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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.
_____/

JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES RESPONSE TO DEPARTMENT'S MOTION TO DISMISS COMPLAINT

Plaintiff, JetBlue Airways Corporation & Subsidiaries ("JetBlue"), by and through counsel, serves this response to the motion to dismiss (the "Motion") filed by the Defendant, State of Florida, Department of Revenue (the "Department") and states as follows.

A motion to dismiss tests the legal sufficiency of the complaint and the "factual allegations of the complaint must be taken as true and all reasonable inferences therefrom construed in favor of the nonmoving party." *The Florida Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006). A court should not dismiss a complaint with prejudice "if it supports a cause of action on any ground." *Drakeford v. Barnett Bank of Tampa*, 694 So. 2d 822, 824 (Fla. 2d DCA 1977). The critical question for a court ruling on a motion to dismiss is "whether the nonmovant would be entitled to the requested relief assuming all allegations in its complaint are true." *Malden v. Chase Home Fin., LLC*, 312 So. 3d 553, 555 (Fla 1s DCA 2021).

The Department's Motion raises both threshold issues and Count-specific arguments for dismissal of JetBlue's Complaint. In this response, JetBlue first addresses the threshold issues and then proceeds to rebut the Count-specific arguments as laid out in the Motion.

I. THRESHOLD ISSUES

A. JetBlue has Standing in this Case Because it Meets Each of the Necessary Requirements.

It is well understood that there are three requirements for standing to sue. Those requirements are: (1) injury-in-fact; (2) a causal connection between the alleged injury and the conduct complained of; and (3) a showing that there is a substantial likelihood that the requested relief will remedy the injury-in-fact. *See e.g.*, *State v. J.P.*, 907 So. 2d 1101,1113 n.4 (Fla. 2004). Each of the elements of standing have been met in this case.

JetBlue has alleged that it suffered an injury-in-fact. Complaint at ¶¶ 8-9, 23, and 25 (alleging that this action relates to a corporate income tax assessment and the basis of the assessment). JetBlue also alleged a "causal connection" between the assessment and the "conduct complained of." Specifically, JetBlue claims that the disputed corporate income tax assessment was the direct result of the application of an unconstitutional statute. Complaint at ¶¶ 16-25 (explaining the basis for the Department's assessment was section 220.151(2))(c)). Finally, JetBlue alleged that the requested relief – *i.e.*, the invalidation of the assessment – will remedy the injury-in-fact. *See e.g.*, Complaint at ¶¶ 8-9, and 23.

The Department's more specific standing argument is that JetBlue has failed to allege sufficient facts to support its as-applied constitutional challenges. The Department urges that JetBlue's constitutional arguments are based on the claim that section 220.151(2)(c) is invalid because it includes areas within the geographic borders of Alabama or Georgia. Motion at ¶ 19. JetBlue lacks standing with respect to its as-applied constitutional challenges, the Department concludes, because JetBlue did not allege that any of its flights that originated or terminated in Florida flew over any portion of the Box[1] that is within the geographical boundaries of Alabama or Georgia. The Department's standing argument is premised on an incorrect characterization of JetBlue's constitutional claims and must therefore be rejected.

The crux of JetBlue's constitutional challenges is that section 220.151(2)(c) considers revenue miles flown ***outside*** the geographic borders of Florida as revenue miles "in this state."[2] JetBlue's Complaint explains the factual basis for its constitutional arguments succinctly:

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[1] JetBlue herein follows the convention of the Department in the Motion by referring to the geographic area described by section 220.151(2)(c) as "the Box."

[2] The Department makes much of the fact that the challenged statute has ben part of Florida law since 1971. *See e.g.*, Motion at ¶ 22. Although that is certainly true, almost all of the major airlines have challenged the law over the past two decades. Many of these airlines settled their disputes with the Department. *See* https://www.floridatrend.com/article/26728/airlines-fight-florida-box-formula-for-calculating-taxes (discussing the history of challenges to section 220.151(2)(c)). *See also UPS Worldwide Forwarding, Inc. v. Dep't of Revenue*, Case No. 2016 CA 000980 (Fla. 2d Cir. Ct. Sept. 7, 2016) (voluntary dismissal) and *American Airlines, Inc. v. Dep't of Revenue*, Case No. 2006 CA 001829 (Fla. 2d Cir. Ct. Nov. 1, 2008) (voluntary dismissal).

