a nonresident's income from sources within the taxing state. *See Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 463 n. 11 (1995) (a state taxing nonresidents "generally may tax only income earned within the" state); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) ("As to non-residents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources."); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920) (state "has jurisdiction to impose a tax of this kind upon the incomes of non-residents arising from any business, trade, profession, or occupation carried on within its borders...").

c) The U.S. Constitution forbids a state from taxing extraterritorially beyond the state's boundaries. *MeadWestvaco Corp.*, 553 U.S. at 19 ("The Due Process and Commerce Clauses forbid the States to tax "extraterritorial values.") (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 164 [1983]).

d) States must use reasonable apportionment formulas. A state cannot use an apportionment formula which achieves "arbitrary results" by "grossly distort[ing]" the income earned in the state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274, 281 (1978).

e) The dormant Commerce Clause and its regulation of interstate commerce apply to individuals and to the travel of individuals between states. *Comptroller of the Treasury v. Wynne* 575 U.S. 542, 553 (2015) ("[T]he dormant Commerce Clause should [not] treat individuals less favorably than corporations."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (for purposes of the Commerce Clause, interstate commerce "includes the transportation of persons and property" across state boundaries) (internal citations and quotation marks

omitted); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 574 (1997) ("The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support some exertion of federal control or regulation.") (internal citations and quotation marks omitted); *City of New York v. State of New York*, 94 N.Y.2d 577, 597 (2000) ("It has long been recognized...that the movement of persons across State lines is a form of commerce") (citing *Camps Newfound/Owatonna*, 520 U.S. at 573).

ii. Applied to the facts of this case, New York's taxation of the income Professor Zelinsky earned at home in Connecticut during the COVID-19 period violates each of these five overlapping principles under the dormant Commerce Clause and the Due Process Clause.

a) *As applied to these facts, the "convenience of the employer" doctrine fails to apportion.* For the COVID-19 period from March 15, 2020 through December 31, 2020, New York taxes Professor Zelinsky's entire Cardozo salary even though he did not set foot in New York due to Governor Cuomo's COVID-related executive order. For this nine and one-half month period, New York's application of the "convenience of the employer" doctrine fails to apportion Professor Zelinsky's Cardozo income between his days worked at home in Connecticut and his days worked in New York – of which there were none. Professor Zelinsky is analogous to the bus in *Central Greyhound* traveling outside the boundaries of New York. New York can only tax Professor Zelinsky, a nonresident, on the part of his Cardozo income earned in New York, not the income Professor Zelinsky earned exclusively at home in Connecticut starting on March 15, 2020.

Central Greyhound is a fundamental statement of the constitutional requirement that, under the dormant Commerce Clause, income must be fairly apportioned among the states in which it is earned. In *Central Greyhound*, buses owned by a New York corporation left New

York, traveled on the highways of Pennsylvania and New Jersey, and completed their respective journeys at destinations back in New York. *Central Greyhound*, 334 U.S. at 654. New York purported to tax the entire gross receipts earned by these buses even though “nearly 43% of the[ir] mileage” occurred on the roads of New Jersey and Pennsylvania. *Id.* at 660. The U.S. Supreme Court ruled against New York, holding that, under the Commerce Clause, Central Greyhound’s gross receipts must be apportioned for tax purposes among New York, New Jersey and Pennsylvania based on the mileage the buses traveled in each of these states. *Id.* at 663.

While a Central Greyhound bus performed some of its travel in New York and some in other states, after March 15, 2020 and the Governor’s shut down order, Professor Zelinsky performed all of his tasks for Cardozo in Connecticut. *Central Greyhound*’s dormant Commerce Clause command to apportion based on the taxpayer’s physical performance applies to Professor Zelinsky and his Cardozo salary, earned for the COVID period wholly outside New York.

Central Greyhound plays a foundational role in the U.S. Supreme Court’s Commerce Clause case law. *See, e.g., Comptroller of the Treasury v. Wynne* 575 U.S. 542, 550-53, 558 (2015) (citing *Central Greyhound*); *Okla. Tax Comm’n v. Jefferson Lines, Inc.* 514 U.S. 175, 186, 189-191 (1995) (citing *Central Greyhound*); *Goldberg v. Sweet*, 488 U.S. 252, 260, 264 (1989) (citing *Central Greyhound*).

Instead of apportioning as required by the dormant Commerce Clause, New York, under the convenience of the employer doctrine, taxes 100% of Professor Zelinsky’s Cardozo salary for the COVID-19 period even though Professor Zelinsky earned all of this Cardozo salary outside New York’s borders. 100% is not apportionment. To apportion is “to divide.”⁴⁴ Instead of

⁴⁴ *Apportion*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/apportion>

dividing Professor Zelinsky's Cardozo salary between New York and Connecticut based on the days worked in each, New York uses the "convenience of the employer" label to tax all of Professor Zelinsky's 2020 salary, including the salary which Professor Zelinsky exclusively earned in Connecticut because of Governor Cuomo's March, 2020 shut down order. On these facts, New York's failure to apportion Professor Zelinsky's salary to Connecticut violates the dormant Commerce Clause for the COVID-19 period.

b) *On these facts, the "convenience of the employer" rule improperly taxes Professor Zelinsky, a nonresident, on Connecticut-source income.* The Cardozo income which Professor Zelinsky earned on his days worked at home is Connecticut source income. As Professor Zelinsky is not a New York resident, New York can only tax him on his New York source income. New York cannot tax Professor Zelinsky on the income he earned outside of New York at his home in Connecticut. *See Okla. Tax Comm'n.*, 515 U.S. at 463 n. 11 (1995); *Shaffer*, 252 U.S. at 57; *Travis*, 252 U.S. at 75.

