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IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

JETBLUE AIRWAYS CORPORATION &
SUBSIDIARIES, foreign corporations,

Plaintiff,

vs.

Case No. 2024 CA 1177

STATE OF FLORIDA,
DEPARTMENT OF REVENUE,
an agency of the State of Florida,

Defendant.
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JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES MOTION FOR JUDGMENT ON THE PLEADINGS RELATING TO COUNT 4 AND COUNT 5 OF THE COMPLAINT

Plaintiff, JetBlue Airways Corporation & Subsidiaries ("JetBlue"), by and through counsel, moves for judgment on the pleadings in its favor and against the State of Florida Department of Revenue (the "Department") pursuant to Rule 1.140(c), Florida Rules of Civil Procedure. This motion is timely because the pleadings are closed and the Court has not yet scheduled trial.

INTRODUCTION

In this dispute, JetBlue challenges the validity of Florida's rules for taxing airline transportation companies.[1] JetBlue contends that Florida's corporate income

[1] This Court recently issued a ruling in favor of the Department in a case involving similar constitutional challenges in *Frontier Airlines, Inc. v. Dep't of Revenue*, Case No. 2023 CA 1433 (Fla. 2d Cir. Ct. Sep. 18, 2023). However, it is important to note that Judge Marsh's terse Order in that case provides no discussion of the merits of the legal arguments raised by the parties much less his specific reasons for granting the Department's motion. In addition, there is no transcript of the proceedings before Judge Marsh at the hearing on the Department's motion to dismiss. Finally, it is clear that "[t]rial courts do not create precedent." *State v. Bamber*, 592 So.2d 1129,

tax laws applicable to airline transportation companies are unconstitutional because they impose tax on flight miles occurring outside the geographic borders of the state.

It is well understood that a state is not permitted to impose its corporate income tax on 100% of the income of a multistate business. The United States Constitution mandates that a state may only tax the taxpayers and transactions with which it has a sufficient connection – or nexus. Even where such a connection exists, however, a state is only permitted to tax an apportioned share of the multistate taxpayer's business income.

The authority to determine how a taxpayer's income is apportioned is left to the states. States use mathematical formulas to apportion the income of a multistate business. Without exception, these formulas reflect numerical comparisons between a taxpayer's in-state business activities and a taxpayer's business activities everywhere. The specific composition of these apportionment formulas varies from state-to-state. Many states – including Florida in this case – use special apportionment formulas that apply only to certain industries.

The U.S. Supreme Court has long-recognized that a state's choice of an apportionment formula is necessarily an imperfect method for dividing up the income of a multistate business. As a result, the Court has refused to endorse one specific apportionment formula as being consistent with the United States Constitution. Despite this "hands off" approach, the Court has made clear that once a state has

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1132 (Fla. 2d DCA 1991). The rulings of a trial court "are not binding, even in the adjacent courtroom." *Id.*

chosen an apportionment formula, that formula must respect certain constitutional guardrails.

States do not have *carte blanche* when it comes to apportionment formulas. There are several constitutional limitations on a state's authority to apportion income. One such limitation is the Commerce Clause of the United States Constitution. In this motion, JetBlue contends that Florida's method for apportioning the business income of airline transportation companies violates the Commerce Clause.

It is important to emphasize that there is a constitutionally significant distinction between (1) a challenge to the ***application of a specific apportionment formula*** chosen by a state and (2) a challenge to the ***components that make up*** a state's apportionment formula. The U.S. Supreme Court has made abundantly clear that it will not strike down a state's ***choice*** of apportionment formula merely because a taxpayer prefers a different formula. However, the Court has been equally clear that once a state chooses an apportionment formula, the ***composition of that formula*** must adhere to certain fundamental constitutional constraints.

In this case, JetBlue is not arguing that it disagrees with Florida's approach to apportioning the income of airline transportation companies. To the contrary, JetBlue's sole argument in this motion is that one component of Florida's apportionment formula is facially unconstitutional under the Commerce Clause of the United States Constitution.

FACTUAL AND PROCEDURAL BACKGROUND

JetBlue is a commercial airline serving over 100 destinations across the United States, the Caribbean, Latin America, Canada, and Europe. JetBlue operates flights originating from and/or terminating at several Florida-based commercial airports. JetBlue is the corporate parent of an affiliated group which files a consolidated return for Florida corporate income tax purposes pursuant to chapter 220, Florida Statutes.

In filing its Florida corporate income tax returns for the periods in dispute, JetBlue apportioned its income to Florida in accordance with sections 220.131(5) and 220.151(2), Florida Statutes, which requires corporations engaged in transportation other than by pipeline to use a one-factor apportionment formula consisting of revenue miles in Florida divided by revenue miles everywhere.[2] For a commercial airline, a "revenue mile" is defined as the transportation of one passenger the distance of one mile for consideration.