> 19. By contrast, substantial portions of the area encapsulated by the box are in international waters and fall outside the boundaries of both Florida and the United States. For example, the western boundary of the box extends approximately 280 miles beyond Indian Shores Beach outside St. Petersburg, Florida, and the box extends approximately 110 miles beyond Atlantic Beach outside Jacksonville on the eastern side. In addition, area contained within the box includes portions of the states of Alabama and Georgia.
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> 20. During the Period, JetBlue operated flights that originated from and/or terminated at Florida commercial airports that traveled outside the geographical boundaries of the state of Florida, but within the box as defined by section 220.151(2)(c), Florida Statutes.
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> **********
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> 23. The entire amount of the tax at issue in the NOPA relates to revenue miles added to the numerators of JetBlue's apportionment factors for the Period for miles flown outside the geographic boundaries of the state of Florida, but within the box as defined by section 220.151(2)(c), Florida Statutes.

The Department's standing argument misses the mark because it presumes that one or more of JetBlue's as-applied constitutional claims is dependent on a showing that JetBlue flights originating or terminating in Florida flew over the geographic boundaries of Alabama and Georgia. That is simply not the case.

JetBlue's constitutional arguments are predicated on the fact that Florida defines "revenue miles in this state" to include revenue miles flown outside the geographic boundaries of Florida.[3] The Complaint refers to the Box as including

[3] 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

areas within the geographic boundaries of Alabama and Georgia merely to demonstrate this indisputable fact. JetBlue has alleged facts sufficient to support these arguments. *See e.g.*, Complaint at ¶ 20.

Even if this Court were to conclude that the Department's position has merit, JetBlue should be permitted leave to amend its Complaint to resolve any perceived standing issue. *See e.g.*, *Webb v. Town Council of Town of Hilliard*, 766 So. 2d 1241, 1244–45 (Fla. 1st DCA 2000) (reversing the trial court and finding dismissal without prejudice was appropriate to remedy standing concerns).

B. JetBlue's Complaint Properly Presents a Facial Challenge to Section 220.151(2)(c).

JetBlue's Complaint raises both facial and as-applied challenges to the application of section 220.151(2)(c), Florida Statutes. In the Motion, the Department presents a general argument that the Complaint should be dismissed "to the extent it proposes a facial constitutional challenge to section 220.151(2)(c)." Motion at ¶ 68. In support, the Department cites *Cashatt v. State,* 873 So. 2d 430 (Fla. 1s DCA 2004). In *Cashatt,* the court explained that a statute is facially unconstitutional only when

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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.

"no set of circumstances exists in which the statute can be constitutionally applied." *Id.* at 434.

The Department maintains that JetBlue's facial challenges cannot meet the standard outlined in *Cashatt* and proceeds to outline an example. The example given by the Department, however, only serves to demonstrate the validity of JetBlue's facial constitutional claims.

In the Department's example, the taxpayer is an airline that transacts business solely in Florida and only conducts flights between Jacksonville, Florida, and Miami, Florida.[4] During the flights between Jacksonville and Miami, the plane travels over international waters outside of Florida's territorial waters. The Department contends that the application of section 220.151(2)(c) to the airline would apportion all of the taxpayer's income to Florida. It may be true that all of taxpayer's income would be subject to Florida tax, ***but not for the reasons advanced by the Department in the Motion***.

If, as posited in the example, the airline only engaged in flights within Florida, section 220.151(2)(c) ***would not apply at all***. It is a fundamental principle of state taxation that only taxpayers engaged in business in multiple tax jurisdictions are

[4] It is important to note that the facts of the Department's example would simply never occur. JetBlue is not aware of any airline in the history of air travel in the continental United States that restricted its operations solely to one state. Moreover, it is not clear why a flight from Jacksonville to Miami would ever need to fly over international waters. Hypothetical examples used to rebut a facial challenge must have at least some basis in reality to be effectual. *See e.g., Woods v. State*, 214 So. 3d 803, 807-808 (Fla. 1s DCA 2017) (refusing to apply the rule in *Cashatt* where the hypothetical example was "fanciful" and avoided the application of the challenged statute).

required (or permitted) to apportion their business income for purposes of state corporate income taxation. *See* Hellerstein, *State Taxation*, ¶ 8.05 (3rd ed. 2016) (outlining general apportionment principles).

