

The Taxpayers

- 1) The taxpayer with New York source income is Edward A. Zelinsky, a resident of New Haven, Connecticut. He is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan ("Cardozo").
- 2) Doris Zelinsky is the spouse of Edward A. Zelinsky and is also a resident of New Haven, Connecticut. She signed the New York state nonresident joint income tax return for 2019 along with Professor Zelinsky. Mrs. Zelinsky has no New York source income.
- 3) The Zelinskys were the taxpayers in *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003).

Jurisdiction

- 4) The Tax Appeals Tribunal has jurisdiction pursuant to NY CLS Tax § 689(c). The taxpayers timely filed an amended New York state nonresident income tax return for 2019, such return claimed an income tax refund, more than six months have expired since such amended return was filed, and the Department of Taxation and Finance ("the Department") has not responded to such amended return or the amended return's claim for a refund.

Additional Facts

- 5) On the Zelinskys' original 2019 New York State income tax return, Professor Zelinsky reported as New York source income his entire Cardozo salary including the portion of such salary attributable to the days when Professor Zelinsky worked remotely for Cardozo at his home in Connecticut.
- 6) The taxpayer's major and equally important tasks for Cardozo are teaching and legal scholarship.
- 7) 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).
- 8) 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 State Residents*, 92 STATE TAX NOTES 31 (April 1, 2019); *Continuing the Debate on the Johnson Amendment*, 162 TAX NOTES 1017 (March 4, 2019).

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

10) On September 25, 2020, the Zelinskys filed an amended New York State income tax return claiming a refund of their 2019 taxes in the amount of \$10,615. This claim for a refund is based upon the Due Process and Commerce Clauses of the U.S. Constitution.

11) Specifically, the Zelinskys claim that it is unconstitutional for New York to tax the part of Professor Zelinsky's Cardozo salary earned on the days in 2019 on which he worked for Cardozo at his home in Connecticut. The amount of this claimed refund represents the New York income tax attributable to the days in 2019 when Professor Zelinsky did his legal scholarship for Cardozo remotely at his home in Connecticut.

12) The Department never responded to the Zelinskys' amended personal income tax return for 2019 or to such amended return's claim for a refund.

Constitutional Arguments

13) As applied to the facts of this case, New York violates its obligation to apportion interstate income under the dormant Commerce Clause of the U.S. Constitution when, pursuant to its "convenience of the employer" rule, New York taxes all of Professor Zelinsky's Cardozo salary, including salary earned by Professor Zelinsky in Connecticut when he worked at home during his legal scholarship for Cardozo in 2019.

14) See *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, 287 (1977) (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); *Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 594 (2013) (tax on interstate commerce must be "fairly apportioned").

15) As applied to the facts of this case, New York also violates the Due Process Clause of the U.S. Constitution when, under the banner of employer convenience, it projects its taxing authority extraterritorially by taxing income Professor Zelinsky earned on his days working at home for Cardozo in Connecticut in 2019.

16) 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...").

Additional Legal Arguments for Overruling *Zelinsky*

17) For five additional reasons, *Zelinsky* should be revisited and reversed, thus granting Professor Zelinsky a refund for the nonresident personal income taxes he paid in 2019 on the Cardozo salary he earned working remotely at his home in Connecticut.

18) First, the expansion of interstate remote work during the Covid-19 crisis is a change of circumstance which requires revision and reversal of the *Zelinsky* decision.

19) Notwithstanding the value of stare decisis, precedents should be overturned "when the lessons of time may lead to a different result." *People v. Taylor*, 9 N.Y.3d 129, 149 (2007). See also *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 23 (2016) ("in the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision."). *Zelinsky* is such a case, which should be overruled based on "the lessons of time" including the covid-related growth of remote work.

20) Instructive in this context is the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018).

In *Wayfair*, the Supreme Court reversed itself in light of changed conditions. In *National Bellas Hess, Inc. v. Dept. of Rev. of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court had held that states could not impose sales tax collection responsibilities upon retail firms selling solely from out-of-state locations. Subsequently, in light of the new "economic reality" of "[m]odern e-commerce," *Wayfair*, 138 S.Ct. at 2092 and 2095, the Court reconsidered these earlier decisions and reversed them in *Wayfair*.

