
**Supreme Court of the State of New York
Appellate Division: Third Department**

In the matter of:

EDWARD A. ZELINSKY and DORIS ZELINSKY,

Petitioners,

v.

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF
NEW YORK and THE NEW YORK STATE TAX APPEALS TRIBUNAL,

Respondents.

***Amicus Curiae* Brief of
National Taxpayers Union Foundation
In Support of Petitioners**

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INTEREST OF *AMICUS CURIAE*

Founded in 1973, the National Taxpayers Union Foundation (“NTUF”) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal level. NTUF’s Taxpayer Defense Center advocates for taxpayers in the courts, produces scholarly analyses, and engages in direct litigation and *amicus curiae* briefs upholding taxpayers’ rights and challenging administrative overreach by tax authorities. NTUF’s expertise appears in nationwide publications on New York’s Convenience of the Employer Rule (20 N.Y.C.R.R. § 132.18). *See, e.g.,* Andrew Wilford, *Taxation Without Remuneration: The Convenience of the Employer Rule*, TAXNOTES (Feb. 18, 2025) <https://www.taxnotes.com/tax-notes-today-state/jurisdiction-tax/taxation-without-remuneration-convenience-employer-rule/2025/02/18/7r1k0>. Accordingly, *Amicus* has an institutional interest in this case. All parties consented to the filing of this brief.¹

¹ *Amicus Curiae* confirms that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

“No taxation without representation”—the battle cry 250 years ago that led to the American Revolution, still applies today. In our multi-tiered, complex system of federalized government, the states themselves have leeway to set their own tax systems: tax types, tax rates, tax credits, and the like. And if someone does not like their state’s tax system, they are free to move. But yet New York reaches across its borders to demand tax revenue from nonresidents merely because their employer is based in the state.

This system becomes all the more egregious when the state of New York itself closes its borders and keeps people from working in-state. That’s exactly what happened in reaction to the COVID-19 pandemic: New York, via a series of executive orders, closed businesses and mandated people work from home instead to “slow the spread” of the novel virus. The problem is that the Zelinskys, like many others, do not live in New York, but instead commute into the state from a neighboring state. Their home state of Connecticut also ordered them to stay home due to the pandemic. In the end, the Zelinskys faced multiple orders from multiple states telling them to stay home, and yet New York now argues it was for mere “convenience” that they stayed home, and thus they owe New York income taxes.

New York is in the minority of states that try to tax extraterritorially, and the only one to do so broadly. Two of other six states which do so—Connecticut and

New Jersey—have just a “retaliatory” convenience of the employer rule, applying only to the extent that New York imposes this burden. If New York stopped taxing nonresidents today, *half* the convenience rule states would disappear. Pennsylvania exempts its Philadelphia-area neighbor via reciprocity. Oregon and Nebraska tightly cabin their rule to apply in only very limited circumstances, unlike New York’s taxing of a professor. Arkansas and Alabama recently moved quickly to quell attempts by their Departments of Revenue to adopt a convenience rule.

A state’s ability to tax is not plenary: it is instead subject to regulation by Congress via the Commerce Clause and judicial evaluation of the purpose and effects under the Dormant Commerce Clause. The Dormant Commerce Clause case law requires more than mere hand waiving towards a nexus with the state. Thus far, in this instance, all New York has shown is that Zelinsky’s employer is based in the state, not that Zelinsky himself could even work in New York during the COVID-19 emergency. During the COVID-19 pandemic, New York provided no services to the Zelinskys and affirmatively told them to stay home—in Connecticut.

New York’s convenience of the employer rule thus reaches beyond any fairly attributable economic activity within the taxing State. And the typical answer of offsetting tax credits to ease any double taxation do not help in this instance because New York takes what is not given in services or goods to the payee in anyway, and often wholly confiscates the tax revenue from the other states.

Nor does the limited expansion of economic nexus for the sake of collecting sales tax revenue for online retailers in *South Dakota v. Wayfair*, 585 U.S. 162 (2018), help the state of New York here. It is true that *Wayfair* upheld South Dakota’s taxing of electronic commerce, but the Court insisted on important safeguards. The state here meets none of them here when it demands both that Zelinsky stay home in Connecticut *and* pay New York income taxes.

