State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 2, 2026 CV-25-1156

In the Matter of EDWARD A. ZELINSKY et al.,
Petitioners,
v OPINION AND JUDGMENT

COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK et al.,
Respondents.

Calendar Date: June 1, 2026

Before: Clark, J.P., Fisher, Powers, Mackey and Corcoran, JJ.

Edward A. Zelinsky, New Haven, Connecticut, petitioner pro se, and for Doris Zelinsky, petitioner.

Letitia James, Attorney General, Albany (*Taylor A. Sutton* of counsel), for Commissioner of Taxation and Finance of the State of New York, respondent.

National Taxpayers Union Foundation, Washington, DC (*Joseph Henchman* of counsel), for National Taxpayers Union Foundation, amicus curiae.

Corcoran, J.

Proceeding pursuant to CPLR article 78 (initiated in this Court pursuant to Tax Law § 2016) to review a determination of respondent Tax Appeals Tribunal which sustained personal income tax assessments imposed under Tax Law article 22.

Petitioners, residents of Connecticut, commenced this proceeding to review a determination of respondent Tax Appeals Tribunal sustaining the denial of their New York personal income tax refund claims for the 2019 and 2020 tax years. Petitioner Edward A. Zelinsky, a law professor and attorney employed by Cardozo Law School, performed teaching and scholarship duties both within and outside New York, including from his Connecticut home, during the tax years coinciding with the COVID-19 pandemic.[1]

Petitioners filed New York nonresident income tax returns for 2019 and 2020, allocating a portion of Zelinsky's salary to Connecticut and claiming refunds of withholdings attributable to income earned while working remotely from home. Following an audit, the Division of Taxation (hereinafter the Division) determined that certain disputed income remained taxable as New York source income pursuant to the so-called convenience of the employer rule (*see* 20 NYCRR 132.18 [a]) and denied the claimed refunds. Petitioners challenged that determination before an Administrative Law Judge, who sustained the Division's position. Petitioners then appealed to the Tribunal, which concluded that Zelinsky's remote work income remained taxable as New York source income under Tax Law article 22. Petitioners now claim that the Tribunal violated state regulations and that the Due Process and dormant Commerce Clauses of the US Constitution forbid the state from taxing the income earned at Zelinsky's out-of-state home.

Petitioners' previous challenge to the constitutionality of New York's convenience of the employer rule (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d 85 [2003], *cert denied* 541 US 1009 [2004] [hereinafter *Zelinsky I*]) failed when the Court of Appeals upheld the state's taxation of Zelinsky's entire income earned in 1994 and 1995, when he split his hours working as a law professor, teaching on campus at Cardozo Law School in New York City three days per week when classes were in session and otherwise working from his Connecticut home. Zelinsky remained employed there during the 2019 and 2020 tax years, including when the COVID-19 pandemic interrupted academic instruction on campus in 2020. Between January 2020 and March 2020, Zelinsky commuted to New York three days per week to teach classes and perform other academic duties on campus, such that Zelinsky worked at the New York campus 24 days during the 2020 tax year. In response to the pandemic, on March 20, 2020, Governor

[1] During the relevant tax years, only Zelinsky earned New York source income. Although petitioners, as spouses, filed joint nonresident income tax returns, only his income is at issue here.

Andrew Cuomo issued Executive Order 202.8, directing nonessential businesses to reduce in-person workforce levels by 100% and to implement telecommuting and remote work "to the maximum extent possible" (Executive Order [A. Cuomo] No. 202.8 [9 NYCRR 8.202.8]). Zelinsky performed his duties remotely from Connecticut for the remainder of the year.

Petitioners now contend that the work-from-home mandate during the pandemic eroded the analysis and holding of *Zelinsky I*. More particularly, they argue that the Tribunal irrationally determined that Zelinsky did not work from home in Connecticut during the pandemic out of necessity of his employer and that the resulting taxation of his entire income violates the dormant Commerce and Due Process Clauses of the US Constitution. In response, respondent Commissioner of Taxation and Finance insists that the Administrative Law Judge properly applied the convenience rule to Zelinsky's remote work and that taxing all of his law school earnings as New York source income comported with the Due Process and dormant Commerce Clauses. We agree with the Tribunal's determination and therefore confirm.