21) A similar process of reconsideration and reversal should occur on the facts of this case, In light of the growth of interstate remote work, particularly in response to the Covid-19 crisis, *Zelinsky*, like *Quill* and *National Bellas Hess*, has been overtaken by "the lessons of time." *People v. Taylor*, 9 N.Y.3d at 149. In light of changed circumstances, *Zelinsky* should be reversed and Professor Zelinsky should accordingly receive a personal income tax refund for 2019 for the income he earned on his days doing legal scholarship at home for Cardozo in Connecticut.

22) Second, Judge Robert Smith's prescient dissent in *Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427, 440 (2005) should be revisited and adopted as the law in New York. As Judge Smith observed, sustaining the "convenience of the employer" doctrine to tax income earned beyond New York's borders requires "a novel Commerce Clause theory as a companion to [the court's] novel due process theory." *Huckaby*, 4 N.Y.3d at 448.

23) Judge Smith's dissent in *Huckaby* is a better statement of the law today, in light of the growth of interstate remote work as a result of the Covid-19 crisis. That dissent should now become the law. The dormant Commerce Clause requirement of apportionment and the Due Process prohibition on extraterritorial taxation both preclude New York from taxing the salary Professor Zelinsky earned remotely in 2019 on his work-at-home days in Connecticut.

24) Instructive in this context is *Matter of Brooke S.B.*, 28 N.Y.3d at 26 wherein the New York Court of Appeals reversed its prior precedent and adopted Judge Kaye's earlier dissent as the proper statement of the law. In a similar fashion, Judge Smith's *Huckaby* dissent should now be adopted as the law.

25) Here again, *Wayfair* is also instructive. Justice Abraham Fortas had dissented in *National Bellas Hess*. 386 U.S. at 760. With remarkable foresight, he predicted the world of *Wayfair*. Subsequently, Justice Byron White, with similar insight,

dissented in *Quill*. 504 U.S. at 327. These dissents became the law in *Wayfair* when changed circumstances caused the U.S. Supreme Court to reconsider and reverse.

26) Similarly, on the facts of this case, Judge Smith's *Huckaby* dissent should be revisited and adopted as the law in New York.

27) Third, independent legal commentators overwhelmingly criticize *Zelinsky* for failing to properly apply the dormant Commerce Clause and Due Process Clause of the U.S. Constitution. See Jerome R. Hellerstein, Walter Hellerstein, and John A. Swain, *STATE TAXATION*, para. 20.05[4][e][i] (3d. ed. 2020 rev.) (*Zelinsky* decision "does not withstand analysis"); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in our National Economy*, 8 *FLA. TAX. REV.* 885, 922 (2008) ("the *Zelinsky* court erred"); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents, Part 2*, 42 *ST. 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...*"); Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 *UC DAVIS LAW REV.* (forthcoming) ("The [*Zelinsky*] court merely evaded the real issue, which is what the fair apportionment of multistate income would be if the activity impacts interstate commerce.").

28) See *Matter of Brooke S.B.*, 28 N.Y.3d at 25-26 (in overturning prior decision, the court notes the opposition of "legal commentators" to the court's prior decision).

29) Fourth, as applied to the facts of Professor *Zelinsky's* employment by Cardozo in 2019, New York's "convenience of the employer" doctrine produces results which are arbitrary and grossly distorted and thus unconstitutional.

30) As a matter of constitutional law, New York cannot apply an income apportionment formula which creates "arbitrary result[s]" by "grossly distort[ing]" the income Professor *Zelinsky* earned in the Empire State in 2019. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274-275 (1978). That is what happened on the facts of this case when New York, through its "convenience of the employer" doctrine, apportioned zero income to Professor *Zelinsky's* activity for Cardozo in Connecticut - even though a majority of his work days in 2019 were spent doing legal scholarship remotely at his home in Connecticut.

