

**REMOTE WORK TAX “FIGHTS”: MODIFICATIONS TO THE
“CONVENIENCE OF THE EMPLOYER” RULE**

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As remote work has become integral to the American workforce, the inefficient taxation mechanics of the “convenience of the employer” rule have been exposed. Instead of allowing nonresident employees to recognize remote work-related savings, certain states subject them to double taxation with nearly unsatisfiable exceptions. Unsurprisingly, constitutional challenges to the rule have repeatedly failed, so states have resorted to engaging in inefficient tax “fights.” Tax “fights,” however, are an improper solution, as they do not solve the burdens on state taxation, employment opportunities, and technological advancements. Instead, this Article proposes that the New York state (“N.Y.”) legislature modify its “convenience of the employer” rule to make the “bona fide employer office” test easier to satisfy, which takes a swing at preventing future tax conundrums in an unpredictable world.

TABLE OF CONTENTS

I. INTRODUCTION.....	580
II. CONSTITUTIONAL AND PANDEMIC-RELATED CHALLENGES.....	584
III. STATE TAXATION, EMPLOYMENT, AND TECHNOLOGICAL INEFFICIENCIES	589
<i>A. State Taxation Inefficiencies</i>	<i>590</i>
<i>B. Employment Inefficiencies</i>	<i>593</i>
<i>C. Technological Inefficiencies.....</i>	<i>594</i>
<i>D. Recommended Modifications to the Convenience Rule</i>	<i>598</i>
IV. CONSEQUENCES AND COUNTERARGUMENTS.....	603
<i>A. Increased Tax “Fights” and Increased Taxpayer Abuse</i>	<i>603</i>

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<i>B. The Future of Technological Transformation</i>	605
<i>C. Clash Between One’s Taxpayer Base and Another’s Growing Pains</i>	607
1. <i>Rising Costs of Living, But One’s Right to a Tax Base</i>	607
2. <i>Costs and Benefits of Retaining an Increased Tax Base</i>	609
V. CONCLUSION	612

I. INTRODUCTION

Jane Doe is a recent college graduate. Driven to pursue the best job opportunity for her future career, she lands a job in New York City. However, Jane is not an ordinary college student—she is conscientious about her finances and realizes that living in the Big Apple is a financial nightmare. Thinking she will amass great savings in cost of living, Jane decides to live in nearby New Jersey and commute to her New York City job. In fact, Jane’s employer only requires her to work in person three days a week, so she gets the luxury of working remotely for two days out of her New Jersey apartment. While Jane might think that this move will substantially reduce her cost of living in the long run, a New York state income tax provision may prove her wrong.

In New York state (“N.Y.”), nonresident employees are subject to an extra income tax that, on its face, incentivizes remote work. Under N.Y. law, the state levies an income tax on nonresident employees that is determined by a “proportion of his total compensation for services rendered as an employee which the total number of working days employed within New York State bears to the total number of working days employed both within and without New York State.”¹ In other words, a nonresident employee (“NRE”) is only taxed on income earned for days worked within the state of N.Y.² Logically, days worked outside the state—such as remotely from one’s out-of-state residence—would produce income that is

¹ N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2024).

² *Id.*

not subject to N.Y. income taxes.³ Yet, this reasoning does not translate to the N.Y. tax code.

According to the N.Y. Tax Division, days that an NRE works remotely only receive nontaxable treatment if they satisfy the “convenience of the employer” rule.⁴ Section 132.18 provides that “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.”⁵ Known as the “convenience of the employer” rule (“Convenience Rule”),⁶ this provision was clarified by the Tax Division in 2006.⁷ In simpler terms, an NRE may only avoid N.Y. income tax on days that they work from home if their home office is deemed a “bona fide employer office” for the “necessity of the employer.”⁸ While there may be an argument that an employee’s home office should be considered a “bona fide employer office,”⁹ an employee’s home

³ See Jared Walczak, *Teleworking Employees Face Double Taxation Due to Aggressive “Convenience Rule” Policies in Seven States*, TAX FOUND. (Aug. 13, 2020), <https://taxfoundation.org/research/all/state/remote-work-from-home-teleworking/> [<https://perma.cc/N2AZ-H7KG>] (“[T]hese [‘convenience of the employer’] rules . . . treat an employee as if they worked out of their company’s office even if they never actually did so.”).

⁴ tit. 20, § 132.18(a).

⁵ *Id.*

⁶ As used throughout this Article, the Convenience Rule is in reference to the New York state Convenience Rule. While six other states follow the “convenience of the employer” rule in some form, *see infra* note 49, this Article focuses on the New York state Convenience Rule for analysis and recommended modifications. If New York were to adopt the proposed modifications, other states may or may not follow suit.

⁷ *Id.*; *see* Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div. 2 (May 15, 2006) (on file with N.Y. State Dep’t Tax’n and Fin.).

⁸ Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div., *supra* note 7, at 2.

⁹ An employee’s home office may satisfy some of the factors that the Tax Division has set forth for determining a “bona fide employer office.” While a home office likely does not satisfy the primary factor—the requirement that the “home office contains or is near specialized facilities . . . that cannot be made available at the employer’s place of business”—a home office may satisfy some of the secondary factors. The Tax Division considers secondary factors for a “bona

office will essentially never meet this standard due to the stringent “bona fide” and “necessity” requirements,¹⁰ making it easy to tax any day that an NRE works from home as a day worked in N.Y.¹¹ Ultimately, this produces inefficient double taxation in state tax systems, since NREs are required to pay income tax to N.Y. for days they work remotely in addition to the state income taxes they already pay to their state of residency.¹²

To combat this double taxation, New Jersey (“N.J.”) recently created a tax credit for residents facing such a remote-worker tax.

fide employer office” to include whether (1) “[t]he home office is a requirement or condition of employment”; (2) “[t]he employer has a bona fide business purpose for the employee’s home office location”; (3) [t]he employee performs some of the core duties of his or her employment at the home office” (4) [t]he employee meets or deals with clients, patients or customers on a regular and continuous basis at the home office”; (5) “[t]he employer does not provide the employee with designated office space or other regular work accommodations at one of its regular places of business”; and (6) “[e]mployer reimbursement of expenses for the home office” is given. With work from home jobs becoming more commonplace in recent years, the home office may very well be considered a “requirement or condition” of employment, particularly if physical office space is not made available to remote workers. In addition, the capabilities of remote work technologies allow employees to virtually “meet” with “clients, patients or customers” at their home offices. See Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div., *supra* note 7, at 3–4; Jennifer S. White et al., *It’s Official – A Renewed Challenge to the Convenience of the Employer Test*, REED SMITH LLP (May 2, 2023), <https://www.reedsmith.com/en/perspectives/2023/05/its-official-a-renewed-challenge-convenience-employer-test> [<https://perma.cc/3AJE-USAJ>] (“As technology makes it easier to work remotely, many employers have hired employees with the intent that they work on a fully remote or hybrid basis.”).

¹⁰ White et al., *supra* note 9 (“In practice, [the ‘bona fide employer office’] threshold is extremely difficult to meet.”).

¹¹ Renu Zaretsky, *Taxing Remote Workers: “Convenience,” Conflict, and the Courts*, TAX POL’Y CTR. (Aug. 2, 2023), <https://www.taxpolicycenter.org/taxvox/taxing-remote-workers-convenience-conflict-and-courts> [<https://perma.cc/7Q47-VLZQ>].

¹² Chris Atkins, *Telecommuter Tax Fairness Act of 2005: Restoring Balance to State Taxation of Telecommuters*, TAX FOUND. (Jan. 26, 2006), <https://taxfoundation.org/research/all/federal/telecommuter-tax-fairness-act-2005-restoring-balance-state-taxation-telecommuters/> [<https://perma.cc/C7C5-3YGD>] (“Absent federal action, many telecommuters will continue to pay taxes on over 100 percent of their income.”).

N.J.’s Assembly Bill 4694 (the “New Jersey Bill”), signed into law on July 21, 2023,¹³ is a leading example of state tax divisions fighting the double taxation of their residents. On top of creating a tax credit, the N.J. Bill adopts the Convenience Rule to retain its own tax benefits from NREs—but, only for NREs of states that also follow the Convenience Rule.¹⁴ In fact, N.J. is not the only state to start a tax “fight” with a neighboring state. New Hampshire’s House Bill 1097, enacted on June 17, 2022,¹⁵ intends to fight back against the extraterritorial taxation of its residents,¹⁶ similar to Massachusetts’ temporary pandemic-related rule that taxed fully remote NREs.¹⁷ As tax “fights” between states continue to grow, changes must be made to the outdated Convenience Rule.

¹³ Assemb. B. 4694, 220th Leg., Reg. Sess. (N.J. 2023) (codified at N.J. STAT. §§ 54A:4-1.1, 4-1.2, 34:1B-139.4; codified as amended at N.J. STAT. § 54A:5-7, 5-8, 9-17).

¹⁴ See N.J. STAT. § 54A:5-8(e); Amber Sparato et al., *Watch Out New York – New Jersey Wants its Taxes Too!*, LITTLER MENDELSON P.C. (Sept. 22, 2023), <https://www.littler.com/publication-press/publication/watch-out-new-york-new-jersey-wants-its-taxes-too> [<https://perma.cc/4C9K-H5YT>] (“[New Jersey Assembly Bill 4694] will now allow New Jersey to recuperate an estimated \$1 billion dollars in lost tax revenue from out-of-state residents who work for New Jersey companies.”).

¹⁵ H.B. 1097, 2022 Sess., Reg. Sess. (N.H. 2023) (codified at N.H. REV. STAT. § 78-F:1).

¹⁶ See *id.* (“In order to promote the health of its economy and the welfare of its citizens, by preserving an environment in which labor is not unduly penalized, it is declared to be the sovereign interest of the state of New Hampshire that the income from employer-employee relationship . . . for services entirely performed within the state of New Hampshire shall not be subject to personal income taxation in any other state.”).