In the Department's example, the airline never takes off or lands in a jurisdiction outside Florida and as such, the airline never establishes substantial nexus in a jurisdiction other than Florida.[5] Thus, pursuant to Fla. Admin. Code r. 12C-1.015(1), the example airline is deemed to be only doing business in Florida, it does not have the right to apportion its income, and it necessarily follows that 100% of the taxpayer's income is subject to tax in Florida.[6]

Section 220.15, Florida Statutes, defining Florida's apportionment rules, only applies to "taxpayers doing business within and without this state[.]" Because the taxpayer in the Department's example is only doing business in Florida, its income would not be subject to apportionment. As a result, section 220.151(2)(c) (providing apportionment rules for providers of airline transportation services) would never apply to the Department's hypothetical Florida-based taxpayer.

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5 *See* Fla. Admin. Code r. 12C-1.015(1)(b)5 "If no other state may tax a Florida corporation because of jurisdictional limitations due to the due process or commerce clauses, Public Law 86-272, or de minimis exceptions, the corporation will not be considered to be doing business within and without Florida."

6 Fla. Admin. Code r. 12C-1.015(1) "... corporations will apportion their adjusted federal income in accordance with section 220.15, F.S., only if they are doing business within and without Florida. A taxpayer will be considered doing business within and without this state if it has income from business activity which is taxable both within and without Florida."

In addition, the Department's hypothetical example must be rejected because it does not involve interstate commerce.[7] It is a truism that the Commerce Clause is implicated only when there is interstate commerce. In the Department's example, there is only one state at issue, Florida. For the Department's hypothetical to be relevant, it would need to include another state. However, including another state necessarily brings in the issue of multiple state taxation and the strictures of the Commerce Clause.

The Department's argument also ignores the fact that certain constitutional arguments raised by JetBlue are properly presented irrespective of the rule of law articulated in *Cashatt*. For example, JetBlue argues that section 220.151(2)(c) is unconstitutional under the Commerce Clause because it fails the internal consistency test as outlined by the U.S. Supreme Court. Complaint (Count IV) at ¶¶ 42-46.

Internal consistency involves a hypothetical exercise to determine if the taxpayer would be subject to multiple taxation assuming every state applied the challenged apportionment formula. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). 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").

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[7] *Woods v. State*, 214 So. 3d at 807-808 (refusing to apply the rule in *Cashatt* where the hypothetical example avoided the application of the challenged statute).

The test for internal consistency raises a facial constitutional challenge that cannot be refuted by presenting one-off examples such as those in the Department's motion. Internal consistency looks to the "structure of the tax" and "[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." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

C. JetBlue has Satisfied the Requirements of Florida Rule of Civil Procedure 1.071.

Florida Rule of Civil Procedure 1.071 provides that a party must "promptly" provide notice to the Attorney General's office of any filed "pleading, written motion, or other document drawing into question the constitutionality of any state statute[.]" In the Motion, the Department argues for dismissal of the Complaint because JetBlue failed to comply with the applicable rule. This contention is moot.

The clear purpose of Florida Rule of Civil Procedure 1.071 is to give the Attorney General's office an opportunity to participate in any litigation which may impact the constitutionality of a state law. *See Brinkmann v. Francois*, 184 So. 3d 504, 507 (Fla. 2016). In this case, on August 28, 2024, JetBlue did provide notice to the Attorney General's office (the "Notice") and filed verification of same with this Court. (Doc. #13).

The critical issue is whether the Notice was provided "promptly" to the Attorney General's office in order provide an opportunity to participate in the litigation. Here, the Notice was served on the Attorney General's office before the Department was required to file an answer in the case. There can be no question that

service of the Notice was "prompt" for purposes of Florida Rule of Civil Procedure 1.071.[8]

The Department cites two cases in the Motion relating to the application of Florida Rule of Civil Procedure 1.071. The first case is *Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038 (Fla. 2018). In that case, the taxpayer raised two separate constitutional challenges. The court stated that a notice of constitutional issue was served by the party "before the summary judgment hearing." *Id.* at 1042. However, that notice only addressed one of the two constitutional claims. The court held that the notice satisfied the procedural rule only for the specific constitutional issue raised in the notice. *Id.*

In this case, JetBlue served the Notice months before any dispositive hearing addressing its constitutional claims. As a result, the Notice was provided "promptly" to the Attorney General's office and the requirements of Florida Rule of Civil Procedure 1.071 have been met.

D. The Department Overstates the Significance of the *Frontier Airlines* Decision.

The Department repeatedly makes note of the fact that "nearly identical claims" were "already considered and rejected" in *Frontier Airlines, Inc. v. Dep't of Revenue*, Case No. 2023 CA 1433 (Fla. 2d Cir. Ct. Sep. 18, 2023). Yet, the *Frontier*

[8] It is clear that the intent of the rule is to provide notice in cases where constitutional challenges are raised in litigation between private parties. In the context of this case, the Attorney General's office almost universally represents the Department in litigation involving Florida's tax laws. In fact, attorney Michael Ayala of the Attorney General's office filed a Notice of Appearance in this case almost two weeks before the filing of the Motion. (Doc. #10). In addition, attorney Lisa Kuhlman of the Attorney General's office is listed in the signature block of the Motion. (Doc. #11).

ruling is of limited, if any, assistance to the Court in resolving the constitutional challenges in this case.