New York's own regulations demonstrate that the work performed by a nonresident employee outside of New York does not generate New York source income, but must instead be apportioned to and taxed in the state in which the nonresident performs her services. 20 NYCRR § 132.18. In one example from the regulations, a Connecticut resident works for a New York employer and performs tasks for her employer in Florida, Arkansas and "Pacific Coast states." *Id.* at example 1. The regulation acknowledges that the salary earned by this nonresident employee in those states is not New York source income but is instead taxable in those other states. *Id.* In the regulation's second example, a New Jersey resident performs services for her New York employer in Chicago, Illinois. *Id.* at example 2. The regulation similarly acknowledges that this

nonresident employee's income earned on her days in Illinois is not New York source income, but should instead be apportioned to Illinois. *Id.*

The "convenience of the employer" rubric flouts these constitutionally-based source rules (as reflected in New York's own regulations) by declaring that work Professor Zelinsky, a nonresident, performed at his out-of-state home generated income which New York can tax as New York source income which need not be apportioned. There is no constitutional authority for this ipse dixit, a conclusory assertion of tax authority in tension with the regulation's own examples pertaining to nonresidents' work outside New York's borders. As a constitutional matter, Connecticut is not New York, just as Florida, Arkansas, Illinois and the "Pacific coast states" are not New York. The Commerce Clause says nothing about work-at-home being different from other out-of-state work. The fact that Professor Zelinsky worked at home does not alter the fact that he worked on his Connecticut days outside New York – just like the nonresident employees in the examples of New York's own regulations. *Id.* at examples 1 and 2.

The *Zelinsky* Court admitted that the purpose of the "convenience of the employer" doctrine is to tax a nonresident like Professor Zelinsky as if he were a New York resident:

Since a New York resident would not be entitled to any special tax benefits for similar work performed at home, neither should a nonresident. Allowing this taxpayer to allocate his income to Connecticut when he stays home to do his work in connection with his teaching activity would enable him to avoid paying taxes that his colleagues who do that work at home in New York--or at the law school--pay. *Zelinsky*, 1 N.Y. 3d at 94 (internal citation omitted)

This is a candid statement of the purpose of the employer convenience doctrine: to avoid the constitutional limits on New York's ability to tax the incomes of nonresident remote workers.

But Professor Zelinsky is not a New York resident and cannot be taxed like one. There is no “special tax benefit” when a nonresident, like Professor Zelinsky, works at his out-of-state home. There is, rather, a constitutional requirement that this nonresident apportion his work-at-home income to his home state since that is the location at which his income is earned.

Professor Zelinsky’s “colleagues who do that work at home in New York” pay New York income tax on their Cardozo salary earned at home because they are New York residents (taxed by New York on their worldwide incomes) and because that income is New York source income, earned at his colleagues’ homes within New York’s borders. New York cannot use the “convenience of the employer” doctrine to tax Professor Zelinsky similarly, as if he were a New York resident. He is not such a resident and, as a constitutional matter, cannot be taxed on his total income as if he were one –particularly when the Governor shut Professor Zelinsky out of his New York office. *Governor Cuomo effectively padlocked Professor Zelinsky’s Cardozo office for the COVID-19 period.*

c) *The “convenience of the employer doctrine” taxes extraterritorially.* On the facts of this case, New York’s “convenience of the employer” doctrine fails to apportion and instead taxes Connecticut source income. The upshot is New York’s unconstitutional extraterritorial projection of its taxing authority beyond its borders into Professor Zelinsky’s Connecticut home – an extraterritorial projection of New York tax authority forbidden under the Due Process and dormant Commerce Clauses. *MeadWestvaco Corp.*, 553 U.S. at 19.

Consider in this context the public services Professor Zelinsky received when he worked at home during the COVID-19 period. On these work-at-home days, Connecticut and its municipalities (not New York) provided the government services Professor Zelinsky received.

The water Professor Zelinsky used at his home was furnished by the South Central Connecticut Regional Water Authority, not by New York. If Professor Zelinsky had needed EMT services on a day working at home, the EMT technician coming to his assistance would have been a New Haven city employee, not a New York employee. The police officer who patrolled the street when Professor Zelinsky worked at home was similarly a member of New Haven's police force, not the NYPD.

On the days when Professor Zelinsky worked at home during the COVID-19 crisis, New York did not extraterritorially ship water, EMT services or police protection across the border into Connecticut. But New York, under its "convenience of the employer" doctrine, taxes extraterritorially the income Professor Zelinsky earned at home, protected for this nine and one-half month period by government services exclusively provided by Connecticut and its localities.

New York did provide services to Cardozo on the days when Professor Zelinsky worked at home. But employers and employees are different persons. New York can tax a New York employer for the services it receives from the Empire State. But New York provided no services to Professor Zelinsky personally starting on March 15, 2020. To tax Professor Zelinsky's income under these circumstances is a forbidden effort by New York to reach "extraterritorial values." *MeadWestvaco Corp.*, 553 U.S. at 19. Indeed, it is a particularly dramatic form of extraterritorial taxation for New York to tax Professor Zelinsky for the COVID-19 period when Governor Cuomo ordered Professor Zelinsky's New York office closed.

d) *The "convenience of the employer" doctrine produces arbitrary results in this case.*

On the facts of this case, New York's "convenience of the employer" doctrine achieves "arbitrary results" by "grossly distort[ing]" the income earned by Professor Zelinsky in New

York during the COVID-19 period. *Moorman Mfg. Co.*, 437 U.S. at 281.