31) This arbitrary, grossly-distorted result (i.e., zero income apportioned to Connecticut) violates New York's obligation under

the dormant Commerce Clause to properly apportion Professor Zelinsky's Cardozo salary between the two states in which Professor Zelinsky worked for Cardozo in 2019. This result also projects New York's tax authority extraterritorially in violation of Due Process to reach income Professor Zelinsky actually earned within the borders of Connecticut.

32) Fifth, New York's continued application of the "convenience of the employer" doctrine in this kind of case is economically self-destructive. Besides being unconstitutional, New York's "convenience of the employer" doctrine is self-destructive in the post-pandemic world. That doctrine leads to irrational tax overreach which encourages individuals to sever their ties with New York in the post-pandemic world.

Conclusion

33) As applied to the facts of this case, New York violates its obligation to apportion under the dormant Commerce Clause when, pursuant to its "convenience of the employer" rule, New York taxes all of Professor Zelinsky's Cardozo salary, including salary earned by him in Connecticut when he worked at home for Cardozo in 2019.

34) On the facts of this case, New York also violates the Due Process Clause when it projects its taxing authority extraterritorially by taxing income Professor Zelinsky earned on his days working at home for Cardozo in Connecticut in 2019. The *Zelinsky* decision should be revisited and reversed, particularly in light of the rapid growth of remote work during the Covid-19 crisis.

35) Accordingly, the Department should not follow *Zelinsky*. Instead, the taxpayers should be given their claimed refund for New York personal income taxes for 2019 attributable to the days Professor Zelinsky worked remotely at his home in Connecticut.

The Taxpayers

- 1) The taxpayer with New York source income is Edward A. Zelinsky, a resident of New Haven, Connecticut. He is the Morris and Annie Trachman Professor of Law at the Benjamin N. Cardozo School of Law of Yeshiva University in Manhattan ("Cardozo").
- 2) Doris Zelinsky is the spouse of Edward A. Zelinsky and is also a resident of New Haven, Connecticut. She signed the New York state nonresident joint income tax return for 2020 along with Professor Zelinsky. Mrs. Zelinsky has no New York source income.
- 3) The Zelinskys were the taxpayers in *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003), cert. denied, 541 U.S. 1009 (2004).

Jurisdiction

4) The Tax Appeals Tribunal has jurisdiction pursuant to NY CLS Tax § 689(c). The taxpayers timely filed an amended New York state nonresident income tax return for 2020. The Department of Taxation and Finance ("the Department") responded to such amended return by making relatively minor arithmetic adjustments. However, aside from those minor adjustments, the Department rejected the amended return's claim for a refund. The Department's letter to the Zelinskys is attached to this petition.

Additional Facts

- 5) On the Zelinskys' original 2020 New York State income tax return, Professor Zelinsky reported as New York source income his entire Cardozo salary including the portion of such salary attributable to the days when Professor Zelinsky worked remotely for Cardozo at his home in Connecticut.
- 6) The taxpayer's major and equally important tasks for Cardozo are teaching and legal scholarship.
- 7) Reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, in 2020, his scholarship was cited by the U.S. Court of Appeals for the Sixth Circuit in *Stegemann v. Gannett Co.*, 970 F.3d 465 (4th cir. 2020).
- 8) 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).

9) Further reflecting the importance to Cardozo of Professor Zelinsky's legal scholarship, on August 25, 2021, TaxProf Blog identified Professor Zelinsky as one of the nation's most widely-cited tax scholars.

10) The coronavirus changed employment and educational patterns in 2020.

11) 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.

12) Starting on March 16, 2020, Cardozo complied with Governor Cuomo's Covid-related executive order and closed its doors to all in-person activity. From March 16, 2020 through December 31, 2020, Professor Zelinsky worked exclusively at his home in Connecticut and never set foot in New York because of the coronavirus.

13) From his home, Professor Zelinsky taught and met with Cardozo students and faculty using zoom. He also continued his pre-Covid work pattern, doing his legal research and writing for Cardozo at his Connecticut home.