As an initial matter, the constitutional claims in *Frontier* differed from this case. In *Frontier*, the taxpayer filed a four Count complaint. Count I claimed that section 220.151(2)(c) violated the Supremacy Clause of the United States Constitution. Count II raised two Commerce Clause challenges – one arguing that the tax was not fairly related to the services and benefits provided by Florida and a second claiming that the statute violated the foreign Commerce Clause. Count III of Frontier's complaint claims that section 220.151(2)(c) contradicts the Florida Constitution's defined boundaries of the state. Lastly, Count IV raised a challenge under the Due Process Clause of the United States Constitution.

The Department filed a motion to dismiss in *Frontier*. It appears, however, that the Department did not secure a court reporter to attend the hearing on its motion to dismiss. As a result, it is not clear what arguments were raised or considered during that hearing. Following the hearing, Judge Marsh issued a one page Order dismissing Counts I, III, and IV of Frontier's complaint with prejudice. However, Judge Marsh dismissed Count II without prejudice thereby giving Frontier the opportunity to amend its complaint.[9] Judge Marsh provides no guidance in the Order regarding the basis for the dismissal of any of the four Counts.

[9] For reasons unknown, Frontier chose not to amend its Complaint in response to Judge Marsh's Order.

In this case, JetBlue filed a nine Count complaint challenging the constitutionality of section 220.151(2)(c). JetBlue has raised some of the same arguments, but there are also key differences. For example, Count Four of JetBlue's complaint argues that section 220.151(2)(c) fails the internal consistency test of the Commerce Clause. Count Five of the complaint contends that section 220.151(2)(c) fails the external consistency test of the Commerce Clause. Neither of these arguments is raised in *Frontier*.

Even if *Frontier* and this case were "nearly identical," and they are not, that decision is not controlling in this case. *State v. Bamber*, 592 So.2d 1129, 1132 (Fla. 2d DCA 1991) (stating that "[t]rial courts do not create precedent" and trial court rulings "are not binding, even in the adjacent courtroom").

II. COUNT-SPECIFIC ARGUMENTS

A. Counts I, II, and VIII are Consistent with the Fundamental Principles of Apportionment.

In the Motion, the Department misrepresents JetBlue's fundamental position in this case. According to the Department, JetBlue asserts in its Complaint that the Florida Legislature "devise[d] a devious scheme to extend the state's political boundaries in contravention of the federal and state constitutions and international law." Motion at ¶ 22. That, however, is an inaccurate characterization. JetBlue is ***not*** alleging in the Complaint that section 220.151(2)(c) extends Florida's geographic borders. JetBlue's core position is that, through the operation of section 220.151(2)(c), Florida is reaching outside its geographic borders to tax extraterritorial income. Put differently, Florida treats extraterritorial revenue miles as if they were "in this state"

for purposes of Florida's corporate income tax. This is a subtle distinction, but a crucially significant one with respect to the application of federal and state constitutions and international law.

It is well understood that a state is not permitted to impose 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." *Container Corp.*, 463 U.S. at 165-166. Even where such a connection does exist, however, a state is only permitted to tax an apportioned share of the multistate taxpayer's business income. *Id.* at 166.

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. *See e.g.*, Section 220.15, Florida Statutes. 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. *See* Section 220.151, Florida Statutes. The dispute in this case involves Florida's special apportionment formula for taxpayers providing airline transportation services.

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. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 445 (1940) (explaining the that Constitution does not impose a single apportionment formula on the states). Despite this "hands off" approach, the Court has made clear that once a state has chosen an apportionment formula, that formula must respect certain constitutional guardrails.

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 believes the formula to be unfair and/or prefers a different formula. *See e.g.*, *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). 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. *Container Corp.*, 463 U.S. at 169.