Instructive in this context is Judge Robert Smith's dissent in *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427, 440-50 (2005) (Smith, J., dissenting). Agreeing with Judge Robert Smith were Judge George Smith and Judge Carmen Ciparick who were part of the *Zelinsky* Court, but who switched sides a little over a year later to join Judge Robert Smith's *Huckaby* dissent. *Huckaby*, 4 N.Y.3d at 450.

A central theme of Judge Smith's *Huckaby* dissent is the inconsistency of the employer convenience doctrine with the Due Process and Commerce Clause constraints on states' taxing authority. *Id.* at 447. Equally significant is Judge Smith's observation that, on the facts of *Huckaby*, the "convenience of the employer" rule is an irrational apportionment formula, taxing all of Mr. Huckaby's income though he spent a minority of his work days working in the Empire State:

[T]he tax in this case--applied to 100% of Huckaby's income--is out of all proportion to the time he spent working in New York--25%. *Id.*

The facts of this case are even more dramatic than the facts of *Huckaby*. For the COVID period from March 15, 2020 to December 31, 2020, Professor Zelinsky spent 0% of his work days in New York because of Governor Cuomo's executive order shutting down Cardozo. But New York uses the employer convenience rubric to tax 100% of Professor Zelinsky's Cardozo salary earned during this period. This result is "out of all proportion to the time he spent working in New York." There is no more "gross distortion" of a nonresident's income than New York taxing him on all of his income when none of his work days are in New York *because Governor*

Cuomo shut Professor Zelinsky's New York office.

e) Professor Zelinsky is protected from New York's overreaching taxation by the dormant Commerce Clause and its requirement that income be properly apportioned to reflect the locations at which such income is earned. *City of New York*, 94 N.Y. 2d at 597 ("It has long been recognized...that the movement of persons across State lines is a form of commerce").

vi. Conclusion

As applied to the facts of this case, the dormant Commerce Clause and the Due Process Clause prohibit New York's taxation of Professor Zelinsky's Cardozo salary starting on March 15, 2020. This taxation fails to apportion any salary to Connecticut as the Constitution requires. Through the employer convenience rule, New York unconstitutionally taxes Professor Zelinsky, a telecommuting nonresident, as if he were a New York resident, taxable on all of his income by the Empire State. The salary Professor Zelinsky earned working at home in Connecticut was Connecticut-source income, not taxable by New York. New York's extraterritorial taxation of the income Professor Zelinsky earned at home in the Nutmeg State during the COVID-19 period produces grossly distorted results. The dormant Commerce Clause and the Due Process Clause protect Professor Zelinsky from New York's overreaching taxation. On the facts of this case, New York's "convenience of the employer" doctrine, as applied to the period after March 15, 2020, violates each of the five interlocking, mutually-reinforcing principles the U.S. Supreme Court has articulated under the Commerce and Due Process Clauses.

C. The *Zelinsky* decision is not good law and does not bind this Tribunal.

For seven reasons, the 2003 *Zelinsky* decision is not good law and does not bind this Tribunal. First, as to 2020, *Zelinsky* does not address Professor Zelinsky's independent state law

claim that, for the last nine and one-half months of 2020, no income tax is due as a matter of state law. Second, the facts of *Zelinsky* for the years 1994 and 1995 are radically different from the facts of the COVID-19 period from March 15, 2020 through December 31, 2020. Third, the U.S. Supreme Court's intervening decisions in *MeadWestvaco* and *Wynne* erode *Zelinsky*. Fourth, Judge Robert Smith's *Huckaby* dissent further undermines *Zelinsky*, indicating that judges of the Court of Appeals have concluded that *Zelinsky*'s constitutional analysis is wrong. Fifth, commentary on *Zelinsky* has been adverse to that decision. Sixth, *Zelinsky* has been overtaken by events, namely, the COVID-related growth of remote work. Finally, the Tribunal's unique role in the articulation of New York tax law further indicates that *Zelinsky* does not bind this Tribunal.

i. *Zelinsky* does not address Professor Zelinsky's independent state law claim that, for the last nine and one-half months of 2020, no New York income tax is due as a matter of New York law.

For the COVID period from March 15, 2020 through December 31, 2020, Professor Zelinsky asserts both a state law claim and an as-applied federal constitutional claim: As a matter of state law, no New York income tax is due as Professor Zelinsky had no New York office and worked entirely outside New York's borders for his employer's necessity. On the facts of the case, the Due Process and dormant Commerce Clauses forbid New York from taxing the Cardozo salary Professor Zelinsky earned at his Connecticut home. The 2003 *Zelinsky* decision only addresses constitutional issues since no state law claim was asserted in that case. Accordingly, *Zelinsky* does not address Professor Zelinsky's independent state law claim that, for the last nine and one-half months of 2020, no tax is due as a matter of state law.

ii. The facts of *Zelinsky*, for the years 1994 and 1995, are radically different from the facts of the COVID-19 period from March 15, 2020 through December 31, 2020.

The facts of *Zelinsky* bear no relation to the facts of the COVID-19 period. A central factual premise of *Zelinsky* is that in 1994 and 1995 “Cardozo Law School provide[d] educational services to its students in New York City, which is where the taxpayer perform[ed] the primary duties of his occupation--teaching classes and meeting with students.”⁴⁵ As to his legal scholarship, the *Zelinsky* Court held, Professor Zelinsky “chooses to do [this] at home.”⁴⁶ “[A]ll of petitioner's teaching is accomplished in New York and [it is] his voluntary choice to bring auxiliary work home to Connecticut.”⁴⁷ Because of Professor Zelinsky’s “physical presence in New York,”⁴⁸ the *Zelinsky* court found, he received from New York “a host of tangible and intangible protections, benefits and values to the taxpayer and his employer, including police, fire and emergency health services, and public utilities.”⁴⁹

None of this was true for the last nine and one-half months of 2020.