14) For this period, i.e., from March 16, 2020 through December 31, 2020, Professor Zelinsky had neither classrooms nor an office available to him in Manhattan.

15) On the Zelinskys' original New York nonresident personal income tax return for 2020, they paid New York tax on Professor Zelinsky's entire Cardozo salary for 2020. This income amounted

to \$251,925 on which he paid New York state income tax of \$15,839. By the amended return, Professor Zelinsky claimed a refund of \$14,319 since most of his 2020 Cardozo income was earned in Connecticut while New York was closed because of the virus.

16) This claim for a refund was based on both state law and constitutional law. As a matter of state law, it violates the "convenience of the employer" rule for New York to tax Professor Zelinsky for his Cardozo income when, on the facts of this case, Cardozo was closed pursuant to the Governor's pandemic-related executive order. For most of 2020, Professor Zelinsky had neither an office nor classrooms in New York and was "obligate[d]" to work at his home in Connecticut.

17) As a constitutional matter, it violates the Due Process Clause and dormant Commerce Clause for New York, on the facts of this case, to tax the Cardozo salary Professor Zelinsky earned working at home in Connecticut.

State Law

18) "Convenience of the Employer." New York's "convenience of the employer" rule¹ provides that, for New York personal income tax purposes, as to a nonresident employee,

any allowance claimed for days worked outside 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.²

20) As the Appellate Division stated in *Kitman v. State Tax Commission*, 92 A.D.2d 1018, 1019 (3rd Dept., 1983):

¹ Although this regulation is referred to as the "convenience of the employer" rule, that exact term does not actually appear in the regulation. *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y. 3d 85, 89 (2003), cert. denied, 541 U.S. 1009 (2004) (characterizing the New York regulation as "convenience of the employer" test).

² 20 NYCRR § 132.18(a) (emphasis added).

The case law has clearly held that an employee's out-of-State services are not performed for an employer's necessity where the services could have been performed at his employer's office. *Id.*³

20) See also *Fass v. State Tax Commission*, 68 A.D.2d 977, 978 (3rd Dept., 1979) ("an employee's out-of-State services are not performed for an employer's necessity where the services could have been performed at his employer's office.").

21) Starting on March 16, 2020, Professor Zelinsky could not perform his teaching or scholarly duties for Cardozo at Cardozo since Cardozo was closed pursuant to the Governor's covid-related executive orders. Thus, starting on March 16, 2020, Professor Zelinsky could not perform his duties at his employer's office since his employer was closed due to the virus and the Governor's order.

22) The Governor's covid-related executive orders. 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." Governor Andrew Cuomo, Executive Order No. 202.6 (March 18, 2020).⁴ Pursuant to this order, Cardozo shut its doors for the balance of 2020. This "obliterate[d]" Professor Zelinsky to work at his home in Connecticut for most of 2020.

Constitutional Law

23) The Commerce Clause. The dormant Commerce Clause of the U.S. Constitution requires all states to apportion interstate income among the states in which such income is earned.

24) See *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, 287 (1977) (state tax must be "fairly apportioned" to the taxing state); *Central Greyhound*

³ (internal citations and quotation marks deleted).

⁴ available at <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/E0202.6.pdf>

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); *Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 594 (2013) (tax on interstate commerce must be "fairly apportioned").

25) The Due Process Clause. In addition, the Due Process Clause of the U.S. Constitution forbids a state from taxing a nonresident extraterritorially beyond the state's boundaries. A state may only tax a nonresident on income he earns within the taxing state's borders.

26) 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...").

State Law Argument

27) As a matter of state law, on the facts of this case, New York cannot tax the Cardozo salary Professor Zelinsky earned starting as of March 16, 2020 when Cardozo was closed. Professor Zelinsky earned this money at home in Connecticut and had no office or classrooms available to him in Manhattan because Cardozo was closed due to the coronavirus and the Governor's covid-related executive orders. See 20 NYCRR § 132.18(a); Executive Order No. 202.6 (March 18, 2020).