In this case, JetBlue is not arguing in Counts I, II, and VIII that it disagrees with Florida's ***approach*** to apportioning the income of providers of airline transportation services. To the contrary, JetBlue's sole argument is that one ***component*** of Florida's apportionment formula violates the Florida and United States Constitutions. Specifically, JetBlue contends that the express statutory language of section 220.151(2)(c) – which defines "in this state" to specifically include

areas outside Florida - makes clear that Florida is reaching outside its geographic boundaries to include extraterritorial activity in the numerator of the sales factor.[10]

The Department, misunderstanding JetBlue's position, notes that the U.S. Supreme Court has often refused to invalidate state apportionment ***formulas*** that, when applied to a specific taxpayer, results in taxable income which may reflect more than the taxpayer's in-state activity. In support, the Department refers to several cases including *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298 (1994), *Container Corp.*, *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980), and *Moorman.*

JetBlue agrees with the Department that the Court gives great latitude to the states regarding the choice of an apportionment formula. However, in this case, JetBlue is not arguing for a different apportionment formula for providers of airline transportation services. The crux of this dispute relates to whether the composition of a specific variable in Florida's apportionment formula passes constitutional muster.

In each of *Barclays*, *Container Corp.*, *Mobil Oil*, and *Moorman*, the taxpayer argued that a facially neutral apportionment formula was unconstitutional because it did not fairly approximate the taxpayer's business activity in the taxing state. Those cases are drastically different from this one where the apportionment factor – section 220.151(2)(c) – expressly attributes activity outside Florida as if it occurs "in

[10] The result is that the value sales factor grows larger thereby increasing a taxpayer's apportionment percentage and resulting Florida corporate income tax liability. *See* Section 220.15, Florida Statutes.

this state." Unlike the taxpayers in the cited cases, JetBlue's constitutional challenge is not premised on its subjective judgment that section 220.151(2)(c) taxes extraterritorial income, that fact is undeniably present in the statute's text.

The caselaw cited by the Department helps illustrate JetBlue's point. In *Barclays*, the taxpayer challenged California's apportionment formula under the Commerce Clause. 512 U.S. at 307-310. The taxpayer argued that the result of the application of California's facially neutral apportionment formula was an enhanced risk of double international taxation. *Id.* at 316-317. The Court concluded that California's choice of apportionment formula was constitutional. *Id.* at 330-331.

In *Container Corp.*, the taxpayer challenged the same California law that was the subject of the *Barclays* decision. The dispute in *Container Corp.* was whether the application of California's apportionment ***formula*** to the taxpayer's specific facts was fair and/or discriminated against interstate commerce. 463 U.S. at 169-170. The Court refused to invalidate California's apportionment formula. *Id.* at 184-185.

Mobil Oil dealt with a slightly different issue. In that case, the taxpayer argued that dividend income from certain of its subsidiaries should not have been included in its pre-apportionment tax base for purposes of calculating its Vermont corporate tax liability. 445 U.S. at 440. The taxpayer's position was that its foreign subsidiaries were not "unitary" with its domestic business and including the income of these subsidiaries in the pre-apportionment tax base was unconstitutional. *Id.* The Court rejected the taxpayer's constitutional challenges to the application of Vermont's apportionment formula. *Id.* at 449.

At issue in *Moorman* was the constitutionality of Iowa's single sales factor apportionment formula. The taxpayer argued that the use of a single sales factor to apportion multistate business income was unconstitutional under the Due Process Clause and the Commerce Clause because the use of different apportionment formulas across states results in duplicative state taxation. 437 U.S. at 271, 276. The Court, rebuffing the taxpayer's claims, again stated that the United States Constitution is "neutral" with respect to a state's choice of apportionment formula. *Id.* at 279.

In each of *Barclays*, *Container Corp.*, *Mobil Oil*, and *Moorman*, the taxpayer argued that a state's chosen facially neutral apportionment ***formula*** violated the Constitution by taxing income earned outside a state's borders. The Court sustained each state's apportionment formula emphasizing that a state is free to choose its own formula to apportion income of multistate businesses. This case, however, raises a distinctly different issue.

It is a fundamental constitutional precept that a state is not permitted to "tax[ ] value earned outside [the taxing state's] borders." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). Section 220.151(2)(c) undeniably taxes value – *i.e.*, revenue miles – earned outside Florida's geographic borders because it expressly defines "revenue miles in this state" to include revenue miles over Alabama, Georgia, and international waters.[11] JetBlue contends that the composition of the sales factor

[11] 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

of Florida's apportionment formula is invalid because it objectively seeks to tax value earned outside Florida's geographic borders in contravention of time-honored constitutional principles.

JetBlue's argument is so fundamental and well understood by state taxing authorities that it is rarely litigated. Florida's general apportionment formula applicable to the vast majority of corporate taxpayers defines the numerator of the sales factor to include "sales of the taxpayer ***in this state***." Section 220.15(5), Florida Statutes. For this purpose, "in this state" is not defined. The legislature rightly presumed that "in this state" means the geographic boundaries of the state.