Section 220.151(2)(c), Florida Statutes, states that taxpayers engaged in air or sea transportation must count as revenue miles in Florida all miles within a defined geographical area:

> [T]he "revenue miles in this state" shall include all miles traversed within the area bounded on the west by the meridian of longitude 87° 30′ west from Greenwich, bounded on the north by the northern land border of this state or the

[2] Because JetBlue (a commercial airline) files its Florida income tax return on a consolidated basis with non-airline members of its affiliated group, section 220.131(5), Florida Statutes, requires JetBlue to convert its apportionment to a three factor formula to be consolidated with the other, non-airline members. The numerators of the converted apportionment factors are determined solely by the revenue miles factor established in section 220.151(2), Florida Statutes. For ease of reading, this motion will focus only on the determination of that single revenue miles factor.

> parallel of latitude 31° north from the equator, bounded on the east by the meridian of longitude 80° west from Greenwich, and bounded on the south by the parallel of latitude 23° 30′ north from the equator as the case may be. The "revenue miles in this state" shall also include all miles traversed between points in this state, even though the route of travel is not wholly over the land mass of the state.

The area referenced in section 220.151(2)(c), Florida Statutes, is the "Florida Box." The Florida Box encompasses portions of Alabama, Georgia, and international waters, all of which are obviously outside the geographical boundaries of the state.

JetBlue computed its Florida apportionment for the periods in dispute by including in the numerator of its apportionment formula only those revenue miles flown within the geographical boundaries of Florida. JetBlue excluded from the numerator of its apportionment formula revenue miles flown outside the geographical boundaries of Florida, but within the Florida Box.

The Department conducted an audit of JetBlue's filed corporate income tax returns for the tax years 2019, 2020, and 2021 (the "Audit Period"). At the conclusion of the audit, the Department issued a Notice of Proposed Assessment ("NOPA") to JetBlue assessing additional corporate income tax for the Audit Period. In the NOPA, the Department proposed only one material adjustment.[3] The material adjustment was to change the calculation of the numerator of the apportionment formula reported by JetBlue under section 220.151(2)(c), Florida Statutes, by adding

[3] In addition to the adjustment to the revenue miles apportionment factor at issue herein, the auditor also made (1) a favorable adjustment to JetBlue's state modification for bonus depreciation and (2) a net favorable adjustment to JetBlue's payroll factor. Both adjustments are immaterial and collectively reduce JetBlue's taxable income by approximately $12,000.00.

additional revenue miles that were not flown within the geographical boundaries of the state of Florida, but were within the Florida Box as defined by section 220.151(2)(c), Florida Statutes. This action followed.

SUMMARY OF CONTROLLING LAW

Commerce Clause – Generally

The U.S. Supreme Court has repeatedly stated that a state tax withstands scrutiny under the Commerce Clause if it meets the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Under *Complete Auto*, a state tax will be sustained if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state. *Id.* at 279.

With respect to the fair apportionment prong of *Complete Auto*, the Court has instructed that the Commerce Clause of the United States Constitution prevents a state from "tax[ing] value earned outside [the taxing state's] borders." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). In this motion, JetBlue maintains that section 220.151(2)(c), Florida Statutes, is unconstitutional under the Commerce Clause because the statute taxes value earned outside Florida's borders and, therefore, fails to meet the fair apportionment prong of *Complete Auto*.

Formulary Apportionment

The Court has recognized two different ways to derive taxable income attributable to a state. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164 (1983). The first approach is to use geographical or transactional accounting to

allocate items of income and loss to specific jurisdictions. As explained by the Court, however, this approach is problematic because "formal accounting is subject to manipulation and imprecision[.]" *Id.* The second approach is referred to as formulary apportionment. Formulary apportionment "apportion[s] the total income of [the business] between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." *Id.* at 165.

In numerous cases the Court has explained that "States have wide latitude in the selection of apportionment formulas." *See e.g.*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978). In these decisions, the Court has acknowledged that deriving "precise territorial allocations of 'value' is often an elusive goal, both in theory and in practice." *Container*, 463 U.S. at 164.

A taxpayer challenging the fairness of a state's chosen apportionment formula must establish by "clear and cogent evidence" that the income apportioned to the taxing state is "out of all appropriate proportion to the business transacted ... in the State." *Hans Rees' Sons, Inc. v. North Carolina ex. rel. Maxwell*, 283 U.S. 123, 135 (1931). However, where, as here, the taxpayer is challenging the ***components*** of a state's chosen apportionment – and not the ***formula*** itself – different constitutional standards apply.

Commerce Clause – Internal Consistency Test

A state apportionment formula is facially unconstitutional under the Commerce Clause if it lacks "internal consistency." The U.S. Supreme Court has explained the internal consistency test in the following way:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with intrastate commerce. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). Simply stated, the internal consistency test is concerned with double taxation of the taxpayer on the same multistate business activity. The internal consistency test does not require proof of ***actual*** double taxation – the ***possibility*** of double taxation is sufficient. *Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984) (stating that actual double taxation "is not the test" as the constitutionality of a state law would then "depend on the shifting complexities of the tax codes of 49 other States").

Where a state law is determined to be internally inconsistent, it necessarily establishes that the taxing state is impermissibly "tax[ing] value earned outside [the taxing state's] borders" in violation of the Commerce Clause. *ASARCO, Inc.*, 458 U.S. at 315.