¹⁷ Carolyn Wright, *New Hampshire Law Prohibits Nonresident State Income Tax on Residents Working Remotely for Out-of-State Employers*, ERNST & YOUNG LLP (Feb. 21, 2023), <https://taxnews.ey.com/news/2023-0334-new-hampshire-law-prohibits-nonresident-state-income-tax-on-residents-working-remotely-for-out-of-state-employers> [<https://perma.cc/JZT7-G3MK>] (“Although the Massachusetts income tax on the wages of New Hampshire’s remote workers is no longer required, several states (and localities) have permanently adopted the convenience of the employer rule (e.g., New York).”).

Given the numerous unsuccessful constitutional challenges to the Convenience Rule,¹⁸ the power lies in the hands of state legislatures to reduce inefficiency. The N.Y. state legislature should be motivated to make modifications to its Convenience Rule by the current inefficiencies in state taxation, employment, and technology. The Convenience Rule hampers technological progress in the employment sphere and may ultimately lead to more states engaging in inefficient tax “fights.” If the Convenience Rule was modified to ensure that NREs can more easily satisfy the “bona fide employer office” test, while not creating state tax nexus issues for their employer, these issues could be avoided.

This Article proceeds in four parts. Part II highlights the constitutional and pandemic-related challenges to N.Y.’s Convenience Rule and examines the leading tax “fight” between N.Y. and N.J. Part III argues that the Convenience Rule ultimately penalizes the employee for participating in work from home (“WFH”) employment, because it (A) passes the burden to the employee’s home state to provide a tax credit, (B) discourages employees from applying to WFH jobs in states in which they do not live, and (C) encourages tax “fights” and hampers technological progress in the technologically-advancing employment sphere. Then, Part III recommends modifications to the Convenience Rule to increase the presence of “bona fide employer office[s]” while balancing the potential nexus-related harms to employers. Finally, Part IV explores potential consequences of increased tax “fights” between neighboring states and increased taxpayer abuse, and addresses counterarguments focused on the inevitability of technological transformation and the clash between one state’s right to a taxpayer base and another state’s growing pains of pandemic-driven migration.

II. CONSTITUTIONAL AND PANDEMIC-RELATED CHALLENGES

To further understand the issue with taxing NREs for remote work, it is first important to examine a central lawsuit resting on

¹⁸ See *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85 (2003), *cert. denied*, 541 U.S. 1009 (2004); *In re Zelinsky*, DTA Nos. 830517 & 830681 (N.Y. Div. Tax App. Nov. 30, 2023).

constitutional arguments under the Dormant Commerce Clause and the Due Process Clause, as well as pandemic-related arguments.

Edward Zelinsky, an esteemed tax professor at Cardozo School of Law in New York City,¹⁹ first unsuccessfully challenged the state's Convenience Rule in 2003.²⁰ Twenty years and one pandemic-induced, remote-work transformation later, Zelinsky renewed his challenge.²¹ For tax year 2019, Zelinsky claimed he worked 143 days from his Connecticut home “performing legal scholarship (research and writing) and . . . administrative tasks,” and thus amended his “New York State nonresident and part-year resident income tax return” to allocate \$154,269 of his income toward Connecticut income tax returns.²² For tax year 2020, however, Zelinsky allocated \$227,740 of his income to Connecticut income tax returns, because from March 16, 2020, to December 31, 2020, N.Y.'s “COVID-related executive order” forced him to abstain from “his teaching or scholarly duties for Cardozo in Manhattan due to the closure of the law school and restriction against in-person activity.”²³ Denied tax refunds for both 2019 and 2020,²⁴ Zelinsky brought similar constitutionality arguments for each tax year alongside a pandemic-related “issue of first impression.”²⁵

While Zelinsky brought cogent constitutional arguments against taxing NREs in his renewed suit, the N.Y. Division of Tax Appeals (“the Division”) rested firmly on the doctrine of *stare decisis*. For tax years 2019 and 2020, Zelinsky first re-argued that the Convenience Rule violated the United States (“U.S.”) Constitution's

¹⁹ Edward Zelinsky, *Morris and Annie Trachman Professor of Law*, CARDOZO SCH. OF LAW, <https://cardozo.yu.edu/directory/edward-zelinsky> [<https://perma.cc/PH2G-DX8H>] (last visited Jan. 29, 2024).

²⁰ See *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d at 85 (2003).

²¹ Interestingly enough, the New York Division of Tax Appeals heard the case through a “videoconferencing hearing via CISCO Webex.” *In re Zelinsky*, DTA Nos. 830517 & 830681, at 1.

²² *Id.* at 3.

²³ *Id.* at 5.

²⁴ *Id.* at 3, 6.

²⁵ *Id.* at 9, 16–17, 21.

Dormant Commerce Clause and Due Process Clause.²⁶ The Dormant Commerce Clause requires that N.Y.'s Convenience Rule apply to activity with a "substantial nexus with [New York], is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."²⁷ Zelinsky argued that N.Y.'s Convenience Rule violated the Dormant Commerce Clause because it was not "fairly apportioned," which is a required element of a constitutional state tax on interstate commerce.²⁸ Yet, the Division reasoned that the rule was fairly apportioned and therefore constitutional, as it was both internally and externally consistent.²⁹ Internal consistency is present when double taxation would not occur if every state adopted the tax.³⁰ Without much detail, the Division stated that N.Y.'s Convenience Rule satisfied internal consistency.³¹

On the other hand, external consistency is satisfied when a tax is only levied on "that portion of the income from interstate activity that reflects the in-state component of the activity being taxed."³² Because Zelinsky did not satisfy the burden on the taxpayer to show a "grossly distorted result" in apportionment, the Division found the rule to be externally consistent.³³ Moreover, in analyzing the external consistency of taxing Zelinsky's 2019 remote work, the

²⁶ *Id.* at 9, 21; *see Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d at 85, 89 (2003) ("[Zelinsky] claimed . . . that application of the convenience of the employer test to him . . . violates the Commerce and Due Process Clauses of the Federal Constitution.").

²⁷ *In re Zelinsky*, DTA Nos. 830517 & 830681, at 11 (quoting *Int'l Bus. Mach. Corp. v. Tax Appeals Tribunal*, 214 A.D.3d 1125, 1127 (3d Dept. 2023)).

²⁸ *Id.* For the required elements of a constitutional state tax on interstate commerce, *see Int'l Bus. Mach. Corp.*, 214 A.D.3d at 1127; *see also Zelinsky*, 1 N.Y.3d at 90.

²⁹ *In re Zelinsky*, DTA Nos. 830517 & 830681, at 11–12 (citing *Zelinsky*, 1 N.Y.3d at 91) ("A tax is fairly apportioned if it is both internally and externally consistent.").

³⁰ *Id.* at 11.

³¹ *See id.* ("If every other jurisdiction adopted the convenience of the employer test utilized by New York, no multiple taxation would occur.").

³² *Id.* (citing *Zelinsky*, 1 N.Y.3d at 91).

³³ *See id.* at 12 (citing *Zelinsky*, 1 N.Y.3d at 91) ("There is no specific apportionment formula or method needed to satisfy constitutional requirements.").

Division placed great emphasis on the “choice” that Zelinsky made to work remotely for a portion of the year.³⁴ In fact, the Division found that Zelinsky’s employment at Cardozo School of Law did not even implicate interstate commerce, as his remote work in Connecticut was by “choice,” not by “necessity.”³⁵ Interestingly, the Division considered Zelinsky to still retain benefits from N.Y. when he worked remotely out-of-state, largely due to the benefits conferred in his N.Y.-based employment agreement.³⁶ Even if the Division had found otherwise, though, it still ultimately based its holding on the doctrine of *stare decisis*, since the same facts from the 2003 *Zelinsky* case resulted in a finding of constitutionality on the Dormant Commerce Clause claim.³⁷

In fact, the Division adhered to *stare decisis* so rigidly that it ultimately chose not to reanalyze Zelinsky’s Due Process Clause argument at all. The Due Process Clause requires a “sufficient connection” between Zelinsky and N.Y., along with a “rational[] relat[ionship]” between his income and “values connected with [N.Y.]”³⁸ In the 2003 *Zelinsky* case, the court found that no due

³⁴ *See id.* (citing *Zelinsky*, 1 N.Y.3d at 93).

³⁵ *Id.* at 14 (citing *Zelinsky*, 1 N.Y.3d at 93–94) (“[T]he taxpayer’s crossing of state lines to do his work does not impact any interstate market in which residents and nonresidents compete so as to implicate the Commerce Clause.”); *see id.* at 12 (citing *Zelinsky*, 1 N.Y.3d at 93) (“Petitioner’s choice to bring work home to Connecticut ‘cannot transform him into an interstate actor’ . . . The dormant Commerce Clause protects markets and participants in those markets, it does not protect individual taxpayers.”).

³⁶ *See id.* at 13 (“[Zelinsky] was paid a New York salary with additional benefits regardless of whether he worked in the office or remotely. When [Zelinsky] worked from the office, he received police, fire and emergency health services, and public utilities. ‘[Zelinsky’s] election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income.’”).

³⁷ *Id.* at 9–10 (“As petitioners have not provided any relevant statutory or regulatory changes or cases abrogating or superseding the holding in *Zelinsky*, such holding remains good law and is applicable to the tax years at issue here.”); *see Zelinsky*, 1 N.Y.3d at 96 (finding the dormant Commerce Clause was not violated).