After confirming that the proper legal standard has been applied (*see Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d 131, 144 [2023]), "our review in tax proceedings is limited. If the Tribunal's determination is rationally based upon and supported by substantial evidence, it must be confirmed, even if it is reasonably possible to reach a different conclusion" (*Matter of Beeline.Com, Inc. v State of New York Tax Appeals Trib.*, ___ AD3d ___, ___, 2026 NY Slip Op 00175, *1 [3d Dept 2026] [internal quotation marks and citations omitted]; *see Matter of Schreiber v New York State Tax Appeals Trib.*, 222 AD3d 1303, 1305 [3d Dept 2023]). When "[a]pplying the substantial evidence standard, the question is not whether the reviewing court finds the proof convincing, but whether the agency could do so" (*Matter of Black v New York State Tax Appeals Trib.*, 41 NY3d at 144 [internal quotation marks, ellipses, brackets and citations omitted]).

As relevant here, Tax Law § 601 (e) (1) imposes a tax upon the New York source income of nonresidents (*see Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d 427, 432 [2005], *cert denied* 546 US 976 [2005]). New York source income includes income "derived from or connected with New York sources," including a "profession or occupation carried on" in New York (Tax Law § 631 [a] [1]; [b] [1] [B]). Where a nonresident's profession or occupation is carried on "partly within and partly without" New York, the resulting New York source income is determined through apportionment and allocation pursuant to regulations promulgated by the

Commissioner (Tax Law § 631 [c]). Under 20 NYCRR 132.18 (a), when a nonresident employee performs services both within and without New York, out-of-state workdays are treated as in-state workdays unless the services were undertaken due to the employer's "absolute necessity" (*Matter of Kitman v State Tax Commn.*, 92 AD2d 1018, 1020 [3d Dept 1983], *lv denied* 59 NY2d 603 [1983]) rather than the employee's convenience (*see Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d at 433-434; *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 90).[2] The convenience rule aims to prevent nonresident employees from receiving tax advantages that are unavailable to similarly situated New York residents merely by choosing to perform work remotely outside the state (*see Matter of Speno v Gallman*, 35 NY2d 256, 259 [1974]; *Matter of Kitman v State Tax Commn.*, 92 AD2d at 1019). Judicial interpretation of the convenience rule calls for analysis of why work is performed out of state rather than simply examining the "place of performance" (*Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d at 434 [internal quotation marks omitted]). When a nonresident's out-of-state work remains "inextricably intertwined" with a New York employer and the employer does not require the employee to perform those duties elsewhere, the resulting income remains New York source income (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 92).

For example, courts have found employer necessity to be established when the employer gained a business advantage from its employee working out of state near clients' construction sites (*see Matter of Fischer v State Tax Commn. of State of N.Y.*, 107 AD2d 918, 920 [3d Dept 1985], *appeal dismissed* 65 NY2d 690 [1985]). Another taxpayer sustained his burden of showing employer necessity when his work required specialized equipment that was unavailable at the employer's New York office (*Matter of*

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[2] Zelinsky was not entitled to be taxed pursuant to 20 NYCRR 132.4. That regulation governs the allocation of income earned by nonresident employees whose services are performed wholly within or wholly without New York. Here, however, Zelinsky worked on campus on 24 days from January 2020 to March 2020, such that petitioner performed services both within and without New York during the 2020 tax year. Accordingly, the Tribunal rationally concluded that Zelinsky's income was subject to 20 NYCRR 132.18. Contrary to petitioners' contention, neither the Tax Law nor the applicable regulations provide a basis for treating the nine-month period following March 2020 as a separate taxable period. Unlike *Matter of Hayes v State Tax Commission* (61 AD2d 62, 62-63 [3d Dept 1978]), where the taxpayer retired from his job in New York during the tax year and then worked outside New York as a consultant, no comparable change occurred here.

Fass v State Tax Commn., 68 AD2d 977, 978 [3d Dept 1979], *affd* 50 NY2d 932 [1980]). In contrast, taxpayers failed to establish employer necessity when the employee, residing out of state, performed tasks like writing television scripts (*see Matter of Colleary v Tully*, 69 AD2d 922, 923 [3d Dept 1979]), composing newspaper columns (*see Matter of Kitman v State Tax Commn.*, 92 AD2d at 1019-1020), telephoning clients (*see Matter of Speno v Gallman*, 35 NY2d at 260) and conducting research and scholarly writing (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 94-95; *Matter of Brody v Chu*, 141 AD2d 907, 908 [3d Dept 1988]), because those tasks could have been performed in New York, or anywhere else for that matter.