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

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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.

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. 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 undeniable 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 related to the components of the sales factor numerator of Pennsylvania's apportionment formula. The facts of *FedEx* substantially 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)).

The issue 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.[12]

In sum, Counts I, II, and VIII are not concerned with second guessing Florida's choice of an apportionment ***formula***. To the contrary, these Counts highlight the fatal flaw with the ***composition*** of the sales factor as defined in section 220.151(2)(c).

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[12] There is one key difference between *FedEx* and this case. In *FedEx*, the Department of Revenue interpreted its facially neutral apportionment statute as including revenue miles outside Pennsylvania. Here, the challenged statute – section 220.151(2)(c) – is clear ***on its face*** that Florida includes revenue miles flown outside Florida's geographic borders.

This statute impermissibly and expressly treats revenue miles in Alabama, Georgia, and international waters as if they were revenue miles "in this state." 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.

B. Count III Presents a Valid Commerce Clause Claim Because Florida Lacks Substantial Nexus with Activity it Seeks to Tax.

It is well-settled as a matter of constitutional law that before a state can impose tax on a nonresident corporation, it must have a connection – or "nexus" – with both the taxpayer and the transaction or activity it seeks to tax. Count III does not question whether providers of airline transportation services that operate flights originating or terminating at Florida airports have income tax nexus with Florida. JetBlue agrees that the physical presence of an airline at a Florida airport is sufficient for Florida to have nexus over the airline.[13] The issue raised in Count III, however, is that Florida lacks Commerce Clause nexus over the ***activity it seeks to tax*** – *i.e.*, revenue miles flown outside the geographic borders of Florida.

In *Allied Signal, Inc. v. Director, Div. of Tax'n*, 504 U.S. 768 (1992), the Court was presented with a constitutional challenge to the imposition of New Jersey's corporate tax. The taxpayer, a nonresident of New Jersey, sold stock generating a

[13] In the Motion, the Department cites to *South Dakota v. Wayfair, Inc.*, 585 U.S. 162 (2018), in support of its position that Count III should be dismissed. There can be no dispute that *Wayfair* was concerned with whether the ***taxpayer*** had sufficient constitutional nexus with South Dakota for the state to impose sales tax. As such, *Wayfair* has no relevance to this case.

capital gain. The taxpayer did not challenge the fact that it had nexus with New Jersey based on its presence in the state. The issue in dispute was whether New Jersey had nexus over the transaction – *i.e.*, the sale of the stock – that took place outside the state. The Court made clear that "in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." *Id.* at 778. *See also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (stating that the decisions of the Court "have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State").

While it is certainly the case that Florida has a substantial nexus with revenue miles over the geographic boundaries of the state, there should be no debate that Florida lacks any connection with revenue miles traversed ***outside*** the state. The fact that airlines maintain a physical presence in Florida speaks to substantial nexus over the ***taxpayers***. As explained by the Court in *Allied-Signal*, that is a decidedly different question than whether or not Florida has substantial nexus over the activity engaged in by airlines outside Florida's geographic borders.[14] 504 U.S. at 778 (instructing that nexus over the taxpayer and the taxpayer's activities are two different constitutional concepts).

[14] It is important to note that in another section of the Motion, the Department explicitly recognizes this distinction between nexus over the taxpayer and the taxpayer's activity. *See* Motion at ¶ 39.

C. JetBlue has Alleged Sufficient Facts to Support the Constitutional Claims in Counts IV, V, VI, and VII.

The arguments in the Motion relating to Counts IV, V, VI, and VII confuse the difference between an as-applied and facial constitutional challenge. The Department's defenses are further clouded by the erroneous belief that Florida's decision not to tax flyover miles somehow saves section 220.151(2)(c) from constitutional scrutiny.

1. JetBlue has Alleged Sufficient Facts in Count IV to Support the Facial Challenge of Internal Consistency under the Commerce Clause.

The Department's argument relating to Count IV begins by claiming that the test for fair apportionment under the Constitution requires that the taxpayer prove that the income sought to be taxed is "out of all proportion to the business transacted ... in that State." Motion at ¶ 43 (citing *Container Corp.*, 463 U.S. at 170). The Department claims that Count IV must be dismissed because it does not allege any facts claiming that the income tax liability in dispute is out of all proportion to the business transacted by JetBlue in the state. The Department fails to realize, however, that the apportionment claim referenced in *Container Corp.* is concerned with an ***as-applied*** constitutional challenge. Count IV raises a ***facial*** constitutional attack.