³⁸ *In re Zelinsky*, DTA Nos. 830517 & 830681, at 15 (citing *Zelinsky*, 1 N.Y.3d at 96) (“In *Zelinsky*, the Court found that the Due Process Clause requires that the tax imposed must have a fiscal relation to opportunities that the State has provided, to the protection it has offered, and to the benefits it has conferred.”).

process rights were violated, since Zelinsky had a “physical presence” in N.Y. and had “availed himself of the benefits of the economic market in New York through his employment with Cardozo.”³⁹ Therefore, the “same facts present for 2019” required the Division to hold the Convenience Rule did not violate the Due Process Clause.⁴⁰

Since even Zelinsky’s weightier Dormant Commerce Clause and Due Process Clause arguments failed, it is unsurprising that the Division gave little effect to Zelinsky’s 2020 pandemic-related argument. For the pandemic-related months of the 2020 tax year, Zelinsky asserted the Convenience Rule should not apply.⁴¹ Instead, Zelinsky coupled his constitutional arguments with the assertion that his income in that timeframe “must be allocated to Connecticut due to measures taken in response to the COVID-19 pandemic.”⁴² The lack of rigor in the Division’s analysis in response to this pandemic-related argument, however, is indicative of the lack of precedent informing this specific issue of first impression.⁴³ With apparently no exception for executive order mandates on isolation,⁴⁴ the Division applied the *Phillips* necessity standard, which merely asks whether Zelinsky’s remote work from March to December 2020 was “of such a specialized nature” to require work “out-of-state by the necessity of the employer.”⁴⁵

By applying the *Phillips* necessity standard to Zelinsky’s pandemic-related argument, the Division seemed to reach an illogical and out-of-touch conclusion. After considering whether Zelinsky’s mandatory remote work from March to December 2020

³⁹ *Id.* at 16 (citing *Zelinsky*, 1 N.Y.3d at 97). *But see id.* at 15 (quoting *Zelinsky*, 1 N.Y.3d at 96) (“A state . . . may not tax value earned outside its borders.”).

⁴⁰ *Id.* at 16.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.* at 16–19 (citing to cases that involved similar employment scenarios, but not with pandemic-level restrictions to the likes of 2020).

⁴⁴ *See id.* at 19 (citing *Speno v. Gallman*, 35 N.Y.2d 256, 259 (1974)) (“The Executive Order mandating that all employees work from home due to a worldwide pandemic cannot result in special tax benefits to those who do not live in New York, but nonetheless work for, and benefit from, a New York employer.”).

⁴⁵ *Id.* at 18 (citing *Phillips v. N.Y. State Dep’t of Tax’n and Fin.*, 267 A.D.2d 927, 930 (3d Dept. 1999)).

was out of necessity of the employer under *Phillips*, the Division held Zelinsky “ha[d] not met his burden of establishing that the work he performed at home, out of New York State, was so specialized that it had to be done away from New York by the necessity of Cardozo.”⁴⁶ To reach the illogical conclusion that the N.Y. State Executive Order on remaining home from work did not make Zelinsky’s remote work out of necessity of the employer, the Division raised a constitutional issue:

[To hold that the Executive Order allows Zelinsky to satisfy the *Phillips* necessity standard] would effectively turn New York employers into interstate actors without their consent, forcing them to remit income tax to another state they had no intention of conducting business in, and, therefore, no minimum connection with, in violation of the Due Process Clause.⁴⁷

While this reasoning from the Division strikes as out-of-touch with the sweeping 2020 pandemic-related restrictions that forced most Americans to stay home,⁴⁸ the Division likely has a persuasive argument that will ultimately serve as a major barrier to pandemic-related arguments against state taxation of remote work by NREs.

III. STATE TAXATION, EMPLOYMENT, AND TECHNOLOGICAL INEFFICIENCIES

The failed constitutional and pandemic-related arguments in the 2023 *Zelinsky* case show the N.Y. Convenience Rule is likely here to stay. In fact, N.Y. is one of seven states that currently apply the rule,⁴⁹ and the state has shown no signs of changing course in

⁴⁶ *Id.*

⁴⁷ *Id.* at 19.

⁴⁸ 73% of U.S. counties issued “mandatory stay-at-home orders” from March 1, 2020, to May 31, 2020. Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement – United States, March 1 – May 31, 2020*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 4, 2020), <http://dx.doi.org/10.15585/mmwr.mm6935a2> [<https://perma.cc/6VAT-SN34>].

⁴⁹ White et al., *supra* note 9 (demonstrating New York, Arkansas, Delaware, Nebraska, Pennsylvania, and Connecticut all apply the Convenience Rule); *see also* N.J. STAT. § 54A:5-8(e) (showing New Jersey, on the other hand, adopted a limited Convenience Rule, in which the state will only tax NREs under the Convenience Rule if they reside in a state that also follows the Convenience Rule).

response to the pandemic-driven increase in remote work.⁵⁰ Yet, the Convenience Rule ultimately penalizes the employee for participating in WFH employment, which has burdensome implications on state taxation, employment opportunities, and technological advancements. Ultimately, modifications should be made to the Convenience Rule to ensure NREs can more easily satisfy the “bona fide employer office” test while balancing the potential nexus-related state tax issues for their employers.

A. *State Taxation Inefficiencies*

The Convenience Rule ultimately passes the burden of alleviating an NRE from double taxation onto their home state, which creates state taxation inefficiencies. Since courts are unlikely to uphold challenges to the rule due to the “judiciary’s deference to these sorts of state judgments,”⁵¹ the Convenience Rule leaves individuals or their home state to challenge its validity. Faced with the daunting task of challenging one’s own state tax bill, most individuals—likely unaware of the double taxation in effect⁵²—fail to raise concerns with their employer’s state of taxation within the statutory window of opportunity.⁵³ As a result, states with a large population of residents who are NREs of neighboring states have

⁵⁰ See *Frequently Asked Questions about Filing Requirements, Residency, and Telecommuting for New York State Personal Income Tax*, N.Y. DEPT. OF TAX’N & FIN., <https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting> [<https://perma.cc/D9TG-XZ9G>] (last updated Feb. 14, 2023) (“If you are a nonresident whose primary office is in New York State, your days telecommuting during the pandemic are considered days worked in the state unless your employer has established a bona fide employer office at your telecommuting location.”).

⁵¹ See Bradley W. Joondeph, *Remote Work and the State Taxation of Nonresident Employees*, 2023 WIS. L. REV. 873, 873 (2023) (“Exacting judicial review of these types of rules would risk ensnaring the courts in an endless series of problems they lack the institutional competence to solve.”).

⁵² See Tim Hyde, *Are Taxpayers Well-Informed About the Taxes They Pay? Learning From How and When People Seek Out Tax Information Online*, AM. ECON. ASS’N (Apr. 20, 2016), <https://www.aeaweb.org/research/are-taxpayers-well-informed-about-taxes> [<https://perma.cc/AC7W-XKKC>].

⁵³ See *Don’t Lose Your Refund by Not Filing*, INTERNAL REVENUE SERV., <https://www.irs.gov/individuals/dont-lose-your-refund-by-not-filing> [<https://perma.cc/SVQ9-7HD2>] (last updated Feb. 15, 2024).

become motivated to protect their residents from double taxation.⁵⁴ In particular, N.J. has taken matters into its own hands to “ensure New Jersey taxpayer dollars stay in the state and go toward programs and services that benefit New Jerseyans.”⁵⁵ The N.J. Bill provides a tax credit to N.J. residents equal to 50% of the tax refund they receive from remote work taxes levied from neighboring states like N.Y.⁵⁶

While the N.J. Bill may appear to be a temporary solution to the inefficient double taxation of NREs, it may actually be doing more harm than good. The important statutory distinction is that N.J. residents do not receive a tax credit merely for challenging their remote work taxation from a neighboring state; rather, N.J. grants residents a tax credit only if they challenge their remote work taxation from a neighboring state *and win*.⁵⁷ At its best, the N.J. Bill enables N.J. residents who successfully challenge their remote work taxation from N.Y., for example, to receive more than 100% of their money back: the tax refund from N.Y., which eliminates double taxation, and then a 50% tax credit from N.J., which creates under-taxation.⁵⁸ Yet, given the significant difficulty with satisfying the Convenience Rule,⁵⁹ it is unlikely that many N.J. residents will receive the tax credit at all. Without a substantial amount of N.J. residents satisfying the Convenience Rule, the tax credit provision of the N.J. Bill merely creates an administrative nightmare for the N.Y. Tax Division.

Even still, the administrative burden that the N.J. Bill causes on the N.Y. Tax Division will likely not be enough to motivate N.Y. to amend the Convenience Rule. With potentially hundreds of thousands of N.J. residents encouraged by the N.J. Bill to dispute

⁵⁴ See Assemb. B. 4694, 220th Leg., Reg. Sess. (N.J. 2023) (codified at N.J. STAT. §§ 54A:4-1.1, 4-1.2, 34:1B-139.4; codified as amended at N.J. STAT. § 54A:5-7, 5-8, 9-17); Walczak, *supra* note 3.

⁵⁵ Yaël Bizouati-Kennedy, *Remote Work: Who on East Coast Will Benefit From New Jersey's New Tax Credit?*, YAHOO FIN. (July 24, 2023), <https://finance.yahoo.com/news/remote-east-coast-benefit-jersey-141621343.html?guccounter=1> [<https://perma.cc/B9DU-XGEG>].

⁵⁶ N.J. STAT. § 54A:4-1.1(a)(4).

⁵⁷ See N.J. STAT. § 54A:4-1.1(a)(1)–(4).