Because the pandemic disrupted traditional work environments and forced employers and employees alike to either adapt or suffer financially, some of the above-cited applications of the convenience rule resist ready application here. For instance, the cost-benefit analysis that previously informed voluntary choices about making a long commute to the office or furnishing suitable brick-and-mortar workstations became academic when congregating in person, at the office or elsewhere, was dangerous and temporarily prohibited. Nonetheless, the distinction between work that must be performed at a particular site for the employer's need or benefit and work that could be performed anywhere remains a rational, practical test for work performed at an employee's out-of-state home due to the pandemic.[3]

Here, we find that the Tribunal rationally concluded that Zelinsky's employer did not require him to work in Connecticut even though he could not work on campus in New York. Although the executive order required the law school to implement remote instruction, it did not require Zelinsky to teach from Connecticut. The law school sought to continue instruction and related academic functions uninterrupted. Faculty continued to teach and receive compensation while students continued their studies, remaining on track to advance academically, graduate on time and pursue professional opportunities. Yet nothing in the record suggests that those objectives depended upon Zelinsky working from Connecticut. As argued by the Commissioner, the law school was indifferent to the state from which faculty delivered videoconference lectures or conducted meetings. As in *Huckaby*, Zelinsky "chose to accept employment from a New York employer (with the advantages of a New York salary and fringe benefits) while maintaining his residence" in

[3] The refund claimed for the 2019 tax year requires less discussion because Zelinsky's pre-pandemic remote work was materially indistinguishable from his 1994 and 1995 remote work, such that it was lawfully taxable for the same reasons explained in *Zelinsky I*.

another state (*Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 434-435); the law school did not obtain any advantage from him doing so. A temporary but grave public health emergency, not "employer necessity" as previously defined, explains why Zelinsky worked remotely. On this record, and giving appropriate deference to the Tribunal's interpretation of the regulations it administers, we find no basis to disturb its determination or to grant petitioners any relief on their state law claims.

We next consider petitioners' constitutional arguments. The Court of Appeals rejected analogous dormant Commerce Clause and Due Process Clause arguments arising from Zelinsky's remote work in Connecticut while employed by Cardozo Law School more than 20 years ago (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 96, 97). Petitioners contend that holding is inapplicable because (1) the Supreme Court of the United States has undermined its constitutional reasoning and (2) the Commissioner may not lawfully allocate all of Zelinsky's income to New York without violating the US Constitution when he remained off campus after March 16, 2020 due to state mandates.

Specifically, petitioners argue first that the Tribunal's determination runs afoul of the dormant Commerce Clause. The Commerce Clause of the US Constitution provides that Congress has exclusive power to "regulate [c]ommerce . . . among the several [s]tates" (US Const, art I, § 8, cl 3). Though phrased as a positive grant of regulatory power to Congress, the Commerce Clause has been interpreted as effecting a negative or dormant aspect that prevents states from passing laws that discriminate against, or unduly burden, interstate commerce (*see Matter of Walt Disney Co. & Consol. Subsidiaries v Tax Appeals Trib. of the State of N.Y.*, 42 NY3d 538, 550 [2024], *cert denied* ___ US ___, ___, 145 S Ct 1125 [2025]). To withstand scrutiny under the dormant Commerce Clause, "a state tax (1) must be applied to an activity with a substantial nexus with the taxing [s]tate, (2) must be fairly apportioned, meaning internally and externally consistent, (3) may not discriminate against cross-border commerce and (4) must be fairly related to the services provided by the [s]tate" (*id.* at 551 [internal quotation marks and citation omitted]; *see Overstock.com, Inc. v New York State Dept. of Taxation & Fin.*, 20 NY3d 586, 594 [2013], *cert denied* 471 US 1071 [2013]; *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 90). "The central purpose behind the apportionment requirement is to ensure that each [s]tate taxes only its fair share of an interstate transaction" (*Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 436 [internal quotation marks, brackets and citation omitted]). " 'External consistency is essentially a practical inquiry for determining whether the State

has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed' " (*Matter of International Bus. Machs. Corp. & Combined Affiliates v Tax Appeals Trib. of the State of N.Y.*, 214 AD3d 1125, 1128 [3d Dept 2023], *affd* 42 NY3d 538 [2024], *cert denied* ___ US ___, 145 S Ct 1126 [2025], quoting *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 91). It examines whether a state's tax "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing [s]tate" (*Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 436 n 5 [internal quotation marks and citation omitted]). "No particular apportionment formula or method need be used to satisfy constitutional requirements, and when a [s]tate has chosen one, an objecting taxpayer has the burden to demonstrate by clear and cogent evidence that the income attributed to the [s]tate is in fact out of all appropriate proportions to the business transacted in that [s]tate, or has led to a grossly distorted result" (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 91 [internal quotation marks, ellipsis and citations omitted]).