In the end, the enforcement of the state’s convenience of the employer rule is unjust against the Zelinskys during the COVID-19 Pandemic. All levels of government—from both New York and Connecticut—demanded that the Zelinskys work from home in Connecticut. Providing no services to the Petitioners here, New York demands the ability to both bar them from the state *and* tax their income. This is the very essence of “no taxation without representation.”

ARGUMENT

America was founded on limiting the power of the government to tax and preventing the real threat of extraterritorial taxation. The slogan “no taxation without representation” is “one piece of elementary school folklore that turns out to have been true.” Judge Grant Dorfman, *The Founders’ Legal Case: “No Taxation Without Representation” Versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1379 (2008). Of course, on July 4, 1776, the Declaration of Independence listed among its grievances the “imposing Taxes on us without our Consent.” THE DECLARATION OF

INDEPENDENCE para. 19 (U.S. 1776) *available at*: National Archives, “America’s Founding Documents” Website, <https://www.archives.gov/founding-docs/declaration-transcript>.

Taxes helped create the United States and the Founders put into place multiple provisions in the proposed Constitution to prevent states from exceeding their taxing and regulatory powers over interstate goods and services. The Articles of Confederation had failed, creating “occasions of dissatisfaction between the States” as each state regulated and taxed the other’s goods. THE FEDERALIST No. 22 (Hamilton). Hamilton recognized that commerce was paramount: “It is indeed evident, on the most superficial view, that there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.” *Id.* The solution was to set up a new constitution to ensure “[a]n unrestrained intercourse between the States.” THE FEDERALIST No. 11 (Hamilton). What was needed was not a confederacy, but a federalist union where “[a] unity of commercial, as well as political, interests, can... result from a unity of government.” *Id.* The resulting Constitutional provisions were subject to quite a lot of debate on how to best protect interstate commerce from state interference and taxation. *See, e.g.*, James Madison, “Journal” (Sept. 15, 1787), in THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES MAY–

SEPTEMBER, 1787, 378-81 (Gaillard Hunt ed.) (1908),
<https://www.gutenberg.org/files/40861/40861-h/40861-h.htm>.

From the debates in the Constitutional Convention, what emerged were several provisions aimed at limiting the taxing powers of the states, especially on the ability to tax interstate commerce. There is an express denial of states to tax imports and exports between the states (save for very limited inspection fees). U.S. CONST. art. I, § 10, cl. 2 (Import/Export Clause). The Constitution further placed a limit on states from taxing tonnage of shipping. U.S. CONST. art. I, § 10, cl. 3 (Tonnage Clause). And the Founders placed a general protection of the privileges and immunities of citizenship as well as an express grant for the federal government to regulate commerce. U.S. CONST. art. IV, § 2 (Privileges and Immunities Clause); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause). Taken together, these clauses help create a framework for protecting against overzealous taxation by any one individual state.

Yet under New York's regulations at 20 N.Y.C.R.R. § 132.18(a), the convenience of the employer rule provides that "any allowance claimed for days worked outside of New York State must be based upon the performance of services which of necessity, as distinguished from convenience, obligate the employee to out-of-state duties in the service of his employer." In effect, working remotely for a New York based firm obliges employees to pay New York income taxes, even though the

employee has no representation in New York’s Assembly and thus no say in how much they are taxed. Out-of-state taxpayers who switch from commuting to a New York business to telecommuting for the same business continue paying New York taxes—even as they live and physically work in an entirely different state—unless New York officials agree it is a necessity and not merely a “convenience.”

At issue in the Zelinskys’ matter is New York’s “convenience of the employer” rule applied to them while under orders from both the New York and Connecticut health officials mandating work-from-home during the COVID-19 emergency. There was no convenience about it: all governments involved told the Zelinskys to stay out of New York City, and instead work from home in Connecticut.

I. THE “CONVENIENCE OF THE EMPLOYER” RULE IS A RADICAL POLICY THAT MOST STATES REJECT.

As detailed in NTUF’s research, just seven other states enforce a type of “convenience of the employer” rule. *See, e.g.*, Andrew Wilford, WHICH STATES ARE BEST FOR REMOTE WORKERS?: 2025 REMOTE OBLIGATIONS AND MOBILITY (ROAM) INDEX (Jul. 16, 2025), <https://www.ntu.org/library/doclib/2025/07/2025roam.pdf> (“ROAM INDEX”). But New York’s convenience of the employer policy is the broadest in scope, the most complex, and the most aggressively enforced. In the six other states, the rule is enforced only in limited circumstances.