Commerce Clause – External Consistency

An alternative challenge to the facial constitutionality of a state apportionment formula is that the state law is not "externally consistent." As explained by the U.S. Supreme Court, "[e]xternal consistency … looks … to the economic justification for the state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state." *Jefferson Lines*, 514 U.S. at 185.

Under this test, "the factor or factors used [by the taxing state] must actually reflect a reasonable sense of how income is generated[.]" *Container*, 463 U.S. at 169-170. Practically speaking, the external consistency test "examines whether the tax is levied solely upon the revenue from interstate commerce which reasonably represents the in-state portion of the activity being taxed." *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

As one leading commentator on state and local taxation has noted, "the external consistency test in substance is nothing more than another label for the fair apportionment requirement." Hellerstein, *State Taxation*, ¶ 4.16[2] (3rd ed. 2016). Recounting that the fair apportionment prong of *Complete Auto* has long-been "a central tenant of the Court's Commerce [ ] Clause jurisprudence," the commentator stated "using the phrase 'external consistency' to describe this requirement has not added (or subtracted) anything from its substance." *Id.*

Florida's Apportionment Laws

Florida, like every other state imposing a corporate income tax, uses apportionment formulas to derive the portion of a multistate taxpayer's income

subject to tax. The default apportionment formula applicable to most corporate taxpayers is found in section 220.15, Florida Statutes. This statute provides that the adjusted federal income[4] of a taxpayer "shall be apportioned to this state … by an apportionment fraction composed of a sales factor representing 50 percent of the fraction, a property factor representing 25 percent of the fraction, and a payroll factor representing 25 percent of the fraction." Section 220.15(1), Florida Statutes.

Section 220.15(5), Florida Statutes, explains that the sales factor is "a fraction the numerator of which is the total sales of the taxpayer in this state during the taxable year or period and the denominator of which is the total sales of the taxpayer everywhere during the taxable year or period." Similarly, section 220.15(2), Florida Statutes, states that the property factor is defined as "a fraction the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the taxable year or period and the denominator of which is the average value of such property owned or rented and used everywhere." Finally, section 220.15(4), Florida Statutes, notes that the payroll factor is "a fraction the numerator of which is the total amount paid in this state during the taxable year or period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the taxable year or period."

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[4] For this purpose, adjusted federal income is equal to a taxpayer's federal taxable income as adjusted for Florida-specific additions and subtractions. Section 220.13, Florida Statutes.

A mathematical representation of the apportionment formula outlined in section 220.15, Florida Statutes, is as follows:

$$\left(\frac{\text{Florida In-State Sales}}{\text{Everywhere Sales}}+\frac{\text{Florida In-State Sales}}{\text{Everywhere Sales}}+\frac{\text{Florida In-State Property}}{\text{Everywhere Property}}+\frac{\text{Florida In-State Payroll}}{\text{Everywhere Payroll}}\right)/4$$

The result of this equation[5] is then multiplied by a taxpayer's adjusted federal income (modified for Florida adjustments) to determine Florida taxable income. For the purposes of the numerators of the sales, property, and payroll factors referenced in section 220.15, Florida Statutes, the phrase "in this state" is not defined.

In addition to the generally applicable apportionment formula in section 220.15, Florida Statutes, there are several additional apportionment formulas that apply to specific industries. These special apportionment formulas are found in section 220.151, Florida Statutes. This case relates to Florida's apportionment formula applicable to airline transportation companies in section 220.151(2), Florida Statutes.

Section 220.151(2), Florida Statutes, provides as follows:

> The tax base for a taxpayer furnishing transportation services, for the purpose of computing a tax on those activities, shall be apportioned to this state by multiplying such base by a fraction the numerator of which is the revenue miles of the taxpayer in this state and the denominator of which is the revenue miles of the taxpayer everywhere.

A "revenue mile" is defined as "the transportation of one passenger or 1 net ton of freight the distance of 1 mile for a consideration." Section 220.151(2)(a), Florida Statutes. Although the phrase "in this state" is not defined for purposes of the default

[5] As noted above, the sales factor is 50% of the apportionment fraction and as such, it is added twice. Section 220.15(1), Florida Statutes.

apportionment formula in section 220.15, Florida Statutes, the legislature included a definition of "in this state" applicable to airline transportation companies. Section 220.151(2)(c), Florida Statutes, explains that "revenue miles in this state" means the area comprising the Florida Box.[6] Section 220.151(2)(c), Florida Statutes, provides in pertinent part:

> [T]he "revenue miles in this state" shall include all miles traversed within the area bounded on the west by the meridian of longitude 87° 30′ west from Greenwich, bounded on the north by the northern land border of this state or the parallel of latitude 31° north from the equator, bounded on the east by the meridian of longitude 80° west from Greenwich, and bounded on the south by the parallel of latitude 23° 30′ north from the equator as the case may be. The "revenue miles in this state" shall also include all miles traversed between points in this state, even though the route of travel is not wholly over the land mass of the state.