⁵⁸ See *id.*

⁵⁹ Zaretsky, *supra* note 11.

their remote work tax bill from N.Y.,⁶⁰ the administrative burden on the N.Y. Tax Division may be substantial. In the 2023 *Zelinsky* case, for example, Zelinsky filed an amended N.Y. State nonresident and part-year resident income tax return on July 24, 2021, but did not receive a response until August 19, 2021, when the Division requested that Zelinsky verify his amended income allocation.⁶¹ Then, the Division did not issue a judgment on Zelinsky’s refund request until September 17, 2021.⁶²

While this seems like a quick turnaround to obtain a refund judgment, particularly given the millions of tax returns the N.Y. Tax Division handles annually,⁶³ the major encouragement by the N.J. Bill to combat a remote work tax bill may quickly add a substantial number of tax refund requests for the Division to process. As the Division “submitted 31 proposed findings of fact” just for the judgment denying Zelinsky’s refund request,⁶⁴ the Division could very soon be handling hundreds of thousands of refund requests that each involve specific investigative and administrative processes. While it is unclear whether the Division is equipped to handle that much of an administrative burden, a potential increased burden on N.Y. will clearly not motivate the state to amend their Convenience

⁶⁰ In tax year 2021, the New York Tax Division received 10,878,455 tax returns, of which 476,372 were from New Jersey residents that accounted for \$4.3 billion of the \$59.92 billion New York state tax liability. See *Personal Income Tax Filers, Summary Dataset 1 – Major Items by Liability Status and Place of Residence: Beginning Tax Year 2015*, N.Y. OFF. INFO. TECH. SERVS., <https://data.ny.gov/Government-Finance/Personal-Income-Tax-Filers-Summary-Dataset-1-Major/73iw-kuxv/data> [<https://perma.cc/9Z7V-VHMQ>] (last updated 2021).

⁶¹ *In re Zelinsky*, DTA Nos. 830517 & 830681, at 5 (N.Y. Div. Tax App. Nov. 30, 2023).

⁶² *Id.* at 6.

⁶³ In tax year 2021, the New York Tax Division received 10,878,455 tax returns that represent \$59.92 billion in New York state tax liability. *Personal Income Tax Filers, Summary Dataset 1 – Major Items by Liability Status and Place of Residence: Beginning Tax Year 2015*, *supra* note 60.

⁶⁴ *In re Zelinsky*, DTA Nos. 830517 & 830681, at 6–7 (discussing the use of N.Y. COMP. CODES R. & REGS. tit. 20, § 3000.15(d)(6) for submission).

Rule, given NREs' inextricable connection to N.Y. communities that N.Y. recognizes as integral contributors to its tax-based services.⁶⁵

B. Employment Inefficiencies

In addition to the state taxation inefficiencies created by the Convenience Rule, the rule burdens employment opportunities because it discourages NREs from seeking WFH jobs for employers located out-of-state. There is no question the COVID-19 pandemic sparked a WFH employment revolution,⁶⁶ encouraging the American workforce to actively seek out WFH opportunities.⁶⁷ In fact, one study found nearly one-third of hybrid workers would take a pay cut to become a full-time remote worker.⁶⁸ Trending with the increase in WFH employment is the increase in relocation to areas with lower costs of living.⁶⁹ In 2021, San Francisco, San Jose, Los Angeles, and Washington, D.C.—some of the country's most booming metropolitan areas—saw the exodus of more college-educated workers than those who moved in.⁷⁰ While densely populated metropolitan areas have typically been home to college-educated workers, trends have shown “affordability has broadly been eroding up the income spectrum.”⁷¹

With national employment trends indicating employees prefer a WFH employment option while residing in an area with a lower cost

⁶⁵ See *infra* notes 130–35 (discussing NRE's historic reliance on New York-based employers and the New York Tax Division's reliance on NREs).

⁶⁶ Katherine Haan, *Remote Work Statistics and Trends in 2024*, FORBES ADVISOR, https://www.forbes.com/advisor/business/remote-work-statistics/#sources_section [<https://perma.cc/ATW3-4XWC>] (last updated June 12, 2023) (“As of 2023 . . . 28.2% of employees have adapted to a hybrid work model.”).

⁶⁷ See *id.* (“A staggering 98% of workers expressed the desire to work remotely, at least part of the time. This overwhelming figure reflects the workforce's growing affinity towards the flexibility, autonomy and work-life balance that remote work offers.”).

⁶⁸ *Id.*

⁶⁹ Emily Badger et al., *Coastal Cities Priced Out Low-Wage Workers. Now College Graduates Are Leaving, Too.*, N.Y. TIMES (May 13, 2023), <https://www.nytimes.com/interactive/2023/05/15/upshot/migrations-college-super-cities.html> [<https://perma.cc/RS9D-JXXH>].

⁷⁰ *Id.*

⁷¹ *Id.*

of living,⁷² the taxation of remote work by NREs under the Convenience Rule inefficiently burdens these transformative employment trends. Instead of being able to retain the full benefit of WFH employment—i.e., savings in cost of living—employees in states that follow the Convenience Rule are subject to double taxation.⁷³ Thus, the only way an informed taxpayer could still receive an overall net benefit in this situation is if their cost savings from relocation to another state exceed the taxes levied on the portion of their income earned through remote work. This determination, while simplistic in theory, is likely more complex than one may anticipate, as it requires a prediction of (1) cost of living expenses in the long term, which can vary substantially month-to-month;⁷⁴ and (2) amount of days (or even hours) worked remotely, which can vary substantially even week-to-week. Viewed as an “*economic distortion* into the decision whether to telecommute or normally commute,” the effect of the double taxation of NREs is increased inefficiency in the employment sphere.⁷⁵ Taxpayers may be disinclined to pursue WFH jobs because of the difficulty of assessing any potential savings with the Convenience Rule, which may ultimately hamper technological progress in the employment sphere.

C. *Technological Inefficiencies*

In an era of advancing technology that allows employees to virtually connect with employers from anywhere in the world, the Convenience Rule hinders technological progress in the

⁷² See *id.* (“Remote work has driven demand for more space by white-collar workers in precisely the places where more space is hardest to come by. And remote work has altered the bargain that educated workers must swallow high living costs to access the highest wages.”).

⁷³ Atkins, *supra* note 12 (“Absent federal action, many telecommuters will continue to pay taxes on over 100 percent of their income.”).

⁷⁴ Rebecca Lake & Daphne Foreman, *Fixed vs. Variable Expenses: What’s the Difference?*, FORBES ADVISOR, <https://www.forbes.com/advisor/banking/budgeting-fixed-expenses-vs-variable-expenses/> [<https://perma.cc/Z4HU-XUXV>] (last updated Apr. 11, 2022) (“Budgeting for variable expenses can be more challenging, as you may not be able to pinpoint exactly how much they’ll add up from one month to another.”).

⁷⁵ See Atkins, *supra* note 12 (emphasis added).

employment sphere and may ultimately lead to states engaging in inefficient tax “fights.” WFH employment has become an integral part of employment opportunities and preferences for Americans.⁷⁶ In fact, employers have begun to highly value WFH options as a means of (1) “attract[ing] the best talent” and (2) “control[ing] the costs of employer office space.”⁷⁷ Advancing technology that drives WFH employment has increased efficiency and productivity,⁷⁸ reduced overhead costs,⁷⁹ improved overall work-life balance,⁸⁰ and solidified the ability for Americans to work from any place at any time.⁸¹

As a result, innovations in remote work-driven technology have skyrocketed in recent years to the point where new employment arrangements, such as shared office spaces and employer response systems to natural disasters, are commonplace.⁸² In fact, U.S. patent

⁷⁶ See *supra* notes 66–69.

⁷⁷ White et al., *supra* note 9.

⁷⁸ See Morris A. Davis et al., *The Work-From-Home Technology Boon and its Consequences* 39 (Nat’l Bureau of Econ. Rsch., Working Paper No. 28461, 2023) (“According to our model, [the pandemic] caused a large increase in the relative productivity of WFH due to the presence of an adoption externality.”). *But see* Davis et al., *supra*, at 2–3 (“The long-term effects of COVID on income and productivity depend on WFH technology being available but not yet fully adopted . . . [O]ur estimates using more recent technologies suggest that WFH is an imperfect substitute for face-to-face interactions.”); Alexandra Dimitropoulou, *Remote Work and its Effects on Work-Life Balance*, CEOWORLD MAG. (May 8, 2023), <https://ceoworld.biz/2023/05/08/remote-work-and-its-effects-on-work-life-balance/> [<https://perma.cc/K8Q3-WUFA>] (“Without the ability to easily interact with colleagues in person, misunderstandings can occur, and it can be difficult to build and maintain relationships.”).

⁷⁹ See Davis et al., *supra* note 78, at 42 (“Simulations of our model suggest that these changes will markedly reduce office rents.”).

⁸⁰ See Dimitropoulou, *supra* note 78 (“[I]ncreased flexibility . . . allows [remote workers] to better balance their personal and professional lives, and can result in a better overall quality of life.”). *But see id.* (“When your workspace is also your home, it can be challenging to turn off work and focus on personal pursuits.”).

⁸¹ See Davis et al., *supra* note 78, at 42 (“Surveys suggest that once the pandemic subsides, workers will approximately quadruple their time spent working from home relative to pre-pandemic levels.”); Dimitropoulou, *supra* note 78 (“Without the constraints of a traditional office setting, employees can often set their own schedules and work from anywhere.”).

⁸² Natalie Hamingson, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, BUS. NEWS DAILY,

applications for “technologies in support of video conferencing, telecommuting, remote interactivity, and working from home” more than doubled in the first nine months of 2020.⁸³ Yet, advances in remote work-oriented technology will only be accomplished to the extent that the remote worker population continues to evolve.⁸⁴ With the burden of double taxation on NREs of employers located in states that follow the Convenience Rule, employees may reach the economically-distorted decision to avoid WFH employment opportunities. Without consumer preferences driving technological innovation in the employment sphere, technology developers may be unable to accurately and efficiently achieve advancements, bringing this recent innovation to a halt.

Further, those employers that are still resistant to embracing the WFH employment arrangement of today’s workforce may, in reaction to the Convenience Rule, solidify their decision to resist change. Certain employers “fear a lack of productivity in their employees” that work remotely, or simply refuse to invest in remote work-oriented technology as a cost of doing business.⁸⁵ Yet, a hybrid employment model is ideal for employers, as it provides employers with a balance between overseeing employees and embracing advancements in remote technology which increase efficiency.⁸⁶

<https://www.businessnewsdaily.com/8156-future-of-remote-work.html>
[<https://perma.cc/VQE5-48FF>] (last updated Oct. 24, 2023).