28) Under the "convenience of the employer" rule, Professor Zelinsky's 2020 activities for Cardozo beginning on March 16, 2020 were necessarily performed at his Connecticut home because Cardozo, Professor Zelinsky's employer, was closed due to the coronavirus and the Governor's orders closing New York in response to the virus. Starting on March 16, 2020, Professor Zelinsky was "obligate[d]" to work at his home in Connecticut since he had no employer office available to him in New York.

29) See *Kitman v. State Tax Commission*, 92 A.D.2d 1018, 1019 (3rd Dept., 1983); *Fass v. State Tax Commission*, 68 A.D.2d 977, 978 (3rd Dept., 1979).

Constitutional Argument

30) As a constitutional matter, on the facts of this case, taxing Professor Zelinsky on any or all of the Cardozo income he earned at home in Connecticut in 2020 violates both New York's obligation to apportion interstate income pursuant to the dormant Commerce Clause and New York's Due Process obligation to tax nonresidents only on income earned within the taxing state's borders.

31) See *MeadWestvaco Corp. v. Ill. Dep't. of Revenue*, 553 U.S. 16, 24 (2008); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287 (1977); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 663 (1948); *Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 N.Y.3d 586, 594 (2013).

32) See also *Okla. Tax Comm'n. v. Chickasaw Nation*, 515 U.S. 450, 463 n. 11 (1995); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 75 (1920).

Additional Legal Arguments for Overturning *Zelinsky*

33) For five reasons, the New York Court of Appeals should reconsider and reverse its decision in *Zelinsky* and thus grant Professor Zelinsky a refund for personal income taxes paid in 2020.

34) *First, the expansion of interstate remote work during the Covid-19 crisis is a change of circumstance which requires revision and reversal of the Zelinsky decision.*

35) Interstate remote work expanded in the years subsequent to 2003 when *Zelinsky* was decided and then burgeoned further during the Covid-19 crisis. This expansion of interstate remote work has made even more anomalous the reasoning of and the result in *Zelinsky*, i.e., taxing nonresident telecommuters on the days they work at their out-of-state homes and do not set foot in New York State. The *Zelinsky* decision should be reconsidered and reversed in light of these changed circumstances.

36) Instructive in this context is the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). In *Wayfair*, the Supreme Court reversed itself in light of changed conditions. In *National Bellas Hess, Inc. v. Dept. of Rev. of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court had held that states could not impose sales tax collection responsibilities upon retail firms selling

solely from out-of-state locations. Subsequently, in light of the new "economic reality" of "[m]odern e-commerce," *Wayfair*, 138 S.Ct. at 2092 and 2095, the Court reconsidered these earlier decisions and reversed them in *Wayfair*.

37) A similar process of reconsideration and reversal should occur in this context. In light of the growth of interstate remote work, particularly in response to the Covid-19 crisis, *Zelinsky*, like *Quill* and *National Bellas Hess*, has been overtaken by events. In light of these changed circumstances, *Zelinsky* should be reversed. The contemporary growth of interstate remote work highlights New York's unconstitutional refusal to apportion Professor Zelinsky's Cardozo salary under the dormant Commerce Clause and New York's unconstitutional extraterritorial projection of its taxing authority to reach his salary earned at home in Connecticut in violation of the Due Process Clause. Professor Zelinsky should accordingly receive a personal income tax refund for 2020 for the income he earned on his days working at home in Connecticut.

38) Reinforcing this conclusion is the Court of Appeals' acknowledgment that, notwithstanding the value of stare decisis, precedents should be overturned "when the lessons of time may lead to a different result." *People v. Taylor*, 9 N.Y.3d 129, 149 (2007). See also *Matter of Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1, 23 (2016) ("in the rarest of cases, we may overrule a prior decision if an extraordinary combination of factors undermines the reasoning and practical viability of our prior decision."). *Zelinsky* is such a case, which should be overruled.