Count IV claims that the application of section 220.151(2)(c) fails the internal consistency test under the Commerce Clause. It is well understood that an internal consistency claim is a ***facial*** constitutional challenge. *Jefferson Lines*, 514 U.S. at 185 (explaining that internal consistency "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 ... would place interstate commerce at a disadvantage[.]").

Paragraph 44 of Count IV correctly outlines the test for internal consistency under the Commerce Clause. The Department does not claim that JetBlue misstates the proper test. Paragraph 45 of Count IV explains in detail how the application of the internal consistency test to section 220.15(2)(c) results in a constitutional violation. No additional facts are needed to support this facial constitutional challenge under the Commerce Clause.

The Department also maintains that there can be no internal consistency violation because there is no risk of double taxation. This is so, the Department argues, because Florida does not apportion income based on flyover miles. "Flyover miles" are miles flown over Florida with respect to flights that neither originate or terminate in the state. Because Florida does not apportion income based on flyover miles, the Department asserts, "it is highly unlikely that any airline would face a state income tax burden on more than its total income." Motion at ¶48. The Department's defense founded on the exclusion of flyover miles is unsound.

According to the Department, there can be no risk of double taxation because if every state adopted the apportionment methodology in section 220.151(2)(c) "much – if not most – airline income would not be taxed by any state." Motion at ¶48. This is true, the Department explains, because no state would include flyover miles in the

sales factor numerator. As a result, the Department concludes, an airline would never be taxed on more than its total income.

What the Department ignores is that ***no state*** may tax flyover miles. This fact is not a matter for debate. Federal law specifically exempts flyover miles from tax. 49 U.S. Code § 40116(b), which addresses state taxation of air commerce, specifically states "A State or political subdivision of a State may levy or collect a tax on, or related to, a flight of a commercial aircraft or an activity or service on the aircraft only if the aircraft takes off or lands in the State or political subdivision as part of the flight." This federal law codified the holdings of several decisions of the U.S. Supreme Court making clear that the state taxation of flyover miles is constitutionally objectionable. *See e.g., United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 631 (1973) (state has no nexus to tax an airplane based solely on its flight over the state); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302–304 (1944) (Jackson, J., concurring) (same). The fact that no state can constitutionally tax flyover miles is critical to understanding the applicable test for internal consistency in this case.

If no state can tax flyover miles, then those miles are excluded from the double taxation analysis. What remains are the revenue miles that states actually have the constitutional power to tax. With respect to these remaining flyover miles, it is clear that section 220.151(2)(c) fails the internal consistency test. If every state adopted section 220.151(2)(c), then every state would impose tax on revenue miles outside its geographic borders. The United States map depicting the resulting taxing scheme applicable to providers of airline transportation services would resemble a Venn

diagram on steroids. There would be countless overlaps of taxing jurisdictions imposing tax on the very same revenue miles. Double taxation would become the rule and not the exception.

There is an additional reason to reject the Department's argument on this point. The Department's position is that since Florida does not include flyover miles in the sales factor numerator it is therefore acceptable to include revenue miles flown outside the state in the sales factor numerator of airlines. However, the fact that Florida is prevented by federal law from taxing flyover miles is not a "permission slip" for the state to impose tax on extraterritorial income. Neither 49 U.S. Code § 40116 nor the United States Constitution contain a "safe harbor" permitting such an act.

As explained in the Complaint, if every state adopted section 220.151(2)(c), the result would be a veritable minefield of double, triple, and quadruple taxation of airlines. Attached hereto are three exhibits. **Exhibit A** is a unmarked map of the southeastern states. **Exhibit B** is the same map of the southeastern states with quadrilaterals (squares and rectangles) drawn around each state in the matter required by section 220.151(2)(c).[15] **Exhibit C** is the same map of the southeastern states with color-coded references to areas of multiple taxation by the states. Red

[15] The manner which the Florida Legislature constructed the Box referenced in section 220.15(2)(c) is relatively straightforward. The parameters of the Box are simply the northernmost point, the easternmost point, the southernmost point, and the westernmost point of the geographic area around the state. **Exhibit B** and **Exhibit C** use this same approach to prepare "boxes" around each of the states included in the map southeastern states.

shading reflects ***double*** taxation by the states, blue shading signifies ***triple*** taxation by the states, and yellow shading indicates ***quadruple*** taxation by the states.

2. JetBlue has Alleged Sufficient Facts in Count V to Sustain the External Consistency Argument under the Commerce Clause.