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[6] Florida is unique in its definition of the sales factor for airline transportation companies. The statutes and rules of other states simply refer to sales/revenue derived ***"in the state"*** clearly relying on state geographic borders. *See e.g.*, Ala. Admin. Code § 810-27-1-.18.01(3) ("The numerator of the revenue factor is the total revenue of the [airline] in Alabama"); Ga. Code Ann. § 48-7-31(d)(2.1) ("The revenue air miles factor is a fraction, the numerator of which shall be equal to the total, for each flight stage which originates or terminates in this state, of revenue passenger miles by aircraft type flown in this state"); La. Rev. Stat. Ann. § 47.245(A) ("[G]ross apportionable income from Louisiana sources shall include all gross receipts derived from passenger journeys and cargo shipments originating in Louisiana, and any other items of gross apportionable income or receipts derived entirely from sources in this state"); S.C. Code Ann. § 12-6-2310(5) ("Airline companies shall use a fraction in which the numerator is revenue tons loaded and unloaded in this State during the taxable year, and the denominator is revenue tons loaded and unloaded everywhere during the taxable year"). JetBlue is not aware of any state that utilizes an apportionment formula like Florida's that arbitrarily defines "in this state" to include geographic regions outside the state's borders.

The Florida Box includes portions of Alabama, Georgia, and international waters off the coast of Florida.[7] *See* Affidavit of Mr. Rick Lee Mecklenburg ("Mecklenburg Affidavit") attached hereto as **Exhibit 1**.

STANDARD OF REVIEW

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Menendez v. Palms West Condominium Ass'n*, 736 So. 2d 58 (Fla. 1st DCA 1999). There is no dispute as to any material fact in this case that would preclude entry of summary judgment in favor of JetBlue.

ARGUMENT

I. SECTION 220.151(2)(c), FLORIDA STATUTES, IS FACIALLY UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE BECAUSE IT FAILS THE INTERNAL CONSISTENCY TEST (COUNT FOUR).

Although the concept is nearly a century old, the U.S. Supreme Court first expressly articulated the Commerce Clause requirement of internal consistency in

[7] It is well-settled that Florida's ***sales and use tax*** laws do not apply outside the geographic borders of the state. *Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So.2d 954 (Fla. 2005). In *New Sea Escape Cruises*, the Department imposed sales and use tax on certain purchases of gambling equipment used by the taxpayer on its cruise ship. The taxpayer argued that it was entitled to apportion its sales and use tax liability per section 212.08(8)(a), Florida Statutes, because the cruise ship was used in interstate commerce. The Department disagreed and treated the miles traveled by the cruise ship outside Florida's territorial boundaries as ***intrastate***. The Court ruled in favor of the taxpayer and made clear that it is a "general principle of law that a state may not tax interests which are not within its territorial jurisdiction." *Id.* at 962 (citing *Straughn v. Kelly Boat Serv., Inc.*, 210 So.2d 266, 267 (Fla. 1st DCA 1968)). Although this case deals with Florida's corporate income tax laws and not sales and use taxes, it is clear from *New Sea Escape Cruises* that the courts of Florida are predisposed to preventing the state from exercising its taxing authority outside its geographic borders.

Container. In that case, the Court made clear that internal consistency involves a hypothetical exercise to determine if the taxpayer is subject to multiple taxation assuming every state applied the identical apportionment formula under review. 463 U.S. at 169. As explained by the Court in *Container*, internal consistency represents a facial challenge to a state's apportionment formula. The analysis is controlled by the express text of the challenged state law. To prevail under the internal consistency test, a taxpayer need only show a ***theoretical*** risk of multiple taxation. *Armco,* 467 U.S. at 644.

The U.S. Supreme Court has struck down several state apportionment formulas for failing the internal consistency test. One example is *Tyler Pipe Industries, Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987). *Tyler Pipe* addressed the application of the Washington B&O tax – a tax on gross receipts. The B&O tax imposed a different tax rate depending on the classification of a taxpayer's activities in the state. Two specific categories of activities subject to tax were manufacturing and wholesaling. The B&O tax contained a multiple activities exemption that applied only to Washington-based manufacturers. *Id*. at 236. The exemption provided that local manufacturers that also made wholesale sales would only be subject to the B&O tax under the manufacturer classification. *Id.*

The taxpayer in *Tyler Pipe* – an interstate manufacturer-wholesaler – asserted that the tax exemption violated the Commerce Clause because it failed the internal consistency test. *Id*. at 239. The Court agreed noting that if every state applied the tax exemption, an interstate manufacturer-wholesaler would be subject to B&O tax

under both the manufacturer and wholesaler exemption while local manufacturer-wholesalers would only be subject to the tax under the manufacturer classification. *Id.* at 240-241.

A more recent case addressing the internal consistency test is *Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). The issue in *Wynne* dealt with the application of Maryland's personal income tax. The challenged Maryland law allowed residents to claim a credit against ***Maryland's*** income tax for income taxes paid to other states. *Id.* at 545. However, the law made clear that a resident was not permitted a credit against the ***county*** portion of the Maryland income tax. *Id.* The taxpayers challenged the Maryland law arguing that it violated the internal consistency test under the Commerce Clause. The Court agreed and cited the following example:

> Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Id. at 564-565. The *Wynne* Court held "the internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff." *Id.* at 565.