Professor Zelinsky had no “physical presence in New York” during the COVID period because Governor Cuomo closed Professor Zelinsky’s Cardozo office, starting on March 15, 2020. It was not Professor Zelinsky’s “voluntary choice” to work exclusively at home during the COVID-19 period. *It was Andrew Cuomo’s choice for Professor Zelinsky to work at home.*

⁴⁵ *Zelinsky*, 1 N.Y. 3d at 92.

⁴⁶ *Id.*

⁴⁷ *Id.* at 93.

⁴⁸ *Id.* at 97.

⁴⁹ *Id.* at 95.

Cardozo Law School did not “provide[] educational services to its students in New York City” during the pandemic. Governor Cuomo made Cardozo shut its Manhattan location and embrace remote education. During the last nine and one-half months of 2020, Connecticut and its municipalities exclusively provided Professor Zelinsky’s “police, fire and emergency health services, and public utilities.”

In short, the facts of the COVID-19 period starting on March 15, 2020 were fundamentally different from the facts upon which the *Zelinsky* court based its decision.

iii. The U.S. Supreme Court’s intervening decisions in *MeadWestvaco* and *Wynne* erode *Zelinsky*.

MeadWestvaco and *Wynne*, both decided by the U.S. Supreme Court after *Zelinsky*, erode that decision of the Court of Appeals. *MeadWestvaco* strongly affirms the U.S. Supreme Court’s opposition to the kind of extraterritorial income taxation which occurs when New York uses the “convenience of the employer” doctrine to tax Professor Zelinsky’s Cardozo income earned beyond New York’s borders. *MeadWestvaco Corp.*, 553 U.S. at 19. *MeadWestvaco* also confirms the importance of apportioning income to the states in which such income is earned. *Id.* at 24. *Wynne* confirms the Supreme Court’s insistence that individuals like Professor Zelinsky receive the protections of the dormant Commerce Clause. *Wynne*, 575 U.S. at 553. Both of these post-*Zelinsky* decisions of the U.S. Supreme Court undermine *Zelinsky*.

iv. Judge Robert Smith’s *Huckaby* dissent further undermines *Zelinsky*.

Judge Robert Smith’s *Huckaby* dissent, joined by Judge George Smith and Judge Carmen Ciperick, indicates that judges of the Court of Appeals concluded, almost immediately after

Zelinsky was decided, that its constitutional analysis is wrong. *Huckaby*, 4 N.Y.3d at 440-50 (Smith, J., dissenting). Mr. Huckaby was a telecommuter who spent most of his work days at home in Tennessee. *Id.* at 431, 441. Pointing to his days worked in New York for his New York employer, the Department of Taxation and Finance invoked the “convenience of the employer” rule to tax all of Mr. Huckaby’s salary, including the salary apportionable to his days worked at home in the Volunteer State. *Id.* at 431. As part of his lawsuit, Mr. Huckaby raised again the constitutional issues pressed in *Zelinsky*, i.e., that the Commerce and Due Process Clauses prohibit the application of the “convenience of the employer” doctrine to tax extraterritorially income earned by nonresidents at their out-of-state homes.

Viewing these issues a second time, a bare majority of four judges adhered to the Court’s analysis in *Zelinsky*. Judge Robert Smith, who joined the Court of Appeals after it decided *Zelinsky*, issued a blistering dissent in *Huckaby*: Taxing nonresidents on their income earned at their out-of-state homes, he wrote, is “unsupported by any precedent [and] is a radical departure from long-accepted limits on the powers of states to tax nonresidents.” *Huckaby*, 4 N.Y.3d at 447. In order to sustain the “convenience of the employer” doctrine from constitutional attack, Judge Smith opined, the Court of Appeals adopted “a novel Commerce Clause theory as a companion to its novel due process theory.” *Id.* at 448.

Particularly noteworthy was the decision of Judges George Smith and Carmen Ciparick to join Judge Robert Smith’s *Huckaby* dissent. These two judges had been part of the Court which decided *Zelinsky* by a 6-0 vote. Evidently persuaded by Judge Robert Smith’s dissent, they switched sides in *Huckaby* to oppose the application of the employer convenience doctrine in the face of the constitutional challenges previously raised in *Zelinsky*. Without reservation or

qualification, Judges George Smith and Ciparick joined Judge Robert Smith's *Huckaby* dissent in toto. Cf. *Zelinsky*, 1 N.Y. 3d at 97 (Judges George Smith and Ciparick join *Zelinsky* majority) with *Huckaby*, 4 N.Y.3d at 450 (Judges George Smith and Ciparick join *Huckaby* dissent). Thus, the convenience of the employer doctrine survived in *Huckaby* by the barest of majorities, 4-3 with two judges reversing their earlier position in *Zelinsky*.

v. Commentary on *Zelinsky* has been adverse to that decision.