⁸³ Nicholas Bloom et al., *COVID-19 Shifted Patent Applications toward Technologies That Support Working from Home*, 111 AM. ECON. ASS’N PAPERS & PROCS. 263, 263 (2021).

⁸⁴ See Mayank Agarwal, *The Transformational Impact of Technology on Remote Work*, LINKEDIN (Sept. 11, 2023), <https://www.linkedin.com/pulse/transformational-impact-technology-remote-work-mayank-agarwal/> [<https://perma.cc/6VVG-BCX7>] (“As technology continues to advance, remote work is poised to become even more integrated into our work culture, offering exciting possibilities for the workforce of tomorrow.”).

⁸⁵ Hamingson, *supra* note 82; see Dennis Lustre, *The Future of Remote Work: Challenges, Trends, and Tools*, THADDEUS RES. CTR. (Aug. 18, 2023), <https://www.thaddeus.org/technical-blogs/the-future-of-remote-work-challenges-trends-and-tools> [<https://perma.cc/7YST-PZX7>] (“One of the most prominent hurdles [to remote work] is the struggle to maintain work-life balance.”).

⁸⁶ Advancing remote technology is known to improve overall efficiency by easing project/process management and monitoring, simplifying cross-

After understanding the strengthening of states' reliance on the Convenience Rule to maintain their tax base, though, employers may end up reinforcing their desire to resist remote work. Thus, if employees and employers resist WFH employment opportunities, employment-related technological advancements will certainly be stifled.⁸⁷

To prevent the curbing of technological advancement in the employment sphere, some states currently engage in reciprocity agreements on state income taxation. Reciprocity agreements exist when states “agree to divide up their shared taxpayers based on residence, with taxpayers owing tax exclusively to their domiciliary state.”⁸⁸ Thirty reciprocity agreements currently exist, involving sixteen states and Washington, D.C.⁸⁹ While most Convenience Rules are rooted in the argument that NREs are still receiving state service benefits where they are employed and thus should pay taxes to that state in receipt of those benefits,⁹⁰ NREs “typically benefit far more from services where they live.”⁹¹ Thus, instead of

departmental communication, creating access to online data storage devices, and enhancing data security of sensitive information. *See Remote Work And Technology: Why Should Companies Combine Both?*, SYDLE, <https://www.sydle.com/blog/remote-work-and-technology-61772d133885651fa2a7d309> [<https://perma.cc/X3GC-RMDA>] (last updated June 29, 2023); Davis et al., *supra* note 78, at 39 (“According to our model, [the pandemic] caused a large increase in the relative productivity of WFH due to the presence of an adoption externality.”).

⁸⁷ *See* Bloom et al., *supra* note 83, at 263 (“The economic reasoning is simple: When remote work becomes a bigger share of all work, the incentives to advance technologies that support WFH become stronger.”).

⁸⁸ Jared Walczak, *Do Unto Others: The Case for State Income Tax Reciprocity*, TAX FOUND. (Nov. 16, 2022), <https://taxfoundation.org/research/all/state/state-reciprocity-agreements/> [<https://perma.cc/A7B4-PGLE>].

⁸⁹ *Id.*

⁹⁰ Nathan Sauers, *Remote Control: State Taxation of Remote Employees*, 60 HOUS. L. REV. 175, 190 (2022) (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625 (1981)).

⁹¹ Walczak, *supra* note 88. *But see In re Zelinsky*, DTA Nos. 830517 & 830681, at 13 (N.Y. Div. Tax App. Nov. 30, 2023) (quoting *Zelinsky*, 1 N.Y.3d at 95) (“When [Zelinsky] worked from the office, he received police, fire and emergency health services, and public utilities. ‘[Zelinsky’s] election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income.’”).

subjecting NREs to double taxation, reciprocity agreements achieve a “simpler” and “more rational” result.⁹² While reciprocity agreements are a potential solution to the double taxation burden of the Convenience Rule on remote workers, the efficacy of the agreements may be undermined by increased tax “fights” between states. Furthermore, reciprocity agreements are not as effective as modifications to the Convenience Rule that would instead focus on making it easier for NREs to satisfy the “bona fide employer office” test.

D. Recommended Modifications to the Convenience Rule

Instead of engaging in increased tax “fights” with other states or preemptively resolving such fights via reciprocity agreements, the N.Y. state legislature should make modifications to its Convenience Rule that balance the policy preference for increased acceptance of remote offices as “bona fide employer offices” with the commercial preference for minimized nexus-related, out-of-state operations for employers. While the primary and secondary factors that the N.Y. Tax Division currently consider for determining if a remote employee office is a “bona fide employer office” appear thorough, the factors have not been updated since 2006, and the N.Y. Convenience Rule as a whole has not been updated since 1995.⁹³ Since 2006, the concept of a home office has changed dramatically, such that “remote and hybrid work have become *institutional factors* in business operations and labor markets.”⁹⁴ As a result, employers

⁹² Walczak, *supra* note 88; *see* Sauers, *supra* note 90, at 191 (“If an individual never sets foot in the state of their employer, they also receive no benefit from the state’s roads, hospitals, law enforcement, or other public services. . . . Therefore, any amount of tax is not ‘reasonably related to the extent of the contact.’” (quoting *Commonwealth Edison Co.*, 453 U.S. at 626)).

⁹³ *See* Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div., *supra* note 7; *see generally supra* note 9 (discussing the primary and secondary factors in relation to home offices); N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2024).

⁹⁴ Peter Berard et al., *Remote Workforces Are Complicating State Tax Nexus and Withholding: Human Capital Management Solutions Can Support Compliance*, RSM (Jan. 25, 2024) (emphasis added), <https://rsmus.com/insights/services/business-tax/remote-workforces-are-complicating-state-tax-nexus-and-withhold.html> [<https://perma.cc/A33D-D2R6>]; *see supra* notes 66–69.

consider remote offices as fundamental aspects of operations—in essence as “bona fide employer offices”—at a higher rate in these post-pandemic years.⁹⁵ Yet, the outdated Convenience Rule does not follow the glaring employment trends toward WFH employment.⁹⁶

To align with the policy preference for increased acceptance of remote offices as “bona fide employer offices,” the N.Y. state legislature should make the Convenience Rule’s “bona fide employer office” test easier to satisfy. Given the current difficulty in claiming a home office as a “bona fide employer office,” NREs are left with two paths. NREs can either (1) request a refund on their remote work tax bill or encourage their home state to engage in inefficient tax “fights” with other states,⁹⁷ or (2) avoid WFH employment opportunities and cause significant technological hampering.⁹⁸ In order to avoid increased inefficiencies in state taxation, employment, and technological advancements, NREs must be granted “bona fide employer office” status at a higher rate. To reach this result, modifications should be made to the primary or secondary factors of the “bona fide employer office” test.⁹⁹ Since the primary factor—the requirement that the “home office contains

⁹⁵ See White et al., *supra* note 9 (“As technology makes it easier to work remotely, many employers have hired employees with the intent that they work on a fully remote or hybrid basis.”).

⁹⁶ See Jose Maria Barrero et al., *The Evolution of Working from Home 6* (July 2023) (unpublished manuscript) (on file with WFH Research) (“Thus, [scholars] expect the pandemic will ultimately lead to an increase in the *growth rate* of working from home in the next several decades on top of the persistent increase in the *level* of working from home from about 5% to 25% of working days in the US between 2020 and 2023.”).

⁹⁷ See *supra* notes 51–56.

⁹⁸ See *supra* notes 84–87.

⁹⁹ See White et al., *supra* note 9 (discussing primary and secondary factors of “bona fide employer office” test); Paul R. Comeau et al., *New York’s Revised Convenience Rule Provides Some Clarity and Continued Controversy*, HODGSON RUSS (Aug. 2006), https://www.hodgsonruss.com/newsroom-publications-NewYork_srevisedconvenienceruleprovidessomeclarity.html [https://perma.cc/E9MX-PZKN] (“[A]rrangements between an employer and an employee that may currently fail to meet some of the ‘secondary factors’ could be brought into compliance by making modifications to the employer/employee relationship, such as having them agree that the home office is required as a condition of employment, creating paperwork detailing the bona fide business purpose, making provisions for reimbursement of expenses, etc.”).

or is near specialized facilities . . . that cannot be made available at the employer's place of business"¹⁰⁰—presents a situation that already “would have avoided tax under the old convenience rule,”¹⁰¹ the modifications should focus on the secondary factors.

First, the N.Y. state legislature should add “work from home” language to the existing secondary factors, thereby emphasizing that home offices are essentially considered “bona fide employer offices” for the purposes of WFH employment.¹⁰² For example, the secondary factor that “[t]he home office is a requirement or condition of employment” should be modified to “[t]he home office is a requirement or condition of [*work from home*] employment.” Alternatively, the secondary factor that “[t]he employee meets or deals with clients, patients[,] or customers on a regular and continuous basis at the home office” should be modified to “[t]he employee [*remotely*] meets or deals with clients, patients[,] or customers on a regular and continuous basis at the home office.”¹⁰³ WFH-related modifications would give more teeth to NREs seeking “bona fide employer office” status, as NREs could then point to (1) specific language in their employment agreements that provide for WFH employment as a requirement or condition of employment,¹⁰⁴

¹⁰⁰ Memorandum TSB-M-06(5)I from N.Y. State Dep't Tax'n and Fin., Off. Tax Pol'y Analysis, Tech. Servs. Div., *supra* note 7, at 3.

¹⁰¹ Comeau et al., *supra* note 99.

¹⁰² See White et al., *supra* note 9 (“As technology makes it easier to work remotely, many employers have hired employees with the intent that they work on a fully remote or hybrid basis.”).