Two states, Connecticut and New Jersey, have a convenience of the employer rule simply to retaliate against New York’s rule: remove New York’s aggression and

the others would disarm. As the Connecticut General Assembly’s Chief Legislative Analyst recognized, that state’s use of the convenience of the employer rule only applies “to nonresident employees of a Connecticut employer who work from an out-of-state location and reside in a state that also imposes a convenience rule (e.g., New York).” Rute Pinho, *Convenience of the Employer Rule*, Conn. Off. Of Legis. R. Report No. 2025-R-0067 at 2 (May 2, 2025), <https://www.cga.ct.gov/2025/rpt/pdf/2025-R-0067.pdf>. In other words, the rule applies only in retaliation, particularly to New York’s taxing of its citizens. New Jersey has a similar rule, *see* N.J.S.A. § 54A-5.8(e), and also has offered a gross income tax credit to any Jerseyans who successfully challenged New York’s rule. NJ Tres., Div. of Taxation, *Refundable Gross Income Tax Credit for New Jersey Residents Who Successfully Challenge Another State’s Imposition of the Convenience of the Employer Rule* (Apr. 22, 2025), <https://www.nj.gov/treasury/taxation/individuals/refundablegitcredit.shtml> (discussing law codified at N.J.S.A. § 54A:4-1.1.).

Two other states, Oregon and Nebraska, apply their convenience of the employer rule much more narrowly than New York. Oregon applies its convenience of the employer rule only against executive-level managers of in-state businesses. *See, e.g.*, Paul Boynton, *The Convenience of the Employer Rule and COE States*, MOSEY (Dec. 1, 2025), <https://mosey.com/blog/convenience-of-the-employer-rule->

[coe/](#) (“Oregon’s convenience rule is the narrowest of the group. It applies only to nonresident corporate officers and executives whose compensation is exclusively for managerial services performed for an Oregon employer.”); ROAM INDEX at 16 (noting same); *cf.* Ore. Admin. R. 150-316-025. Thus, for non-corporate officers and managerial employees, “Oregon follows standard sourcing rules: you’re only taxed on wages for work physically performed in Oregon.” Boynton, *The Convenience of the Employer Rule and COE States*. Pennsylvania eases its convenience of the employer rule for neighboring New Jersey and the sake of the greater Philadelphia metropolitan area. *See id.* In Nebraska, the state’s convenience of the employer rule was limited by a 2024 law that prevented it from applying unless the taxpayer in question had spent more than seven days physically working in the state. *See* ROAM INDEX at 6 (“LB1023 also applied this exclusion to the state’s convenience of the employer rule. Nonresident remote workers now must physically work in the state for more than 7 days . . . before the convenience of the employer rule applies to them.”); Leg. B. 1023 (Neb. 108th Legis., 2d Session 2024), <https://nebraskalegislature.gov/FloorDocs/108/PDF/Intro/LB1023.pdf>.

Recent attempts in other states to adopt similar rules have been stopped. In Arkansas, a pair of legal counsel opinions issued in February 2020 effectively established a convenience of the employer rule. *See* Ark. DFA Legal Counsel

Opinions Nos. 2020023 & 20150202 (2020). The state legislature quickly overturned these rulings the following year. Ark. Act 1019 (2021) *available at*: <https://arkleg.state.ar.us/Acts/FTPDocument?path=%2FACTS%2F2021R%2FPublic%2F&file=1019.pdf&ddBienniumSession=2021%2F2021R>.