Like the dissent in *Huckaby*, commentary on *Zelinsky* has been adverse to that decision. See, e.g., Walter Hellerstein, STATE TAXATION, ¶ 20.05[4][e][ii] (3rd ed. 2022) at *27 (*Zelinsky* decision “does not withstand analysis”);⁵⁰ Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 UC DAVIS LAW REV. 1149, 1200 (2021) (“The [*Zelinsky*] court merely evaded the real issue, what the fair apportionment of multistate income would be if the activity impacts interstate commerce.”); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in Our National Economy*, 8 FLA. TAX. REV. 885, 922 (2008) (“[T]he *Zelinsky* court erred”); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents, Part 2*, 42 STATE TAX NOTES 229 (2006) (“The Court of Appeals' statements in *Zelinsky* are inconsistent with its own decision in *City of New York v. State of New York*...”).⁵¹

The Court of Appeals has observed that an adverse response by commentators can signal

⁵⁰ The Court of Appeals cites the Hellerstein treatise as an authoritative source. See, e.g. *Burton v New York State Dept. of Taxation & Fin.*, 25 N.Y.3d 732, 734 (2015) (citing Hellerstein treatise).

⁵¹ In the interests of full disclosure, Professor Zelinsky notes that he has contributed to this literature. See, e.g., Edward A. Zelinsky, *New York's Ill-Advised Taxation of Nonresidents During Covid-19*, 96 TAX NOTES STATE 1001 (2020); Edward A. Zelinsky, *Coronavirus, Telecommuting and the “Employer Convenience” Rule*, 95 TAX NOTES STATE 1101 (2020).

the need to reassess a decision. In *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y. 3d 1 (2016), the Court of Appeals reversed its twenty-five year old precedent in *Alison D. v. Virginia M.*, 77 N.Y.2d 651 (1991), to hold that a “non-biological, non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law § 70.” *Matter of Brooke S.B.*, 28 N.Y. 3d at 14. The Court thereby adopted as controlling law the earlier dissent of then Judge Kaye. Among the factors underpinning the Court’s reversal of its precedent and its embrace of Judge Kaye’s *Alison D.* dissent was the negative response of “legal commentators” to *Alison D.* *Matter of Brooke S.B.*, 28 N.Y. 3d at 25-26 (“legal commentators have taken issue with *Alison D.*...”).

Thus, the Court of Appeals in *Matter of Brooke S.B.* reversed itself and embraced Judge Kaye’s *Alison D.* dissent because, inter alia, legal commentators criticized the Court’s earlier holding in *Alison D.* Likewise, Judge Robert Smith’s *Huckaby* dissent should now be adopted as controlling in light of the negative response *Zelinsky* has received from legal commentators.

vi. *Zelinsky* has been overtaken by events, namely, the COVID-related growth of remote work.

Another reason courts revisit their earlier precedents is that changed circumstances undermine them. That is true of *Zelinsky*. “The COVID-19 pandemic brought a lasting shift to work from home.”⁵² Thus, subsequent events have overtaken *Zelinsky* which is no longer good law.

⁵² Cevat Giray Aksoy et al., *Time Savings When Working From Home*, National Bureau of Economic Research (NBER) Working Paper 30866 (Jan. 2023) at page 1. *See also* 2020 Stipulation at ¶¶ 8 and 9

Consider again *Matter of Brooke S.B.* In addition to the negative response of commentators to its earlier decision in *Alison D.*, the Court of Appeals reversed its position and adopted Judge Kaye’s *Alison D.* dissent because of the changing nature of the American family: “Demographic changes in the past 25 years have further transformed the elusive concept of the ‘average American family.’” *Matter of Brooke S.B., supra*, 28 N.Y. 3d at 25 (internal citation omitted). A precedent should be overturned when an “extraordinary combination of factors undermines the reasoning and practical viability of our prior decision.” *Id.* at 23. *See also People v. Taylor*, 9 N.Y. 3d 129, 149 (2007) (“[T]he lessons of time may lead to a different result.”).

These words describe what we have lived through – COVID-19 and the emergence of remote work as a central reality of the American economy. The April 25th hearing in this case was conducted remotely on Webex. What is remarkable is that today this isn’t remarkable.

Consider in this context the *Zelinsky* court’s unsympathetic characterization of remote work. The Court analogized Professor Zelinsky’s legal scholarship at his home in New Haven to “many busy professionals, at the conclusion of a full day, routinely bring work home for the evenings or weekends.” *Zelinsky, supra*, 1 N.Y. 3d at 92. No court could write these words today as remote work has become a central, widespread and legitimate feature of American life.⁵³ New

⁵³ The prevalence of post-COVID remote work is reflected in scholarly literature, law reviews and popular discourse. *See, e.g.* Aksoy, *supra*, note 52; Stephanie M. Stern, *Untransit: Remote Work and the Transformation of Zoning*, 33 STAN. L. & POL’Y REV 79, 84 (2022) (“[T]he growth of remote work”); PR Newswire, *GoGlobal Shares 2023 Remote Work Predictions* (Dec. 15, 2022) (“[D]emand for remote work opportunities is not going away.”); Bloomberg, *Will remote work continue in 2023?* THE EAST BAY TIMES (Dec. 29, 2022) (“Gallup projects that about 75% of remote-capable workers will be hybrid or fully remote in the long term.”); Jose Maria Barrero, Nicholas Bloom, Shelby Buckman, and Steven J. Davis, WFH Research (Jan. 17, 2023) available at <https://wfhresearch.com/> (“Days Worked from Home are Stabilizing at Near 30%”); Alex Tanzi, Matthew Boyle and Bloomberg, *Remote work gains momentum despite return-to-office mandates from high-profile CEOs*, FORTUNE (March 25,

York must bring its taxation of interstate remote work income into line with today's reality – as the Constitution demands.

In short, even for those who believe *Zelinsky* was correct when it was decided, subsequent events have overtaken *Zelinsky*, namely, the COVID-related growth of remote work as a central feature of the American economy.

vii) The Tribunal's unique role in the articulation of New York tax law further indicates that *Zelinsky* does not bind this Tribunal.