¹⁰³ See Memorandum TSB-M-06(5)I from N.Y. State Dep't Tax'n and Fin., Off. Tax Pol'y Analysis, Tech. Servs. Div., *supra* note 7, at 4 (emphasis added).

¹⁰⁴ See Louise Mooney & Antonia Blackwell, *What Should Employers Include in a Hybrid Working Policy?*, SHOOSMITHS LLP (Aug. 10, 2021), <https://www.shoosmiths.com/insights/articles/what-should-employers-include-in-a-hybrid-working-policy> [https://perma.cc/7KMB-WFFW] (“Whilst many employers are choosing not to update place of work clauses within contracts on the basis that the approach to hybrid working is a flexible, informal one, some employers may decide that setting clear contractual expectations around attendance in the office is preferable and so will look to update place of work clauses.”).

and (2) numerous instances of conducting remote meetings with clients, patients, or customers from a home office.¹⁰⁵

Second, the N.Y. state legislature should explicitly recognize WFH employment scenarios as constituting a “bona fide business purpose” to the employer—a secondary factor¹⁰⁶—if certain criteria are met. Given that employers informally recognize a home office as essentially a “bona fide employer office” at higher rates,¹⁰⁷ the N.Y. state legislature should provide an opportunity for employers to formally recognize their employees’ WFH-related home offices as for a “bona fide business purpose.” Formal recognition of a “bona fide business purpose” may come from “magic words” that state tax divisions designate.¹⁰⁸ For example, the N.Y. Tax Division could provide that a secondary factor of the “bona fide employer office” test—that “[t]he employer has a *bona fide business purpose* for the employer’s home office location”—is met if the employer “[*explicitly designates the employee’s home office as fundamental to operational goals*] and it is necessary that the employee have a[*home*] office . . . in order to meet [*operational goals*].”¹⁰⁹ Thus, the provision that a home office be “fundamental to operational goals” could become “magic words” that employers include in WFH-related employment agreements when employers intend to formally recognize a home office as for a “bona fide business

¹⁰⁵ See Monette Davis, *Tips for Working Effectively with Clients While Remote*, AM. BAR ASS’N (Oct. 31, 2023), <https://www.americanbar.org/groups/litigation/resources/newsletters/pretrial-practice-discovery/tips-working-effectively-clients-remote/> [<https://perma.cc/Y7Q2-G8KY>] (“[I]t has become easier for lawyers to meet with their clients virtually with just one click of a button when a face-to-face meeting may not be available.”).

¹⁰⁶ Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div., *supra* note 7, at 3.

¹⁰⁷ See White et al., *supra* note 9 (“As technology makes it easier to work remotely, many employers have hired employees with the intent that they work on a fully remote or hybrid basis.”).

¹⁰⁸ “Magic words” is a phrase commonly referenced in contract drafting, which describes a group of words that “can serve as elegant shorthand for more complex legal concepts.” Lori D. Johnson, *Say the Magic Word: A Rhetorical Analysis of Contract Drafting Choices*, 65 SYRACUSE L. REV. 451, 453 (2015) (citation omitted).

¹⁰⁹ Memorandum TSB-M-06(5)I from N.Y. State Dep’t Tax’n and Fin., Off. Tax Pol’y Analysis, Tech. Servs. Div., *supra* note 7, at 3 (emphasis added).

purpose.” By placing the power to satisfy a secondary factor in the hands of the employer, clearcut “bona fide business purpose” language strengthens the legitimacy of a NRE’s home office and reduces the amount of employee abuse of overall modifications.

While employer-driven “magic words” to satisfy the “bona fide business purpose” secondary factor gives more control to the employer, the N.Y. state legislature should ultimately provide robust guardrails within the secondary factors of the “bona fide employer office” test to avoid potential consequences of WFH-related modifications. Despite the importance of recognizing the policy preference for increased acceptance of remote offices as “bona fide employer offices,” it is equally important to recognize the commercial preference for minimizing nexus-related, out-of-state operations for employers.¹¹⁰ The “ancillary effects” of satisfying the “bona fide employer office” test may create a previously non-existent nexus between the employer and the NRE’s home state, which would have significant state tax implications for the employer.¹¹¹

To prevent the employee’s creation of an unwanted nexus with other states, the N.Y. state legislature should give employers more control over the satisfaction of the “bona fide employer office” test. In addition to the control inherent in the previously suggested “magic words” for a secondary factor, the N.Y. state legislature can give control to employers by requiring (1) further employment agreement language for the requirement of a home office for

¹¹⁰ See Comeau et al., *supra* note 99 (“Indeed, some employers may actually want to avoid establishing ‘bona fide employer offices’ in other states because that may cause the company to have nexus in other states for other tax purposes.”).

¹¹¹ Berard et al., *supra* note 94 (“A remote workforce can significantly affect a company’s state tax nexus footprint . . . [and] could cause new income and franchise tax and sales and use tax obligations if nexus was not previously established in the employee’s resident state.”). *But cf.* Drew VandenBrul & Jennifer W. Karpchuk, *Remote work creates a spectrum of state and local tax issues*, TAX ADVISOR (Dec. 1, 2021), <https://www.thetaxadviser.com/issues/2021/dec/remote-work-state-local-tax-issues.html> [<https://perma.cc/9JGE-NA4K>] (“Some states have crafted nexus waivers during the pandemic, whereby they explicitly stated that the presence of a remote employee working in the state solely due to the pandemic would not create nexus for certain taxes. While temporarily beneficial to taxpayers, some of those policies have already expired.”).

employment and the reimbursement of home office expenses; and (2) a heavily structured method of tracking hybrid schedules to ensure compliance.¹¹² Increased employer control raises the likelihood that employers actively create a new nexus with states only when they see a competitive advantage to do so and reduces the likelihood that employees will find ways to abuse modifications that make the “bona fide employer office” test easier to satisfy.

IV. CONSEQUENCES AND COUNTERARGUMENTS

Modifications to the Convenience Rule would surely align an outdated state taxation provision with modern trends in employment and technology. But, successfully stamping out inefficiencies may be limited by increased tax “fights” between states and increased taxpayer abuse, potentially inevitable technological transformations, and the clash between one state’s right to a taxpayer base and another state’s growing pains of pandemic-driven migration.

A. Increased Tax “Fights” and Increased Taxpayer Abuse

While some may argue that the Convenience Rule is limited to six states,¹¹³ and thus has minimal disruption on economically distorted taxpayer decision-making, the recent employment and judicial trends around the rule likely foreshadow an increase in tax “fights” among states. As tax revenues decline, states may become

¹¹² See Comeau et al., *supra* note 99.

¹¹³ As of December 2023, nearly 157.2 million Americans are employed across the fifty states and the District of Columbia. The six states that have fully adopted the “convenience of the employer” rule represent only 13% of the total American workforce, as New York employs approximately 9.7 million people, Pennsylvania employs around 6.2 million, Connecticut employs around 1.7 million, Arkansas employs around 1.4 million, and Nebraska employs around 1 million. Although New Jersey adopted a limited version of the Convenience Rule, in which the state only taxes NREs of states that also follow the Convenience Rule, if the approximately 4.4 million employed by New Jersey were included in this calculation, then it would still only amount to 16% of the total American workforce. *Graphics for Economic News Releases: Employment by State, Seasonally Adjusted*, U.S. BUREAU LAB. STATS., <https://www.bls.gov/charts/state-employment-and-unemployment/employment-by-state-bar.htm> [<https://perma.cc/PD93-XGJG>] (last updated Dec. 2023).

more inclined to secure as much tax revenue as possible, and less inclined to participate in cooperative reciprocity agreements or remote-worker friendly statutory modifications.¹¹⁴ To start, the rate of higher-educated workers leaving states with high costs of living has increased since the pandemic-driven remote work revolution.¹¹⁵ Mass relocation, then, further reduces those states' tax bases by removing the economic activity of those higher-earning workers.¹¹⁶ The strengthening of the rule, as evidenced by the 2023 *Zelinsky* case,¹¹⁷ and the continuing decline in revenues, may spark a wave of states adopting the Convenience Rule, which could, in the extreme, lead to tax "fights" between every state in the nation before modifications are made to the Convenience Rule.

Further, any modifications to the Convenience Rule will successfully reduce the current inefficiencies only to the extent that individual abuse of the modifications is minimized. In fact, some may argue that while the modifications intend to give employers more control over the ability of their employees to satisfy the "bona fide employer office" test, individuals will always find a way to abuse an easier test.¹¹⁸ Of course, reducing the severity of the "bona fide employer office" test from a 100% fail rate to even a 90% fail rate through the proposed modifications will technically increase the amount of abuse encountered. Yet, taxpayers already abuse numerous tax provisions.¹¹⁹ Instead of shying away from any degree

¹¹⁴ See Sauers, *supra* note 90, at 178 (internal citation omitted) ("Indeed, states with large revenue shortfalls are looking to increase taxes for high earners to make up for lost revenue.").

¹¹⁵ See Badger et al., *supra* notes 69–71.

¹¹⁶ Sauers, *supra* note 90, at 183 (citing Walczak, *supra* note 3).

¹¹⁷ *In re Zelinsky*, DTA Nos. 830517 & 830681 (N.Y. Div. Tax App. Nov. 30, 2023).

¹¹⁸ See Clark Merrefield, *Federal Tax Evasion: Why It Matters and Who Does It*, JOURNALIST'S RES. (Jan. 14, 2020), <https://journalistsresource.org/politics-and-government/tax-evasion-primer/> [<https://perma.cc/LDW3-9PQU>] ("On the federal level, lost revenue from intentional evasion and unintentional errors comes to about \$458 billion per year. . . . Underreporting is the most common form of tax evasion and made up 84% of the tax gap from 2008 to 2010.").