39) *Second, Judge Smith's Huckaby dissent should control.* Judge Robert Smith's prescient dissent in *Huckaby* should be revisited and adopted as the law in New York. As Judge Smith observed, sustaining the "convenience of the employer" doctrine to tax income earned beyond New York's borders requires "a novel Commerce Clause theory as a companion to [the court's] novel due process theory." *Huckaby*, 4 N.Y.3d at 448.

40) Here again, *Wayfair* is instructive. Justice Abraham Fortas had dissented in *National Bellas Hess*. 386 U.S. at 760. With remarkable foresight, he predicted the world of *Wayfair*. Subsequently, Justice Byron White, with similar insight, dissented in *Quill*. 504 U.S. at 327. These dissents became the law in *Wayfair* when changed circumstances caused the U.S. Supreme Court to reconsider and reverse.

41) So too, Judge Smith's dissent in *Huckaby* is a better

statement of the law today, in light of the growth of interstate remote work as a result of the Covid-19 crisis. That dissent (like Justices Fortas' and White's dissents) should now become the law. The dormant Commerce Clause requirement to apportion and the Due Process prohibition on extraterritorial taxation both preclude New York from taxing the salary Professor Zelinsky earned on his work-at-home days in Connecticut.

42) Also instructive in this context is *Matter of Brooke S.B.*, 28 N.Y.3d at 19 wherein the New York Court of Appeals reversed its prior precedent and adopted Judge Kaye's earlier dissent as the proper statement of the law. In a similar fashion, Judge Smith's *Huckaby* dissent should now be adopted as the law.

43) *Third, independent legal commentators overwhelmingly criticize Zelinsky.* Independent legal commentators have examined Zelinsky and found it wanting. See, e.g., Walter Hellerstein, STATE TAXATION, para. 20.05[4][e][i] (3d. 2015) (*Zelinsky* decision "does not withstand analysis"); Morgan L. Holcomb, *Tax My Ride: Taxing Commuters in our National Economy*, 8 FLA. TAX. REV. 885, 922 (2008) ("the *Zelinsky* court erred"); William V. Vetter, *New York's Convenience of the Employer Rule Conveniently Collects Cash From Nonresidents, Part 2*, 42 ST. 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...*"). Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 UC DAVIS LAW REV. (forthcoming) ("The [*Zelinsky*] court merely evaded the real issue, which is what the fair apportionment of multistate income would be if the activity impacts interstate commerce.").

44) In overturning *Quill* and *National Bellas Hess*, the *Wayfair* Court noted among other factors the criticism which those earlier decisions had engendered. *Wayfair*, 138 S.Ct. at 2092. So too, New York's courts should heed the criticism which *Zelinsky* has generated and reverse that decision, particularly in light of the expansion of interstate remote work to combat the Covid-19 crisis.

45) See also *Matter of Brooke S.B.*, 28 N.Y.3d at 25 (in overturning prior decision, the court notes the opposition of "legal commentators" to the court's prior decision).

46) *Fourth, as applied to the facts of Professor Zelinsky's situation, New York's "convenience of the employer" doctrine produces results which are arbitrary and grossly distorted and thus unconstitutional.*

47) In discharging New York's constitutional duty under the dormant Commerce Clause to apportion Professor Zelinsky's income, New York has broad authority to design reasonable formulas to apportion. New York, for example, could apportion nonresident income based on the nonresident's hours spent working within or without New York, rather than on a day-by-day basis.

48) However, as a matter of constitutional law, New York cannot apply a formula which achieves "arbitrary results" which "grossly distort" the income Professor Zelinsky earned in the Empire State. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 281 (1978). That is what happens when, on the facts of this case, New York, through its "convenience of the employer" doctrine, apportions zero income to Professor Zelinsky's activity in Connecticut - even though a majority of his work days are spent working at his home in Connecticut.

49) This arbitrary, grossly-distorted result (i.e., zero income apportioned to Connecticut) violates New York's obligation under the dormant Commerce Clause to properly apportion Professor Zelinsky's salary between the two states. This result also projects New York's tax authority extraterritorially beyond its borders in violation of Due Process to reach income Professor Zelinsky actually earned within the borders of Connecticut.