Alabama created a convenience of the employer rule via a tax tribunal ruling on a case of a former Alabaman who moved to Idaho. *See, e.g.,* Janelle Fritts, *Alabama Tax Tribunal Says Out-of-State Workers Owe Income Taxes*, TAX FOUNDATION (Mar. 31, 2023) <https://taxfoundation.org/blog/alabama-remote-work-tax/>. Many think this was constitutionally suspect, *see id.*, and the state legislature quickly and substantially limited its scope by creating a 30-day presence requirement before taxes in that state were due. This calls into question the continued enforceability of Alabama’s convenience of the employer rule as a standalone rule. *See, e.g.,* Andrew Wilford, *Alabama Passes Mobile Workforce Legislation, But Much More Work to Be Done*, NTUF (June 10, 2025) <https://www.ntu.org/foundation/detail/alabama-passes-mobile-workforce-legislation-but-much-more-work-to-be-done> (discussing H.B. 379 (Ala. 2025 Reg. Session), which “includes language that could possibly be used to challenge the state’s “convenience of the employer” rule, a rule that requires individuals who switch from working in Alabama to working remotely for the same Alabama employer while physically out of the state.”); Andrea Ben-Yosef, leg. Ed., *Alabama law provides relief from nonresident income tax for short-term business*

travelers and disaster/emergency personnel, Doc. ID 2025-1106 ERNST & YOUNG LLP (May 21, 2025) <https://taxnews.ey.com/news/2025-1106-alabama-law-provides-relief-from-nonresident-income-tax-for-short-term-business-travelers-and-disaster-emergency-personnel> (“The language of H.B. 379 does not specifically state that the 30-day nonresident income tax exemption applies to employees working outside of the state for an Alabama employer. Specific guidance is needed from the Department to safely arrive at this conclusion.”).

While always a minority rule, the convenience of the employer rule is trending out in the few states that have it. The rule is either being repealed, narrowed by legislation, or applied only in narrow cases. Doing so is good business for the state, as more mobile workforces generate wealth and dynamism that increase the economy of any state that adopts pro-growth policies. As NTUF recognized in the ROAM INDEX at 2: “As more states address their treatment of nonresident taxpayers, states that have yet to do so increasingly stand out in a negative way.” But even if New York is unwilling to be pro-prosperity, then it should at least apply its convenience of the employer rule in a matter consistent with other mandates. Namely, if the *government itself* tells someone to work remotely, then there is no convenience—to the employer or otherwise—in then taxing that activity as if it were still happening in the state.

A. New York Is Effectively Invading the Sovereignty of Other States By Extending Nexus Beyond What the State Supplied During the Pandemic.

New York’s application of convenience of the employer rule here flies in the face of other jurisprudence regarding nexus. A state’s ability to tax is not plenary: it is subject to regulation by Congress via the Commerce Clause and judicial evaluation of the purpose and effects under the Dormant Commerce Clause. *See, e.g., Comptroller of the Treas. of Maryland v. Wynne*, 575 U.S. 542, 554–55 (2015) (“But if a State’s tax unconstitutionally discriminates against interstate commerce, it is invalid regardless of whether the plaintiff is a resident voter or nonresident of the State.”). If the government’s own health department mandated that the Zelinskys stay home and out of his New York worksite, how can the state then demand taxes on their income for the “privilege” of working in New York?

The Dormant Commerce Clause is the Commerce Clause’s prohibition of “state laws that unduly restrict interstate commerce.” *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 514 (2019). “This ‘negative’ aspect of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.” *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)); *see also Wayfair*, 585 U.S. at 178 (“The Court has consistently explained that the Commerce Clause was designed to prevent States from engaging in economic discrimination so they would not divide into

isolated, separable units.”). Thus “[t]he [United States Supreme] Court’s Commerce Clause jurisprudence has ‘eschewed formalism for a sensitive, case-by-case analysis of purposes and effects.’” *Id.* at 179 (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)).

Under *Complete Auto v. Brady*, 430 U.S. 274, 279 (1977), the United States Supreme Court has held that a state imposition of tax on interstate commerce is constitutionally evaluated by a four-part test. Taxes on interstate commerce may survive a “challenge when the tax is [1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.” *Id.* at 279.

The case of the Zelinskys illustrates how clearly the convenience of the employer rule violates the *Complete Auto* test. The State claims that the services provided by New York justify imposing income tax obligations on Professor Zelinsky because a New York employer paid his salary, recruited his students, lent its name to his scholarship, and facilitated his access to a larger academic community—in short, four different ways of saying that Professor Zelinsky’s *employer* was based in New York. But the issue here is not whether Professor Zelinsky’s employer should be liable for all appropriate New York business taxes, but whether Professor Zelinsky himself should be for New York personal taxes.