In this case, the Florida Box as defined by section 220.151(2)(c), Florida Statutes, includes portions of neighboring states. *See* Mecklenburg Affidavit attached hereto as **Exhibit 1**. If every state adopted an apportionment formula like that in section 220.151(2)(c), Florida Statutes, it is patently obvious that there is a risk that JetBlue would be subject to double taxation on the same revenue miles flown. For example, if Georgia law used a "Georgia Box" extending into Florida to define "revenue miles in [Georgia]," an airline transportation company would be subject to tax twice on the same miles flown in Florida that are within the "Georgia Box." This risk of multiple taxation is not permitted under the internal consistency test. *See e.g.*, *Wynne*, 575 U.S. at 565.

Section 220.151(2)(c), Florida Statutes, is facially unconstitutional under the Commerce Clause because it fails the internal consistency test.

II. SECTION 220.151(2)(c), FLORIDA STATUTES, IS FACIALLY UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE BECAUSE IT FAILS THE EXTERNAL CONSISTENCY TEST (COUNT FIVE).

This dispute relates to JetBlue's claim that section 220.151(2)(c), Florida Statutes, is facially unconstitutional because of how it defines the numerator of the sales factor of Florida's apportionment formula applicable to airline transportation companies. More specifically, the definition of "revenue miles in this state" in section 220.151(2)(c), Florida Statues, violates the Commerce Clause because it impermissibly "tax[es] value earned outside [Florida's] borders." *ASARCO, Inc.*, 458 U.S. at 315.

It is important to note that JetBlue is ***not*** arguing for a different ***approach*** to the taxation of airlines. In other words, JetBlue is ***not*** contending that Florida's use

of "revenue miles in this state" as a means of sourcing sales for airline transportation companies is unfair or otherwise unconstitutional. To the contrary, JetBlue contends that it is ***how*** Florida defines "revenue miles in this state" in section 220.151(2)(c), Florida Statutes, that results in the constitutional infirmity.

A. Challenges to a State's Chosen Apportionment Formula.

The U.S. Supreme Court has repeatedly instructed that a state's chosen apportionment formula will not be invalidated merely because the taxpayer's asserts that another approach would be more fair. *See e.g.*, *Butler Bros. v. McColgan*, 315 U.S. 501 (1942). Consistent with this instruction, the Court has acknowledged that apportionment is an inexact science and, as a result, a state has discretion to choose its own apportionment formula. *See Container Corp.*, 463 U.S. at 164.

These directives from the Court, however, have not discouraged taxpayers from arguing that state apportionment formulas are unconstitutional.[8] One of the earliest decisions was *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). The taxpayer was a manufacturer and retailer of typewriters and related items. *Id.* at 118. Although headquartered in New York and having offices in several states, all manufacturing was done in Connecticut. *Id.* at 119. Connecticut's apportionment formula attributed 47% of the net profits of the taxpayer to the state.

[8] Perhaps the most obvious distinction between Commerce Clause challenges to (1) the reasonableness of a state's apportionment formula and (2) the components of the formula, is that the former challenge is always an "as applied" challenge. A taxpayer shows the unreasonableness of a state formula by demonstrating the result of the formula is distortive as to its facts. *See e.g.*, *Hans Rees*, 283 U.S. at 132. By contrast, a challenge to the components of a state formula is a facial challenge. The internal and external consistency tests are not tied to the taxpayer's specific facts. *See e.g.*, *Jefferson Lines*, 514 U.S. at 185

Id. at 120. The taxpayer argued that Connecticut's apportionment formula was unconstitutional. In support, the taxpayer offered evidence that according to its accounting records only 3.2% of the net profits related to Connecticut operations. *Id.* Based on the disparate difference between the result of Connecticut's apportionment formula and the taxpayer's financial records, the taxpayer contended that the apportionment formula was unconstitutional.

The Court rejected the taxpayer's argument noting that in constructing its apportionment formula Connecticut "was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." *Id.* at 120. The Court further explained that the taxpayer's profits "were largely earned from a series of transactions beginning with manufacture in Connecticut and ending with sale in other states." *Id.* The Court upheld Connecticut's apportionment formula noting that there was "nothing in the record to show the method of apportionment … was inherently arbitrary." *Id.* at 121.

More recently, in *Moorman*, the taxpayer challenged Iowa's use of a single sales factor apportionment formula. The taxpayer was an Illinois corporation that manufactured and sold animal feed. 437 U.S. at 269. The taxpayer owned several warehouses in Iowa and Iowa customers accounted for 20% of the taxpayer's total sales. *Id.* Iowa's apportionment formula applicable to multistate businesses employed a single sales factor – *i.e.*, total Iowa sales/total sales everywhere. *Id.* at 276. The taxpayer maintained that Iowa's single sales factor apportionment formula was incompatible with the three factor apportionment formula used by its home state

of Illinois. *Id.* The result of the application of the two different state apportionment formulas, the taxpayer contended, resulted in double taxation thereby violating the Commerce Clause. *Id.*

The Court disagreed with the taxpayer concluding that even if there were double taxation there is no constitutional principle preventing Iowa from using a single sales factor apportionment formula or requiring Illinois to use a three factor apportionment formula. *Id.* at 279.