Petitioners contend that the challenged tax here fails the external consistency test because New York improperly taxed income attributable to work performed in Connecticut during the pandemic. However, as the Commissioner aptly argues, the dormant Commerce Clause is not implicated simply because Zelinsky "cross[ed] . . . state lines to do his work" (*id.* at 93). A nonresident employee's physical presence outside New York, standing alone, does not compel allocation of income away from New York (*see Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 435). The dormant Commerce Clause precludes states from "discriminating between transactions on the basis of some interstate element" (*Matter of Walt Disney Co. & Consol. Subsidiaries v Tax Appeals Trib. of the State of N.Y.*, 42 NY3d at 550 [internal quotation marks, brackets and citation omitted]) but it " 'protects markets and participants in markets, not taxpayers as such' " (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 93, quoting *General Motors Corp. v Tracy*, 519 US 278, 300 [1997]). "Income derived from a business's interstate activities differs from income a nonresident earns from a New York employer – nonresidents do not implicate themselves or their employers in interstate commerce merely by working from home" (*Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 435, citing *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y*, 1 NY3d at 92-93). In other words, although the pandemic forced Cardozo Law School to implement remote work to protect employee and student health, Cardozo did not establish the requisite nexus to Connecticut or any other state by doing so. As with his previous challenge (*see Matter of Zelinksy v Tax*

Appeals Trib. of the State of N.Y., 1 NY3d at 93-94), we likewise conclude that Zelinsky's remote work here does not implicate the dormant Commerce Clause.

Even assuming that Zelinsky's remote work triggered the dormant Commerce Clause, the entirety of his salary was derived from his New York employment, thereby satisfying the external consistency requirement that the tax reach only that portion of value fairly attributable to economic activity within the taxing state. Petitioners contend that income earned from within Connecticut must be attributed to that state, but the Commerce Clause does not impose a rigid physical presence requirement as a prerequisite for state taxation (*see South Dakota v Wayfair, Inc.*, 585 US 162, 177-179 [2018]). Thus, "New York's tax on [Zelinsky's entire] nonresident income is fairly apportioned" (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 94). Petitioners argue that unlike his 1994 and 1995 remote work, Zelinsky received most of his day-to-day governmental services, including police, fire, emergency and utility services from Connecticut instead of New York in 2019 and 2020. However, "the tax imposed need not bear an exact relation to the services actually provided to the individual taxpayer" (*id*. at 95 [internal quotation marks and citation omitted]). In 2019 and 2020, Zelinsky continued to derive substantial economic and professional benefits from his primary business of teaching students at a New York law school, which paid his salary and fringe benefits and operated in New York, even during the pandemic. His job still included a prestigious professional affiliation, institutional support for his scholarship and access to the broader New York legal and academic community. As in *Zelinsky I*, Zelinsky was able to earn his salary "because of the benefits he receives every day from New York" (*id*.). "Since the New York tax imposed did not reach beyond that portion of value fairly attributable to economic activity within the taxing [s]tate" (*id*. at 96 [internal quotation marks, brackets, ellipsis and citation omitted]), petitioners failed to demonstrate by clear and cogent evidence that the income attributed to New York was out of all appropriate proportion to the business transacted here or resulted in a grossly distorted allocation so as to violate the dormant Commerce Clause (*see Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 435; *Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 91, 96).

Petitioners' due process argument is similarly unavailing. As relevant here, the Due Process Clause requires only that there exist a "minimal connection between the taxpayer and the state, and that the income the state seeks to tax be rationally related to values connected with the state" (*Matter of Huckaby v New York State Div. of Tax Appeals*, *Tax Appeals Trib.*, 4 NY3d at 437 [internal quotation marks and citation omitted]; *see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 96).

Stated differently, "the tax imposed must 'bear fiscal relation' to 'opportunities which the state has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society. The simple but controlling question is whether the state has given anything for which it can ask return' " (*Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 96-97 [brackets and ellipsis omitted], quoting *Wisconsin v J.C. Penney Co.*, 311 US 435, 444 [1940]).