The state's rationalizations are insufficient to justify tax obligations on Professor Zelinsky for the days he physically worked in Connecticut. The U.S. Supreme Court measures whether a tax is fairly apportioned by applying an external consistency test: A state tax must tax "only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989); *see also Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995) ("External consistency, on the other hand, looks . . . to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State."). This may be applicable when Professor Zelinsky teaches on campus, but the rationale breaks down when applied to the COVID-19 emergency and the orders to remain home and work remotely.

During the pandemic, Connecticut, not New York, provided the infrastructure that furnishes Professor Zelinsky's home with power and internet access. Connecticut, not New York, maintained the roads that Professor Zelinsky drove on and supported the businesses he traveled to for any supplies. Connecticut, not New York, would have responded if there was a fire or health emergency at his place of work. Yet under the convenience of the employer rule as New York applies it,

Connecticut is empowered to tax none of Professor Zelinsky’s income for the days he worked in Connecticut, while New York is empowered to tax *all of it*.

B. The Convenience of the Employer Rule Discriminates Against Nonresidents and Acts as a Forbidden State Tariff.

During the COVID-19 Emergency, New York’s convenience of the employer rule “reache[d] beyond that portion of value that is fairly attributable to economic activity within the taxing State.” *Jefferson Lines*, 514 U.S. at 185; *see also Alaska Airlines, Inc. v. Department of Revenue*, 769 P.2d 193, 199 (Ore. 1989) (“A state may not tax an activity carried on outside its borders.”). Here, the Zelinskys were ordered to stay home in Connecticut and work from there, not New York. Yet New York taxes that very activity, calling the scheme a “convenience” and eschewing the work-from-home orders of *both* states.

The typical answer—tax credits to offset any double taxation—do not help here because, during the COVID-19 pandemic, New York provided no services to the Zelinskys. To be sure, the *Goldberg* Court held that the fairly apportioned rule “ensure[s] that each State taxes only its fair share of an interstate transaction.” 488 U.S. at 260 (collecting cases). Tax credits, apportionment formulas, and interstate compacts are often employed to avoid this multiple taxation problem. *See, e.g., Andrew Wilford, South Dakota’s Use Tax Threatens Basic Principles of Fair Tax Policy*, NTUF (June 7, 2024) <https://www.ntu.org/foundation/detail/south-dakotas-use-tax-threatens-basic-principles-of-fair-tax-policy>.

But in *Wynne*, 575 U.S. at 567, the United States Supreme Court held that Maryland’s inclusion of only a partial tax credit for taxes paid to another state made “the total tax burden on interstate commerce higher.” More importantly, the *Wynne* Court further rejected Maryland’s argument that the provision of a tax credit of some kind was dispositive, explaining “[t]he critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer.” *Id.* In *Wynne*, the mere presence of a tax credit did not automatically cure the overall tax scheme’s constitutional deficiencies. Instead, the Court needed to look deeper, into the practical effects of Maryland’s tax, to conduct its analysis. *See id.* at 545 (“Maryland admits that its law has the same economic effect as a state tariff, the quintessential evil targeted by the dormant Commerce Clause.”).

And practically speaking, tax credits are no salve to the sting of double taxation in the real world. Nonresident taxpayers affected by the convenience of the employer rule must turn around to their home state and ask for a credit for income taxes paid to New York. This is often refused for days while they were physically working in their home state, as states often only grant credits for taxes paid to another state when the taxpayer was physically working in that other state. In such cases, the taxpayer faces double taxation.

This suggests that the convenience of the employer rule is effectively acting as a tariff, which is “the quintessential evil targeted by the dormant Commerce Clause.” *Wynne*, 575 U.S. at 545. Taxpayers who switch from commuting into the state of New York to working from home face the risk of substantially higher burdens than those who continue to work in New York. Such a restriction represents an intolerable burden on interstate commerce.

Even in cases where the taxpayer’s home state grants the requested credit, taxpayers are still burdened by the convenience of the employer rule. Absent reasonable nexus, imposition of tax represents a violation of the taxpayer’s rights under the Due Process Clause. Even if Connecticut provided a credit, Professor Zelinsky’s rights would still be violated if Oklahoma or Montana or any other state attempted to demand income tax for the days he spent working in Connecticut.