In each of *Underwood* and *Moorman* the taxpayer raised a Commerce Clause challenge to the ***application of a specific apportionment formula to its facts***. Each taxpayer claimed that the ***result of the formula*** violated the Commerce Clause. In both cases the taxpayers asserted that another apportionment approach was preferrable. The taxpayers did not allege – as JetBlue does in this case – that the ***components of a state's apportionment formula*** were in any way constitutionally deficient.

B. Challenges to the *Components* of a State's Chosen Apportionment Formula.

While there are numerous decisions addressing constitutional challenges to the ***application*** of a given state's apportionment formula, there are decidedly few cases concerned with constitutional disputes relating to the specific ***components*** of a state's formula. There is, however, good reason for this dearth of authority.

It is a fundamental precept that under the Commerce Clause, a state is not permitted to "tax[ ] value earned outside [the taxing state's] borders." *ASARCO,* 458 at 315. In cases such as *Underwood* and *Moorman*, the challenged apportionment

formulas were facially neutral and did not ***objectively*** seek to tax extraterritorial values. The taxpayer's argument in both cases was that the state's objectively neutral apportionment formula raised constitutional concerns ***as applied*** to their facts.

As a general rule, state apportionment formulas are facially neutral. For example, in *Underwood* each of the apportionment factors of the Connecticut law compared an "in state" numerator and an "everywhere" denominator. 254 U.S. at 118. Likewise, in *Moorman*, the Iowa single sales factor apportionment formula contrasted "gross sales made within the state" with "total gross sales." 437 U.S. at 270. Neither Connecticut nor Iowa defined the scope of "in state" or "within the state" for apportionment purposes. This is so because the state legislatures accepted that state geographical boundaries are commonly known and observed.

Consider Florida's general three factor apportionment formula in section 220.15, Florida Statutes. The property factor numerator includes property owned or rented and used "in this state." Section 220.15(2), Florida Statutes. The payroll factor numerator includes the total compensation paid by the taxpayer "in this state." Section 220.15(4), Florida Statutes. Finally, the sales factor numerator includes the total sales of the taxpayer "in this state." The Florida legislature did not define "in this state" for purposes of section 220.15, Florida Statutes. Again, Florida's geographical borders are clear and obvious.

Inexplicably, in section 220.151(2)(c), Florida Statutes, applicable to airline transportation companies, the Florida legislature decided to define "revenue miles in this state" by reference to the Florida Box. The Florida Box unquestionably includes

portions of Alabama, Georgia, and international waters. Unlike section 220.15, Florida Statutes, and the apportionment formulas in *Underwood* and *Moorman*, section 220.151(2)(c), Florida Statutes, is ***facially*** unconstitutional under the Commerce Clause. This is so because the formula on its face includes in the Florida numerator revenue miles outside the geographical boundaries of the state. *See* Mecklenburg Affidavit attached hereto as **Exhibit 1**.

Conceptually, the Florida apportionment formula applicable to airline transportation companies treats revenue miles over Alabama, Georgia, and international waters as existing "in this state." Section 220.151(2)(c), Florida Statutes, is ***facially*** unconstitutional because it seeks to "tax[ ] value earned outside [Florida's] borders." *ASARCO,* 458 U.S. at 315.

The case of *Central Greyhound Lines of New York v. Mealey*, 334 U.S. 653 (1948), is squarely on point with this case. The issue in *Central Greyhound Lines* was the constitutionality of New York's utility services gross receipts tax that taxed receipts from miles traveled by motorbus carriers in the state. *Id.* at 654. The taxpayer, a motorbus carrier, argued that the tax was unconstitutional under the Commerce Clause because it included receipts from miles traversed in New Jersey and Pennsylvania. *Id.* Agreeing with the taxpayer, the Court had no trouble invalidating the New York law under the Commerce Clause stating:

> New York claims the right to tax the gross receipts from transportation which traverses New Jersey and Pennsylvania as well as New York. To say that this commerce is confined to New York is to indulge in pure fiction. To do so, does not eliminate the relation of Pennsylvania and New Jersey to the transactions nor eliminate the benefits which those two States

> confer upon the portions of the transportation within their borders. Neither their interests nor their responsibilities are evaporated by the verbal device of attributing the entire transportation to New York.

Id. at 660. The Court buttressed its conclusion that the New York law violated the Commerce Clause by noting the possibility of double taxation on the same receipts.[9] The Court explained:

> If New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which they afford protection, we do not see how on principle and in precedent such a claim could be denied.

Id. at 662. This likelihood of duplicative taxation on the receipts for travel outside New York's borders clearly demonstrated that the tax was not fairly apportioned under the Commerce Clause. *See id*.

In the more recent case of *FedEx Ground Package Sys., Inc. v. Pennsylvania*, 922 A.2d 978 (Pa. Commw. 2007), *aff'd per curiam*, 939 A.2d 323 (Pa. 2007), the dispute was concerned with the components of the sales factor numerator of Pennsylvania's apportionment formula. The facts of *FedEx* mirror those in this case. The taxpayer in *FedEx* was a transportation company. *Id*. at 979. The Pennsylvania apportionment formula applicable to transportation companies was a special, single-factor fraction comparing revenue miles in the state to revenue miles everywhere. *Id*. (citing 72 P.S. § 7401(3)2(b)(1)).