¹¹⁹ Known as "abusive tax shelters," these illegal methods of reducing one's tax liability are widely addressed by the Internal Revenue Service, such that harsh penalties and legal defense practices have developed. See *Dirty Dozen: Beware of Abusive Tax Avoidance Schemes*, INTERNAL REVENUE SERV.,

of change to a currently unworkable “bona fide employer office” test because of the possibility of abuse, state tax divisions should be motivated by the desire to characterize an employer-endorsed home office as a “bona fide employer office,” which would increase both horizontal and vertical taxpayer equity.¹²⁰

B. The Future of Technological Transformation

Similar to the concern for potential abuse is the concern that remote work technology will continue to evolve notwithstanding the burden imposed on taxpayers by the Convenience Rule, which would eliminate any need for modifications to the rule. As a result of the COVID-19 pandemic, remote work technology significantly evolved alongside remote work’s increased prevalence.¹²¹ While the percentage of remote work employment declined as many Americans returned to work,¹²² remote work percentages

<https://www.irs.gov/newsroom/dirty-dozen-beware-of-abusive-tax-avoidance-schemes> [<https://perma.cc/E7YD-H998>] (last updated Mar. 4, 2024); *see also* Jacob Dayan, *Abusive Tax Shelters*, CMTY. TAX (Sept. 25, 2023), <https://www.communitytax.com/tax-blog/abusive-tax-shelters/> [<https://perma.cc/CYJ8-GM54>] (“The IRS treats illegal tax shelters as fraudulent activity and can charge you a penalty of 75% of the tax you underpaid, on top of requiring you to pay the unpaid taxes in full.”); *see also* *Abusive Tax Shelters*, BROWN TAX, P.C., <https://www.browntax.com/irs-audits-and-appeals/abusive-tax-shelters/> [<https://perma.cc/ZG5B-F2L7>] (last visited Mar. 1, 2024) (“[S]uccessfully defending against an abusive tax shelter investigation requires a coordinated and strategic defense, and this means that targeted promoters and taxpayers need highly experienced legal representation.”).

¹²⁰ Chris Wodicka, *Policy Basics: Tax Equity*, COMMONWEALTH INST. FOR FISCAL ANALYSIS (July 13, 2018), <https://thecommonwealthinstitute.org/research/policy-basics-tax-equity/> [<https://perma.cc/Y6DC-CPAE>] (“Horizontal [tax] equity . . . is concerned with equal treatment for those taxpayers in similar situations and with roughly equal ability to pay [such that tax liability remains similar for those earning the same income]. Vertical equity is concerned with tax rates paid by individuals and families with different abilities to pay [such that tax liability proportionately increases as income increases].”).

¹²¹ *See* Bloom et al., *supra* note 83, at 263.

¹²² Nicholas Bloom et al., *Survey: Remote Work Isn’t Going Away – and Executives Know It*, HARV. BUS. REV. (Aug. 28, 2023), <https://hbr.org/2023/08/survey-remote-work-isnt-going-away-and-executives-know-it> [<https://perma.cc/U2RD-HHGC>].

consistently remain above pre-pandemic levels.¹²³ Thus, some posit that remote work technology will undoubtedly continue to evolve as remote work solidifies as a pillar of the American employment sphere.¹²⁴ However, if the unstoppable advancement of remote work technology is taken as a given, interrelated inefficiencies will still exist that burden taxpayers, employers, and innovators.¹²⁵

By modifying the outdated Convenience Rule, the N.Y. state legislature can not only reduce inefficiencies, but also potentially preempt future inefficiencies. Just as no one twenty years ago could have predicted the emergence of the COVID-19 pandemic and the significant remote work revolution,¹²⁶ no one can predict what the employment sphere will look like in twenty years.¹²⁷ The concept of hybrid and remote work may be completely different—for example, employers may work atypical hours in various locations and for various employers, which would present new challenges. Instead of waiting for inefficiencies to arise before they are addressed,¹²⁸ the N.Y. state legislature should take this opportunity to modify its Convenience Rule and take a swing at preventing future tax conundrums in an unpredictable world.

¹²³ *Id.*

¹²⁴ *See id.* (“Remote technologies will only get better, and employees will gravitate to firms with more flexible policies.”).

¹²⁵ *See supra* text accompanying notes 57–59, 75, 87 (discussing inefficiencies in state taxation, employment, and technology).

¹²⁶ New York’s “convenience of the employer” rule became effective on November 22, 1995, which is more than twenty-nine years ago. N.Y. COMP. CODES R. & REGS. tit. 20, § 132.18(a) (2024).

¹²⁷ *See* Bloom et al., *supra* note 122 (“While the future extent of remote work remains uncertain, there’s little chance we will see a big return to the office.”).

¹²⁸ *See* Ross Pounds, *Compare and Contrast: Proactive vs. Reactive Governance*, DILIGENT (Nov. 4, 2022), <https://www.diligent.com/resources/blog/compare-contrast-proactive-vs-reactive-governance> [<https://perma.cc/V5SM-M8QM>] (“[E]ffective governance intelligence empowers *proactive* as opposed to *reactive* decision-making. . . . Proactive governance gets ahead of the rigmarole of negative public sentiment.”).

C. Clash Between One's Taxpayer Base and Another's Growing Pains

Modifications to the Convenience Rule have the potential to preempt future inefficiencies in state taxation, employment, and technology, but may be subject to a clash between one state's right to an economic unity-centered tax base and another state's right to retain the benefits of their increased tax base.

1. Rising Costs of Living, But One's Right to a Tax Base

Some may argue that because of the significant loss in tax revenue to remote workers, states need to tax NREs under the current Convenience Rule to maintain the status quo of state services. However, the revenue losses should serve as a wake-up call to states with high costs of living. Instead of adopting the Convenience Rule, states should understand that their costs of living have risen to unfathomable levels and prioritize attracting workers back within their borders.¹²⁹ In fact, some states with declining tax revenues are devising ways of covering the loss of high-earning residents, such as increasing taxes for the wealthy or providing remote workers with certain tax exemptions if they can establish

¹²⁹ See Paige Ouimet, *Remote Work, High-Skill Migration and Our Changing Cities*, KENAN INST. PRIV. ENTER. (Oct. 14, 2022), <https://kenaninstitute.unc.edu/commentary/remote-work-high-skill-migration-and-our-changing-cities/> [<https://perma.cc/3NEW-5L9Y>] (“Affordable housing is clearly an important driver [of mass migration]. According to Zillow, the median home price in San Francisco was \$1.4 million in August [2022], a figure that is often unaffordable even among high-skill employees. But there is likely to be a limit to this housing-cost-based exodus from the largest U.S. cities. Negative net migration should bring down the cost of living in these cities which, in turn, should encourage more workers to move back.”). *But see* Gleb Tsipursky, *The Hidden Driver Behind Rising House Prices? Remote Work!*, FORBES (Apr. 16, 2023), <https://www.forbes.com/sites/glebtsipursky/2023/04/16/the-hidden-driver-behind-rising-house-prices-remote-work/?sh=bc85b405f847> [<https://perma.cc/8R63-J5MP>] (“In big cities where many people live close together and houses are expensive, the good effect of people working from home help balance out the bad effects of people moving away. This means that even though fewer people live in these cities, the housing market is still strong because more people want to live in their own homes.”).

residency.¹³⁰ States should recognize the consumer-oriented purpose behind the pandemic-driven remote work and relocation revolution and capitalize on the opportunity to reinvent their economies to be healthy, efficient, and resident-driven through modifications that ease the ability to satisfy the Convenience Rule.

However, a salient argument exists that states, such as N.Y., that follow the Convenience Rule and attract masses of NREs have a right to their tax base, even with nonresidents. N.Y. City has long been considered a “single economic unit despite the existence of state lines.”¹³¹ As such, N.Y. residents are “indebted to these [nonresidents] for their productivity, ingenuity[,] and industry.”¹³² Given NREs’ inextricable connection to N.Y. communities, they derive substantial benefits from N.Y.’s tax-based services.¹³³ In particular, the very cities and employers that NREs rely on would not thrive without the support of both resident and nonresident taxpayers.¹³⁴ Thus, when NREs derive benefits from N.Y.’s tax-related services, the “fair” result is to require NREs to “join in the support of the state and local government” by paying proportional state income taxes.¹³⁵ However, the taxation of NREs is only a fair result when they actually derive tax-related benefits

¹³⁰ See Sauers, *supra* note 90, at 195 (“Louisiana’s [new] law provides a two-year 50% tax exemption of wages up to \$150,000 to qualifying remote workers who can establish residency in the state.” (internal citations omitted)).

¹³¹ See Joseph H. Murphy & Albert C. Petite, *Taxation of Nonresidents by New York State*, 12 SYRACUSE L. REV. 147, 147 (1960) (“The man who works in New York but takes the ferry home in the evening is every bit as much a part of the community as the man who rides home on the subway. Whether he is a New Jersey machinist working on a missile project on Long Island, a Connecticut stockbroker on Wall Street or a Vermonter making turbines in Schenectady, his well-being is inextricably tied to that of the State of New York.”).

¹³² *Id.*

¹³³ See *id.* at 148; see also Sauers, *supra* note 90, at 191 (“If an individual [does] set[] foot in the state of their employer, they [do] receive [a] benefit from the state’s roads, hospitals, law enforcement, or other public services.”).

¹³⁴ Murphy & Petite, *supra* note 131, at 148 (“[T]he cities and other municipalities in which nonresidents work could not function as operating public corporations in the absence of a state government to bind them in a workable political system.”).

¹³⁵ *Id.* at 148 (“Any other policy [than taxing NREs] would constitute a discrimination against resident taxpayers.”).

within their state of employment, and not when they work remotely out-of-state.¹³⁶ The relationship between the benefit that remote NREs derive from employers and the burden on that state's tax revenues is tenuous at best.