50) *Fifth, New York's continued application of the "convenience of the employer" doctrine is economically self-destructive.* Besides being unconstitutional, New York's "convenience of the employer" doctrine is self-destructive. That doctrine leads to irrational tax overreach which encourages individuals to sever their ties with New York.

Calculation of 2020 Refund

51) The refund to which Professor Zelinsky is entitled for 2020 is calculated in the following steps:

a) From January 1 through March 15, 2020 was a period of 75 days, representing 20% of the total days of 2020.

b) From March 16th through December 31, 2020 was a period of 291 days, representing 80% of the total days of 2020.

c) Professor Zelinsky's total Cardozo salary for 2020 was \$251,925. The 20% of this salary allocable to the period from January 1 through March 15, 2020 was \$50,385. The 80% of his Cardozo salary allocated to the period of the covid lockdown from March 16 through December 31, 2020 was \$201,540.

d) During the period from January 1 through March 15, 2020, Professor Zelinsky worked for Cardozo a total of 50 days. On 24 of those days (48%), he commuted to Manhattan to teach. On the remaining 26 of those days (52%), Professor Zelinsky did legal research and writing from his home in Connecticut.

e) Consequently, of the \$50,385 attributable to Professor Zelinsky's salary from Cardozo for the period from January 1 through March 15, 2020, 48% is taxable to New York, reflecting the days he physically commuted to Manhattan to teach.

f) $48\% \times \$50,385 = \$24,185$. Hence, in 2020, Professor Zelinsky's gross income from New York sources was \$24,185, reflecting the days he taught in Manhattan before the coronavirus crisis and the Governor's executive order required Cardozo to close.

g) None of the remainder of his Cardozo salary is taxable by New York since, starting on March 16, 2020, Professor Zelinsky had neither an office nor classrooms available to him in New York. Starting on March 16, 2020 and through December 31, 2020, Professor Zelinsky was "obliterate[d]" to work at his home in Connecticut as he had no employer office or classroom available to him in New York.

h) The New York income tax Professor Zelinsky owes on this \$24,185 is \$1,520. With his original 2020 New York return, he paid New York income taxes of \$15,839. Hence, Professor Zelinsky is entitled to the difference of \$14,319 as a refund of his New York income taxes.

i) In its letter of September 17, 2012, the Department made minor arithmetic adjustments which resulted in a refund to Professor Zelinsky of \$1,326.25.

j) This results in a remaining balance of \$12,992.75 which should be refunded to Professor Zelinsky.

Conclusion

52) As applied to the facts of this case, New York violates its obligation to apportion under the dormant Commerce Clause when, pursuant to its "convenience of the employer" rule, New York taxes all of Professor Zelinsky's Cardozo salary, including salary earned by him in Connecticut when he worked at home for Cardozo in 2020.

53) On the facts of this case, New York also violates the Due

Process Clause when it projects its taxing authority extraterritorially beyond its borders by taxing income Professor Zelinsky earned on his days working at home for Cardozo in Connecticut in 2020.

54) The *Zelinsky* decision should be revisited and reversed, particularly in light of the rapid growth of remote work during the Covid-19 crisis.

55) Accordingly, the Department should not follow *Zelinsky*. Instead, the taxpayers should be given their claimed refund for New York personal income taxes for 2020 attributable to the days Professor Zelinsky worked remotely at his home in Connecticut.

56) As a matter of state law, on the facts of this case, New York cannot tax the Cardozo salary Professor Zelinsky earned starting as of March 16, 2020 when Cardozo was closed. From March 16, 2020 through December 31, 2020, Professor Zelinsky had neither an office nor a classroom available to him in New York. For this period, Professor Zelinsky was "obligate[d]" to work at his home in Connecticut since he had no employer office or classroom available to him in New York.

57) Accordingly, on the facts of this case, as a matter of both state and constitutional law, Professor Zelinsky should be given his claimed refund for New York personal income taxes for 2020.