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[9] It is important to note that proof of the risk of multiple taxation is not required under the external consistency test. *Jefferson Lines*, 514 U.S. at 185.

The dispute in *FedEx* centered on the composition of the taxpayer's sales factor numerator. The taxpayer argued that the statute was clear on its face that only Pennsylvania activity could be included in the sales factor numerator. By contrast, the Pennsylvania Department of Revenue contended – as the Department does in this case – that the sales factor numerator could be defined more broadly to include value earned outside the state. *Id.* at 980-981. The court agreed with the taxpayer instructing that:

> The rationale behind apportionment statutes is to ensure that the Commonwealth taxes a fair share of Taxpayer's income. Under the Department's interpretation Taxpayer would pay Pennsylvania taxes on income it earned outside the Commonwealth because the Department's interpretation fails to limit the numerator of the fraction to Pennsylvania activity.

Id. at 981. The court defended its rationale noting that "[t]his Court's interpretation is consistent with the fundamental principles of apportionment that the numerator should only reflect Pennsylvania activity." *Id.* at 980.

Comparing *Underwood* and *Moorman* to *Central Greyhound* and *FedEx* it is apparent that although states are given substantial leeway in their ***choice*** of facially neutral apportionment formulas, the ***components*** of the formula must still comport with the Commerce Clause.

Section 220.151(2)(c), Florida Statutes, violates the Commerce Clause under the test for external consistency because it considers revenue miles flown over Alabama, Georgia, and international waters as Florida revenue miles for apportionment purposes. *See* Mecklenburg Affidavit attached hereto as **Exhibit 1**. The result of the application of section 220.151(2)(c), Florida Statutes, is that airline

transportation companies like JetBlue are required to pay Florida corporate income tax "on income [ ] earned outside [Florida]" because the statute "fails to limit the numerator of the fraction to [Florida] activity." *FedEx*, 922 A.2d at 981.

The external consistency test examines whether the state tax imposed on interstate commerce "reasonably represents the in-state portion of the activity being taxed." *Goldberg*, 488 U.S. at 261. Here, the application of section 220.151(2)(c), Florida Statutes, includes as in-state activity revenue miles flown over Alabama, Georgia, and international waters – both in the Gulf of Mexico and the Atlantic Ocean. Treating revenue miles flown over Alabama, Georgia, and international waters as Florida revenue miles "is to indulge in pure fiction." *Central Greyhound*, 334 U.S. at 660. The external consistency test of the Commerce Clause acts as a bar to such extraterritorial taxation.

Through the definition of "revenue miles in this state" in section 220.151(2)(c), Florida Statutes, Florida has effectively redrawn its geographical boundaries for apportionment purposes. The result is that Florida is taxing more than its fair share of the interstate income earned by airline transportation companies. This is simply not permitted under the Commerce Clause. *ASARCO, Inc.*, 458 U.S. at 315 (stating that the Commerce Clause prevents a state from taxing value earned outside its borders).

It is a fundamental principle of apportionment that section 220.151(2)(c), Florida Statutes, should only reflect revenue miles within the geographic boundaries of Florida. *See e.g., FedEx*, 922 A.2d at 980. Including only revenue miles flown over

Florida would ensure that Florida only taxes its fair share of income earned by airline transportation companies.

Section 220.151(2)(c), Florida Statutes, is facially unconstitutional under the Commerce Clause because does not fairly apportion the income of airline transportation companies and, therefore, fails the external consistency test.

CONCLUSION

For the foregoing reasons, JetBlue respectfully requests that this Court GRANT its motion for judgment on the pleadings with respect to Count Four and/or Five of the Complaint and invalidate the Department's assessment relating to the Audit Period.

Dated: October 22, 2024

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Attorneys for JetBlue Airways Corporation & Subsidiaries

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Florida's E-Filing Portal on October 22, 2024, to all counsel of record.

/s/ *Michael J. Bowen*
Michael J. Bowen, Esq.

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES,

Plaintiff,

Case No. 2024-CA-001177

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.

_______________________________________/

AFFIDAVIT OF RICK LEE MECKLENBURG IN SUPPORT OF JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES

1. I am over the age of eighteen and have personal knowledge of the facts in this Affidavit.

2. I am currently employed as a Surveyor at Clary & Associates, Inc.

3. Clary & Associates, Inc. is a professional surveying and mapping company located in Jacksonville, Florida.

4. I have been employed as a Surveyor at Clary & Associates, Inc. for 17 years.

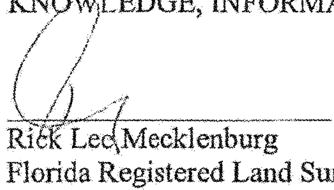
5. I have been a Florida licensed Surveyor & Mapper for 24 years.

6. Attached hereto as **Exhibit A** is a true and correct copy of a map of the State of Florida from the U.S. Department of Interior geological survey.

7. On the attached map of the State of Florida attached hereto I have drawn a box to reflect the latitude and longitude coordinates in section 220.151(2)(c), Florida Statutes. In addition, I have highlighted the geographic boundaries of the State of Florida.