The Court of Appeals previously held that Zelinsky maintained the requisite minimum connection to New York through his physical presence here and his purposeful participation in the New York market for legal education (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 97). Similar connections persisted during the tax years at issue here.[4] Although Zelinsky performed most of his work remotely from Connecticut in 2020, he continued to derive tangible and intangible benefits from his New York employment. The pandemic temporarily altered the location from which Zelinsky performed his duties and his method of teaching, but it did not diminish his connections to New York. Under these circumstances, the challenged tax bore a rational relationship to values connected with New York and therefore did not violate due process.

Further, we reject petitioners' argument that the holdings and rationale of *Zelinsky I* and *Huckaby* have been eroded by subsequent decisions of the US Supreme Court, namely *Comptroller of Treasury of Md. v Wynne* (575 US 542 [2015]) and *MeadWestvaco Corp. v Illinois Dept. of Revenue* (553 US 16 [2008]), cases we find factually distinguishable. *MeadWestvaco* involved a business' failure to pay income tax on capital gains to one of the multiple states where it conducted business (*MeadWestvaco Corp. v Illinois Dept. of Revenue*, 553 US at 19-22). *Wynne* reviewed the imposition of a state personal income tax on pass-through income generated by individuals with stock in

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[4] Zelinsky worked in New York less frequently in 2020 than the taxpayer in *Huckaby*, who worked in New York approximately 25% of the year (*see Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d at 438). Due process was satisfied in that case, in part because the taxpayer's New York presence was "significant enough to satisfy any rough proportionality requirement called for by due process"; the Court did not decide if a nonresident who spent only a "trivial amount of time" working in New York requires different treatment (*id*.). We note that allocation of all of Zelinsky's 1995 income survived constitutional scrutiny even though his physical presence on campus diminished substantially during his sabbatical from teaching in the fall semester (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 89).

a subchapter S corporation that filed tax returns in 39 states (*Comptroller of Treasury of Md. v Wynne*, 575 US at 546-547). Both cases involved the apportionment of income generated through interstate commercial activity and therefore decided how a state may tax value derived from *interstate markets*. In contrast, Zelinsky did not engage in comparable interstate commercial activity here because "nonresidents do not implicate themselves or their employers in interstate commerce merely by working from home" (*Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 4 NY3d at 435; *see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 1 NY3d at 93-94).

Although Zelinsky's remote work during the pandemic was less volitional than his remote work in 1994 and 1995, we reject his argument that he was obliged by necessity of *his employer* to work in Connecticut. Zelinsky was obliged to work off campus, not out of state, in the service of Cardozo Law School during the period covered by the COVID-19 executive order. That obligation arose from the state's public health emergency mandate and deprived both the employer and the employee of the option of working from the law school's New York offices. Zelinsky naturally chose to work from the most logical remote site available to him, his Connecticut home, established for his convenience long before the pandemic, where he used a computer and Internet connection to deliver lectures via videoconference and to conduct meetings. Here, the state, not the employer, prevented Zelinsky and all other employees from working at the New York office supplied by Cardozo Law School. The employer derived the same benefits from its faculty's remote teaching regardless of whether the instructor logged in to class from New York or elsewhere. Other stakeholders, including salaried faculty, staff, law students and prospective employers, likewise benefited from the remote teaching program and the economic impact of uninterrupted instruction, all similarly indifferent to any particular professor's lecture site. Thus, the Tribunal rationally determined that Zelinsky was not obliged *by his employer* to work outside of New York, and its determination is supported by substantial evidence.

Finally, we recognize the continuing debate over New York's convenience of the employer rule (*see Matter of Zelinsky v Tax Appeals Trib. of State of N.Y.*, 301 AD2d 42, 47 [3d Dept 2002], *affd* 1 NY3d 85 [2003], *cert denied* 541 US 1009 [2004]) and arguments in favor of new approaches to taxation of remote work. However, having found no constitutional or other infirmity in the rule's application here, those debates remain the province of the Legislature and the administrative agency that devises and construes the regulation. Accordingly, we find no basis to disturb the Tribunal's determination sustaining the taxation of the disputed income as New York source income under the convenience of the employer rule.

Clark, J.P., Fisher, Powers and Mackey, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

ENTER:

Robert D. Mayberger
Clerk of the Court