A final reason *Zelinsky* does not bind the Tribunal is the Tribunal's unique role in the articulation of New York tax law. See, e.g., *Matter of Easylink Services International, Inc. v. New York State Tax Appeals Tribunal*, 101 A.D.3d 1180, 1182 (3d Dept. 2012) (if Tribunal's decision "is supported by facts or reasonable inferences that can be drawn from the record and has a rational basis in the law, it must be confirmed.") (internal quotation marks and citation omitted); *Matter of Sznajderman v. Tax Appeals Tribunal of the State of New York*, 168 A.D.3d 55, 61 (3^d Dept. 2019) ("The Tribunal's determination will not be disturbed if it is rationally based and is supported by substantial evidence in the record...") (internal quotation marks and citation omitted).

A court of general jurisdiction, such as the New York Supreme Court, might assess the various considerations to favor following *Zelinsky*. But before the Tribunal, the factors counterbalancing stare decisis should weigh more heavily. These factors (the U.S. Supreme

2023) ("The shift to remote work is gaining momentum in some of America's largest metro areas..."); Madison Hoff, *How 3 years of work from home have changed the US economy forever*, INSIDER (April 2, 2023), available at <https://www.businessinsider.com/work-from-home-remote-work-changed-economy-pandemic-2023-4>.

Court's decisions in *MeadWestvaco* and *Wynne*, Judge Smith's *Huckaby* dissent, adverse commentary on *Zelinsky*, the COVID-related growth of remote work) plus the Tribunal's unique role in the articulation of New York tax law confirm that *Zelinsky* is not good law and does not bind the Tribunal.

II. As a constitutional matter, no New York tax is due on the income Professor Zelinsky earned at home in Connecticut for 2019 and the first two and one-half months of 2020.

The facts for the pre-COVID period, 2019 and for the first two and one-half months of 2020, differ from the facts of the subsequent COVID period starting on March 15, 2020. During the pre-COVID period, Professor Zelinsky commuted to Manhattan three days a week as Cardozo then held in-person classes. Professor Zelinsky did his scholarship at home in Connecticut for the rest of his work days.

Two of the legal claims advanced for the COVID period apply as well to the pre-COVID period with recognition of these different facts. *First*, the Due Process and Commerce Clause principles which apply to the period starting on March 15, 2020 also apply to the facts of 2019 and the first two and one-half months of 2020. *Second*, just as *Zelinsky* does not bind this Tribunal for the COVID-19 period starting on March 15, 2020, that decision does not bind this Tribunal for the earlier pre-COVID period.

The upshot is that, on the facts of this case, New York taxes unconstitutionally when it taxes the income apportionable to the days when Professor Zelinsky worked at home in Connecticut in 2019 and for the first two and one-half months of 2020. By taxing the Cardozo salary Professor Zelinsky earned on his days working at home in Connecticut, New York fails to apportion and instead taxes extraterritorially income which is Connecticut source income Professor Zelinsky, a nonresident, earned at home. *Zelinsky* is not good law and does not require this Tribunal to sustain this unconstitutional tax.

A. The Due Process and dormant Commerce Clauses as applied to the facts of this case forbid New York’s taxation of the income Professor Zelinsky earned at home in Connecticut in 2019 and the first two and one-half months of 2020.⁵⁴

i. The same five overlapping federal constitutional principles underpin this as-applied challenge to New York’s taxation of the Cardozo salary Professor Zelinsky earned at his home in Connecticut for the pre-COVID-19 period.

The dormant Commerce Clause of the U.S. Constitution, Art. I, § 8, cl. 3, requires that income earned in two or more states must be fairly apportioned among them. *MeadWestvaco Corp. v. Ill. Dep’t of Revenue*, 553 U.S. 16, 24 (2008) While a state can tax a resident’s worldwide income, under the Due Process Clause, U.S. Constitution, Amend. XIV, § 1, a state can only tax a nonresident’s income from sources within the taxing state. *Okla. Tax Comm’n. v. Chickasaw Nation*, 515 U.S. 450, 463 n. 11 (1995). The U.S. Constitution forbids a state from taxing extraterritorially beyond the state’s boundaries. *MeadWestvaco Corp.*, 553 U.S. at 19.

States must use reasonable apportionment formulas. A state cannot use an apportionment formula which achieves “arbitrary results” by “grossly distort[ing]” the income earned in the state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274, 281 (1978). The dormant Commerce Clause and its regulation of interstate commerce apply to individuals and to the travel of individuals between states. *Comptroller of the Treasury v. Wynne* 575 U.S. 542, 553 (2015).⁵⁵

ii. Applied to the facts of this case, New York’s taxation of the income Professor Zelinsky earned at home in Connecticut in 2019 and the first two and one-half months of 2020 violates each of these five overlapping principles under the Commerce and Due Process

⁵⁴ The pre-COVID period includes 2019, the year at issue in DTA # 830517, and the first two and one-half months of 2020, covered by DTA # 830681. A principal legal difference between the pre-COVID period and the COVID period, discussed *supra*, is that petitioners do not contest the application of the “convenience of the employer” rule to the pre-COVID period.

⁵⁵ These five overlapping principles are elaborated *supra*, pages 23-25.

Clauses.