FURTHER THE AFFIANT SAYETH NOT

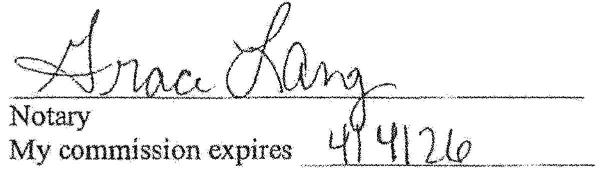
I DECLARE THE ABOVE STATEMENTS TO BE TRUE TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.



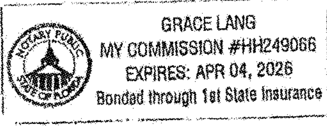
Rick Lee Mecklenburg
Florida Registered Land Surveyor No. 5920

State of Florida
County of Duval September 23, 2024

Now appeared before me the above named Rick Lee Mecklenburg who was placed under oath and affirmed the truth of the foregoing statements.



Notary
My commission expires 4/4/26



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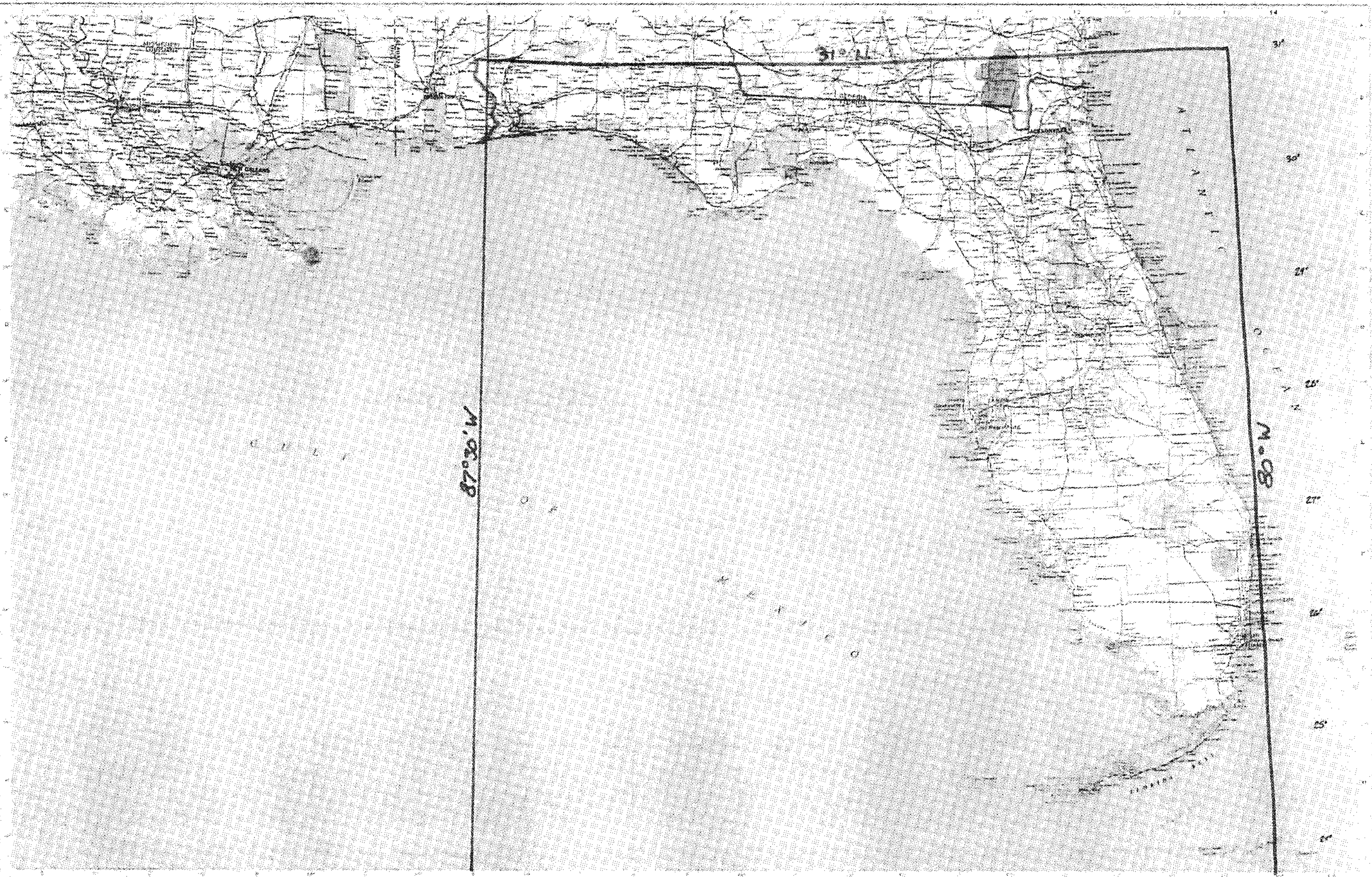
NATIONAL ATLAS
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31° N
87°30' W
80° W
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GEOLOGICAL SURVEY
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