2. *Costs and Benefits of Retaining an Increased Tax Base*

Nonetheless, proponents of states retaining the ability to tax remote NREs argue that neighboring states engaged in tax “fights” should recognize the ultimate benefit in retaining their own tax base,¹³⁷ which may counter any real incentive for neighboring states to provide solutions beyond tax credits. Between 2021 and 2022, nearly 250,000 more people moved out of N.Y. state than into the state,¹³⁸ and one of the top destinations for movers has been “across the Hudson River” to Jersey City and other booming N.J. cities.¹³⁹ As a result, N.J. has experienced a “renaissance really like no other”¹⁴⁰—a massive influx of new residents,¹⁴¹ as well as public

¹³⁶ See *supra* note 92. But see *In re Zelinsky*, DTA Nos. 830517 & 830681, at 13 (N.Y. Div. Tax App. Nov. 30, 2023) (quoting *Zelinsky v. Tax Appeals Tribunal*, 1 N.Y.3d 85, 89 (2003)) (“When [Zelinsky] worked from the office, he received police, fire and emergency health services, and public utilities. ‘[Zelinsky’s] election to absent himself from the locus of his New York employment does not diminish what New York provides in order to enable him to earn that income.’”).

¹³⁷ See Juliana Kaplan & Noah Sheidlower, *Cash-Strapped New Yorkers Are Doing the Unthinkable: Moving to Jersey City*, BUS. INSIDER (Sept. 10, 2023), <https://www.businessinsider.com/people-moving-from-nyc-too-expensive-to-jersey-city-2023-9> [<https://perma.cc/Y4DW-2M3V>] (“[Jersey City mayor Steven] Fulop said that there’s a special character to Jersey City – and that’s part of what’s drawing in and keeping people there . . . Indeed, Jersey has emerged as a real millennial hotspot: New Jersey ranked third on SmartAsset’s list of states with the greatest net number of millennial movers making over \$200,000 a year.”).

¹³⁸ Noah Sheidlower, *Meet the Typical American Moving to – and Leaving – New York*, BUS. INSIDER (Jan. 19, 2024), <https://www.businessinsider.com/moving-to-new-york-city-nyc-weather-expensive-jersey-city-2024-1> [<https://perma.cc/M89B-ACAP>] (“545,600 people moved from New York between 2021 and 2022 – and 884,000 residents since 2020. Over 91,200 moved to Florida, while 75,100 moved to New Jersey. Meanwhile, almost 301,500 people moved into New York between 2021 and 2022.”).

¹³⁹ See *id.*; see also Kaplan & Sheidlower, *supra* note 137.

¹⁴⁰ Kaplan & Sheidlower, *supra* note 137.

¹⁴¹ Sheidlower, *supra* note 138 (“545,600 people moved from New York between 2021 and 2022 . . . [, of which] 75,100 moved to New Jersey.”).

housing redevelopment¹⁴² and world-class art developments.¹⁴³ While N.J.'s economic and cultural transformation from the influx of new residents may be viewed as a reason for the state legislature to leave the extraterritorial taxation of their residents alone, the transformation has created no shortage of problems for N.J. communities.

In tandem with producing significant increases in state tax revenues for N.J., the influx of new residents to the state has caused issues with housing opportunities and state budgeting, which further calls for the state legislature to solve the inefficient extraterritorial taxation of its constituents. As one would expect, the influx of new residents led to an increase in new housing developments, which then triggered an increase in rent prices and ultimately the displacement of lower- and middle-income residents.¹⁴⁴ Today, Jersey City ranks second in one-bedroom median rent prices in the country—behind, of course, N.Y. City.¹⁴⁵ Additionally, from September 2022 to September 2023, the median sale price for homes in Jersey City rose 13% to nearly \$700,000.¹⁴⁶ As a result,

¹⁴² Patrick Spauster, *Jersey City is Trying to Reimagine Public Housing Redevelopment*, BLOOMBERG (Apr. 3, 2023), <https://www.bloomberg.com/news/features/2023-04-03/jersey-city-is-reimagining-public-housing-redevelopment> [<https://perma.cc/6HTY-SYAL>] (“At Holland Gardens, the city and the housing authority saw an opportunity to preserve public housing while leveraging Jersey City’s hot housing market to create additional affordability.”).

¹⁴³ See Julia Jacobs, *Far From Paris, the Pompidou Plans an Outpost in Jersey City*, N.Y. TIMES (June 4, 2021), <https://www.nytimes.com/2021/06/04/arts/design/pompidou-center-jersey-city.html> [<https://perma.cc/7RGY-CRVU>] (“So what’s the next destination for the Pompidou, the Parisian art museum and cultural center? Jersey City, N.J., naturally.”).

¹⁴⁴ See Kaplan & Sheidlower, *supra* note 137 (“[In September 2023], [Jersey City mayor Steven] Fulop announced a new 8,000 unit building would contain 35% affordable housing. For reference, every borough in NYC except Brooklyn issued fewer than 8,000 residential housing unit permits for the entirety of 2022.”); see also Spauster, *supra* note 142 (“While the median household income for Jersey City public housing residents is around \$24,000, in the census tract surrounding Holland Gardens that number is now \$111,000.”).

¹⁴⁵ *Zumper National Rent Report*, ZUMPER (Mar. 26, 2024), <https://www.zumper.com/blog/rental-price-data/> [<https://perma.cc/LQ9Z-M5XX>] (listing Jersey City as second (\$3,260) and New York City as first (\$4,200)).

¹⁴⁶ Kaplan & Sheidlower, *supra* note 137.

“thousands of [Jersey City] residents [have] receiv[ed] eviction notices” in what Jersey City considers “an eviction crisis.”¹⁴⁷ In reaction to the state’s “affordability challenges” and the newly increased state tax revenues, the N.J. legislature enacted a \$54.3 billion budget in June 2023 for fiscal year 2024—the state’s largest budget in history.¹⁴⁸

Yet, recent declines in state tax revenues have brought significant complications to the state’s budget propositions. First, and perhaps expectedly due to “poor stock market performance and a significant reduction in state capital gains taxes,” the 2023 Tax Day brought a decline in state tax revenues by at least 55%, or roughly two billion dollars less in taxes in the next few fiscal years.¹⁴⁹ While the N.J. Treasurer assured the Assembly Budget Committee that the state was “well prepared to handle” this drastic decline,¹⁵⁰ N.J.’s revenue from income, corporate business, and sales taxes declined by 2.8%, or \$529.9 million, in the first half of fiscal year 2024.¹⁵¹ The N.J. legislature is currently sustaining their historic spending plan in spite of “persistent inflation, high interest rates and other economic headwinds.”¹⁵² One solution to declining state tax revenues in N.J. is for the state to retain income taxes from the more than 470,000 residents that file income tax returns in N.Y.

¹⁴⁷ Jersey City, N.J., Ordinance 23-073 (Aug. 17, 2023).

¹⁴⁸ John Reitmeyer, *NJ’s Largest Budget Ever Now Law*, NJ SPOTLIGHT NEWS (June 30, 2023), <https://www.njspotlightnews.org/2023/06/nj-gov-phil-murphy-set-to-sign-record-state-budget/> [<https://perma.cc/3BTJ-AFU4>] (“Everything in this budget is about growing and strengthening the middle class.”).

¹⁴⁹ Nikita Biryukov, *State ‘Well Prepared’ to Handle \$2B Dip in Tax Revenue, Treasurer Says*, N.J. MONITOR (May 17, 2023), <https://newjerseymonitor.com/2023/05/17/state-well-prepared-to-handle-2b-dip-in-tax-revenue-treasurer-says/> [<https://perma.cc/R9CK-NYGF>].

¹⁵⁰ *Id.*

¹⁵¹ Nikita Biryukov, *Sagging Revenue, Looming Costs Could Sink Big Senior Citizen Tax Cut Plan*, N.J. MONITOR (Jan. 22, 2024), <https://newjerseymonitor.com/2024/01/22/sagging-revenue-looming-costs-could-sink-big-senior-citizen-tax-cut-plan/> [<https://perma.cc/8NE6-2W9U>].

¹⁵² John Reitmeyer, *Declining Tax Revenues, Rising Costs Complicate NJ Budget Calculations*, NJ SPOTLIGHT NEWS (Feb. 26, 2024), <https://www.njspotlightnews.org/2024/02/gov-phil-murphy-budget-message-backrop-declining-revenues-rising-costs/> [<https://perma.cc/QQ5T-7KFM>].

under the Convenience Rule.¹⁵³ By taking the opportunity to fight N.Y.'s Convenience Rule, and not succumbing to N.Y.'s desire to retain their tax base of NREs, N.J. can capitalize on its historic spending goals and provide greater benefits to its residents.

V. CONCLUSION

The Convenience Rule has the potential to send shockwaves throughout the American employment sphere. Touching on state taxation, employment trends, technological advancements, and constitutional protections, the application of the Convenience Rule portrays a traditionalist view of taxation in a world that is continuously modernizing and globalizing. If state tax systems cannot adapt to the newly evolved employment regime by modifying their Convenience Rules, then employees may face increased burdens instead of increased work-life balance. Yet, this is a moment for states to recognize the economic consequences of hampering technological and employment advancements and work collaboratively to prioritize employer-owned and resident-driven modifications to the Convenience Rule that balance both policy and commercial preferences. Even with modifications, though, successfully stamping out inefficiencies may be limited by increased tax “fights” between states and increased taxpayer abuse, potentially inevitable technological transformations, and the clash between one state’s right to a taxpayer base and another state’s growing pains of pandemic-driven migration. Despite these limitations, the N.Y. state legislature should take this opportunity to modify its Convenience Rule and take a swing at preventing future tax conundrums in an unpredictable world.

¹⁵³ In tax year 2021, the New York Tax Division received 10,878,455 tax returns, of which 476,372 were from New Jersey residents that accounted for \$4.3 billion of the \$59.92 billion New York state tax liability. *Personal Income Tax Filers, Summary Dataset 1 – Major Items by Liability Status and Place of Residence: Beginning Tax Year 2015*, *supra* note 60.