During the pre-COVID period, Professor Zelinsky spent 40% of his work days commuting to New York, teaching in Manhattan three days a week when Cardozo held in-person classes.⁵⁶ Professor Zelinsky spent the remaining 60% of his pre-COVID work days at home in Connecticut, principally doing legal scholarship.⁵⁷

a) *As applied to these facts, the “convenience of the employer” doctrine fails to apportion.* For the pre-COVID period, Professor Zelinsky again is analogous to the bus in *Central Greyhound* traveling outside the boundaries of New York. New York can only tax Professor Zelinsky, a nonresident, on the part of his Cardozo income earned in New York, not the income Professor Zelinsky earned at home on his work days in Connecticut. In *Central Greyhound*, New York purported to tax the entire gross receipts earned by the Central Greyhound buses even though “nearly 43% of the[ir] mileage” occurred on the roads of New Jersey and Pennsylvania. *Central Greyhound*, 334 U.S. at 660. Professor Zelinsky spent even more time outside of New York, i.e., 60% of his pre-COVID work days. Consequently, *Central Greyhound’s* dormant Commerce Clause command to apportion based on the physical performance of income-producing activity applies to Professor Zelinsky and his Cardozo salary earned at home in Connecticut in 2019 and the first two and one-half months of 2020.

To apportion is “to divide.”⁵⁸ Instead of dividing Professor Zelinsky’s Cardozo salary

⁵⁶ 2019 Stipulation at ¶ 9; Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 9); testimony of Edward A. Zelinsky, Transcript of Hearing, April 25, 2023 at pages 20-21.

⁵⁷ *Id.*

⁵⁸ *Apportion*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/apportion>

between New York and Connecticut based on the days worked in each, New York uses the “convenience of the employer” label to tax all of Professor Zelinsky’s pre-COVID salary. 100% is not apportionment. On these facts, New York’s failure to apportion Professor Zelinsky’s salary to Connecticut violates the dormant Commerce Clause for this pre-COVID period per *Central Greyhound*.

b) *On these facts, the “convenience of the employer” rule improperly taxes Professor Zelinsky, a nonresident, on Connecticut-source income.* The portion of Professor Zelinsky’s Cardozo income which he earned on his days worked at home before COVID is Connecticut source income. As Professor Zelinsky is not a New York resident, New York can only tax him on his New York source income. New York cannot tax Professor Zelinsky on the income he earned outside of New York at his home in Connecticut. *See Okla. Tax Comm’n.*, 515 U.S. at 463 n. 11 (1995); *Shaffer*, 252 U.S. at 57; *Travis*, 252 U.S. at 75.

As observed *supra*,⁵⁹ New York’s own regulations demonstrate that the work performed by a nonresident employee outside of New York does not generate New York source income. Such income must instead be apportioned to and taxed in the state in which the nonresident performs her services. 20 NYCRR § 132.18. The “convenience of the employer” rubric flouts these constitutionally-based source rules (as reflected in New York’s own regulations) by declaring that work Professor Zelinsky, a nonresident, performed at his out-of-state home generated income which New York can tax as New York source income which need not be apportioned. There is no constitutional authority for this ipse dixit, a conclusory assertion of tax authority in tension with the regulation’s own examples pertaining to nonresidents’ work outside

⁵⁹ *Supra*, pages 27-28.

New York's borders.

As also noted *supra*,⁶⁰ the *Zelinsky* Court admitted that the purpose of the “convenience of the employer” doctrine is to tax a nonresident like Professor Zelinsky as if he were a New York resident. As Judge Smith’s *Huckaby* dissent observed, this is unconstitutional.⁶¹

c) *The “convenience of the employer doctrine” taxes extraterritorially for the pre-COVID period.* On the facts of this case, New York’s “convenience of the employer” doctrine fails to apportion and instead taxes Connecticut source income. The upshot is New York’s unconstitutional extraterritorial projection of its taxing authority beyond its borders into Professor Zelinsky’s Connecticut home for the pre-COVID period – an extraterritorial projection of New York tax authority forbidden under the Due Process and dormant Commerce Clauses. *MeadWestvaco Corp.*, 553 U.S. at 19.

Consider in this context the public services Professor Zelinsky received on the days he worked at home during the pre-COVID period. On these work-at-home days, Connecticut and its municipalities (not New York) provided the government services Professor Zelinsky received. The water Professor Zelinsky used at his home was furnished by the South Central Connecticut Regional Water Authority, not by New York. If Professor Zelinsky had needed EMT services on a day working at home, the EMT technician coming to his assistance would have been a New Haven city employee, not a New York employee. The police officer who patrolled the street when Professor Zelinsky worked at home was similarly a member of New Haven’s police force, not the NYPD. On the days when Professor Zelinsky worked at home before the COVID-19

⁶⁰ *Supra*, pages 28-29.

⁶¹ *Huckaby*, 4 N.Y. 3d at 447.

crisis, New York did not extraterritorially ship water, EMT services or police protection across the border into Connecticut. But New York, under its “convenience of the employer” doctrine, taxes extraterritorially the income Professor Zelinsky earned at home, protected on these work-at-home days by government services provided by Connecticut and its localities.

d) *The “convenience of the employer” doctrine produces arbitrary results in this case.*

On the facts of this case, New York’s “convenience of the employer” doctrine achieves “arbitrary results” by “grossly distort[ing]” the income earned by Professor Zelinsky in New York during the pre-COVID period. *Moorman Mfg. Co.*, 437 U.S. at 281.