Yet any number of states could claim nexus on a basis as flimsy as that put forward by New York. After all, other states provided the primary educations that allowed Professor Zelinsky’s students to attend Cardozo, they host the academic institutions and individuals that Cardozo provides Professor Zelinsky access to, and so on. New York’s justifications for nexus amount to much the same.

C. *Wayfair* Is Not a Blank Check to Tax Interstate Commerce.

The State cites the *South Dakota v. Wayfair* decision to claim that, like businesses selling goods into a state, Professor Zelinsky has “availed himself of an

in-state market.” State Br. at 33. Not so. The state here tortures *Wayfair* to the point that any activity could generate sweeping tax obligations. But *Wayfair* itself was far more cabined.

Wayfair was about sales tax collection from in-state residents buying things, not income tax. See *Wayfair*, 585 U.S. at 167. The case’s utility is of limited help here, where *nonresidents* are taxed by New York. But to the extent *Wayfair* examines a principle about extraterritoriality, *Wayfair* upheld South Dakota’s taxing of electronic commerce only because South Dakota had established important safeguards which kept the state’s sales taxes from unduly burdening interstate commerce:

First, the [South Dakota law] applies a safe harbor to those who transact only limited business in South Dakota. Second, [it] ensures that no obligation to remit the sales tax may be applied retroactively.... Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Id. at 189. In other words, *Wayfair* granted some leeway, but only with important restrictions on the state imposing burdens on interstate commerce. Absent these substantial conditions, the South Dakota law would have been unconstitutional.

Wayfair further does not say any interaction with a state’s market establishes nexus. Rather, it allowed the state of South Dakota to impose sales tax collection obligations on out-of-state businesses given a very specific set of circumstances: (1) out-of-state businesses’ transactions were otherwise going untaxed, creating an imbalance with local businesses and (2) South Dakota had gone to great lengths to minimize the burden on out-of-state businesses, including joining the Streamlined Sales and Use Tax Agreement, offering access to free compliance software, and a *de minimis* threshold exempting businesses that do not exceed certain economic thresholds.

Neither the tax avoidance issue nor the simplification measures taken by South Dakota exist here. Indeed, there has been no flexibility or attempt to look at the on-the-ground realities of the Zelinskys in this challenge. The government focuses on prior case law dealing with Professor Zelinsky, State Brief at 23–38, but as Petitioners well-point out already, this instance is different because here the government itself told them to stay home in Connecticut.

II. ENFORCEMENT OF THE “CONVENIENCE OF THE EMPLOYER” RULE AGAINST THE ZELINSKYS IS PARTICULARLY UNJUSTIFIABLE IN THE CONTEXT OF THE COVID-19 EMERGENCY.

Whether or not a state has the constitutional power to tax a nonresident that works for a New York-based business, New York here is arguing for something even broader. It claims the power to tax an individual who stops working in-person for a

New York employer and instead begins working in another state for the same employer, provided they do so for “convenience” rather than out of necessity.

This “convenience” argument collapses under the actual facts of the COVID-19 pandemic. Professor Zelinsky’s employer was required, under the Governor’s executive order, “to reduce the in-person workforce at any work locations by 100%.” Exec. Or. 202.6 (Mar. 18, 2020). The State argues, incredibly, that Mr. Zelinsky was “was free to work remotely from within New York,” State Brief at 10, to satisfy this obligation, as if the health emergency orders allowed for such things. With few exceptions for essential safety employees, campus was closed, libraries were closed, coffee shops were closed (at least to dine-in service). Every level of every relevant government ordered the Zelinskys to stay home. Indeed, the Governor’s Executive Order even explicitly encourages “telecommuting or work from home procedures,” *id.*, both of which imply that they must be done from Professor Zelinsky’s home in Connecticut, not a Starbucks in New York.

New York cannot simultaneously close its borders and businesses and then claim that these barred workers were avoiding the state for mere “convenience.” Yet that is the sum of what the state argues here: the state can order out-of-state workers to stay home, where another state provides all government services, but New York will still insist on its cut. That violates the very essence of “no taxation without representation.”

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the Zelinskys should receive refunds for years 2019 and 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the Court's electronic filing system. I further certify that I caused to be mailed, postage prepaid, the requisite number of briefs to the Court and counsel for parties in this matter.

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