Just as Judge Robert Smith’s *Huckaby* dissent is persuasive for the COVID-19 period covered by Governor Cuomo’s executive order,⁶² that dissent is compelling as well for the pre-COVID period. For 2019 and the first two and one-half months of 2020, Professor Zelinsky spent 40% of his work days in New York, commuting to New York to teach his classes. But New York uses the employer convenience rubric to tax 100% of Professor Zelinsky’s Cardozo salary earned during this pre-COVID period. Again, this result – taxing all of Professor Zelinsky’s salary -- is “out of all proportion to the time he spent working in New York.”⁶³

e) As an individual who had regularly traveled across the New York-Connecticut border during the pre-COVID period, Professor Zelinsky is protected from New York’s overreaching taxation by the dormant Commerce Clause and its requirement that income be properly apportioned to reflect the locations at which such income is earned. *City of New York*, 94 N.Y. 2d at 597 (“It has long been recognized...that the movement of persons across State lines is a

⁶² See discussions *supra* at pages 31-32 and 35-37.

⁶³ *Huckaby*, 4 N.Y. 3d at 447.

form of commerce”).

iii. Conclusion

As applied to the facts of this case, the dormant Commerce Clause and the Due Process Clause prohibit New York’s taxation of Professor Zelinsky’s Cardozo salary earned at home in Connecticut during the pre-COVID period

B. *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85 (2003), cert. denied, 541 U.S. 1009 (2004), is not good law and does not apply to the income Professor Zelinsky earned at home in 2019 and the first two and one-half months of 2020.

The 2003 *Zelinsky* decision does not bind this Tribunal as to Professor Zelinsky’s Cardozo salary earned during 2019 and the first two and one-half months of 2020. A central premise of *Zelinsky* is that Professor Zelinsky’s legal scholarship was an “ancillary” activity which he choose to undertake at home. But there was nothing “ancillary” about Professor Zelinsky’s legal scholarship. Scholarship was (and is) a core function of his work as a law professor, of equal importance to Cardozo as his teaching. In addition, five of the considerations which indicate that *Zelinsky* does not apply to the COVID period also indicate that *Zelinsky* does not control as to the pre-COVID period: The U.S. Supreme Court’s intervening decisions in *MeadWestvaco* and *Wynne* erode *Zelinsky*. Judge Robert Smith’s *Huckaby* dissent further undermines *Zelinsky* as does the adverse commentary on *Zelinsky*. *Zelinsky* has been overtaken by events, namely, the COVID-related growth of remote work. Finally, the Tribunal’s unique role in the articulation of New York tax law further indicates that *Zelinsky* is not good law and does not bind this Tribunal.

i. Professor Zelinsky’s major and equally important tasks for Cardozo were teaching and

legal scholarship.

Zelinsky dismisses Professor Zelinsky’s legal scholarship as an “ancillary” activity which he undertook at home in 1994 and 1995. *Zelinsky*, 1 N.Y. 3d at 94. But there is nothing “ancillary” about Professor Zelinsky’s legal scholarship. As the Division has admitted, in 2019 and 2020, Professor Zelinsky’s major and equally important tasks for Cardozo were teaching and legal scholarship.⁶⁴ These admissions are confirmed by Dean Melanie Leslie: “When Professor Zelinsky worked on his legal scholarship at his home in Connecticut in 2019 and 2020, he was performing an important task for Cardozo.”⁶⁵ Cardozo’s governance rules similarly confirm the centrality of legal scholarship to Professor Zelinsky’s professional obligations: “each [Cardozo] faculty member shall, on a regular basis...[p]repar[e]...scholarly works for publication.”⁶⁶

Whether or not the *Zelinsky* Court was correct to dismiss legal scholarship as an “ancillary” activity in 1994 and 1995, for 2019 and 2020 it is uncontroverted that Professor Zelinsky’s legal scholarship is one of the two major activities he performed for Cardozo, along with teaching. Consequently, Professor Zelinsky’s legal scholarship undertaken at home was (and is) “an important task for Cardozo,”⁶⁷ not an “ancillary” activity.

ii. Five of the considerations undermining *Zelinsky* for the COVID-19 period also undermine that decision as to 2019 and the first two and one-half months of 2020.

⁶⁴ Request for Admissions, DTA # 830681 and Verified Statement in Reply to Request for Admissions (admitting request number 6); Request for Admissions, DTA # 830517 and Verified Statement in Reply to Request for Admissions (admitting request number 6).

⁶⁵ Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 6.

⁶⁶ § V(E) of the Benjamin N. Cardozo Governance Rules (exhibit 2).

⁶⁷ Affidavit of Dean Melanie Leslie (exhibit 1) at ¶ 6.

Five of the considerations which indicate that *Zelinsky* does not apply to the COVID period also indicate that *Zelinsky* does not control for the pre-COVID period: The U.S. Supreme Court's intervening decisions in *MeadWestvaco* and *Wynne* erode *Zelinsky*. Judge Robert Smith's *Huckaby* dissent further undermines *Zelinsky* as does adverse commentary on *Zelinsky*. *Zelinsky* has been overtaken by events, namely, the COVID-related growth of remote work. Finally, the Tribunal's unique role in the articulation of New York tax law further indicates that *Zelinsky* is not good law and does not bind this Tribunal.⁶⁸

III. Conclusion

For all of the foregoing reasons, the Tribunal should grant the taxpayers' claims for state income tax refunds in DTA # 830681 and DTA # 830517.

Respectfully submitted

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By _____
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⁶⁸ These five considerations are elaborated *supra* at pages 35-41.

Certification of Service

I, Edward A. Zelinsky, Esq., hereby certify that, on June 14, 2023, I served the foregoing brief by U.S. Express Mail to the following:

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I further certify that, on June 14, 2023, I also emailed copies of the foregoing brief to Michele.Milavec@tax.ny.gov and to Judge DiFiore c/o Tiffani.Beza-Gaffney@dta.ny.gov.

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