A state tax must be externally consistent to survive scrutiny under the Commerce Clause. 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.

After reciting the applicable test for external consistency under the Commerce Clause, JetBlue's Complaint alleges a series of facts that support its claim that section 220.151(2)(c) is unconstitutional. Specifically, JetBlue claims that through section 220.151(2)(c) Florida is imposing tax "with respect to air travel outside the geographical border of the state of Florida." Complaint at ¶ 50. JetBlue further alleges that the taxation of air travel outside the geographical border of Florida "is outside the scope of the in-state activity conducted by JetBlue." *Id.* These are the only factual allegations necessary to support JetBlue's external consistency argument. Tellingly, the Department does not state exactly what factual allegations are missing from Count V.

The Department counters the external consistency argument by arguing that "[f]ar more expansive taxes" have been found to be constitutional. In support, the Department cites to *Goldberg*. The Department's reliance on *Goldberg* is misplaced.

At issue in *Goldberg* was an Illinois tax on the retail purchase of an interstate phone call. The tax was unapportioned – meaning that it taxed the full value of the phone call. 488 U.S. at 260. The taxpayer argued that the tax failed the external consistency test. In support, the taxpayer claimed that there was a risk of multiple taxation. *Id.* at 262. The Court rejected the taxpayer's argument noting, *inter alia*, that the Illinois law had a credit provision to avoid actual multiple taxation. *Id.* at 264. If the taxpayer were in fact subject to tax on the same call by another state, Illinois would provide the taxpayer with a tax credit against the Illinois tax.

Florida law does not provide airlines with a tax credit in the event that another taxing jurisdiction imposes tax on the same revenue miles outside the geographic borders of Florida, but within the Box. As a result, the feature that saved the Illinois law in *Goldberg* from an external consistency challenge is absent in this case.

3. JetBlue has Alleged Sufficient Facts in Count VI to Establish that the Florida Tax is Not Fairly Related to Services Provided by Florida to JetBlue.

A state tax must be fairly related to the services provided by the taxing state in order to survive scrutiny under the Commerce Clause. *Complete Auto*, 430 U.S. at 279. In Count VI, after outlining the specific constitutional requirement under the Commerce Clause, JetBlue alleges that Florida does not provide "services to aircraft flying outside the geographical border of the state of Florida." Complaint at ¶ 53. Because this factual allegation is true, JetBlue concludes, Florida's apportionment methodology for taxing providers of airline transportation services violates the Commerce Clause.

The Department further defends its position by citing to cases where taxing authorities were successful in defending similar constitutional challenges. Motion at ¶ 54. However, whether the Department correctly cites these decisions is beside the point. These decisions have no bearing on whether JetBlue has pled sufficient facts to support its constitutional claim.

The Department additionally notes all of the state services provided to airlines when such airlines are physically present in the state. However, JetBlue does not dispute this fact. The question raised in Count VI is exactly what services does Florida provide to airlines ***outside*** the geographic border of the state?

The factual allegations in Count VI, if established as true, are sufficient to support JetBlue's claim that the tax imposed is not fairly related to the services provided by Florida to JetBlue. JetBlue has alleged sufficient facts to meet the requisite pleading standard with respect to Count VI.

4. JetBlue has Alleged Sufficient Facts in Count VII to Establish that the Florida Tax Violates the Foreign Commerce Clause.

Article I, Section 8, of the United States Constitution gives Congress the power "to regulate commerce with foreign nations[.]" This delegation of power to Congress is commonly referred to as the foreign commerce clause. A state tax violates the foreign commerce clause where it prevents the federal government from speaking with "one voice." *See Japan Lines, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). A taxpayer establishes that state tax prevents the federal government from speaking with "one voice" by alleging that the tax "either implicates foreign policy issues which

must be left to the Federal Government or violates a clear federal directive." *Container Corp.*, 463 U.S. at 194.

In Count VII, JetBlue alleges that Florida's taxation of flights over international waters violates the foreign commerce clause because this territory is solely within the federal government's authority to regulate. Complaint at ¶ 57. Through these allegations JetBlue unambiguously asserts that Florida's taxation of such flights "implicates foreign policy issues." *Container Corp.*, 463 U.S. at 194.

CONCLUSION

For the foregoing reasons, JetBlue respectfully requests that this Court DENY the Department's motion to dismiss the complaint.

Dated: October 16, 2024

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by Florida's E-Filing Portal on October 16, 2024, to all counsel of record.

/s/ *Michael J. Bowen*
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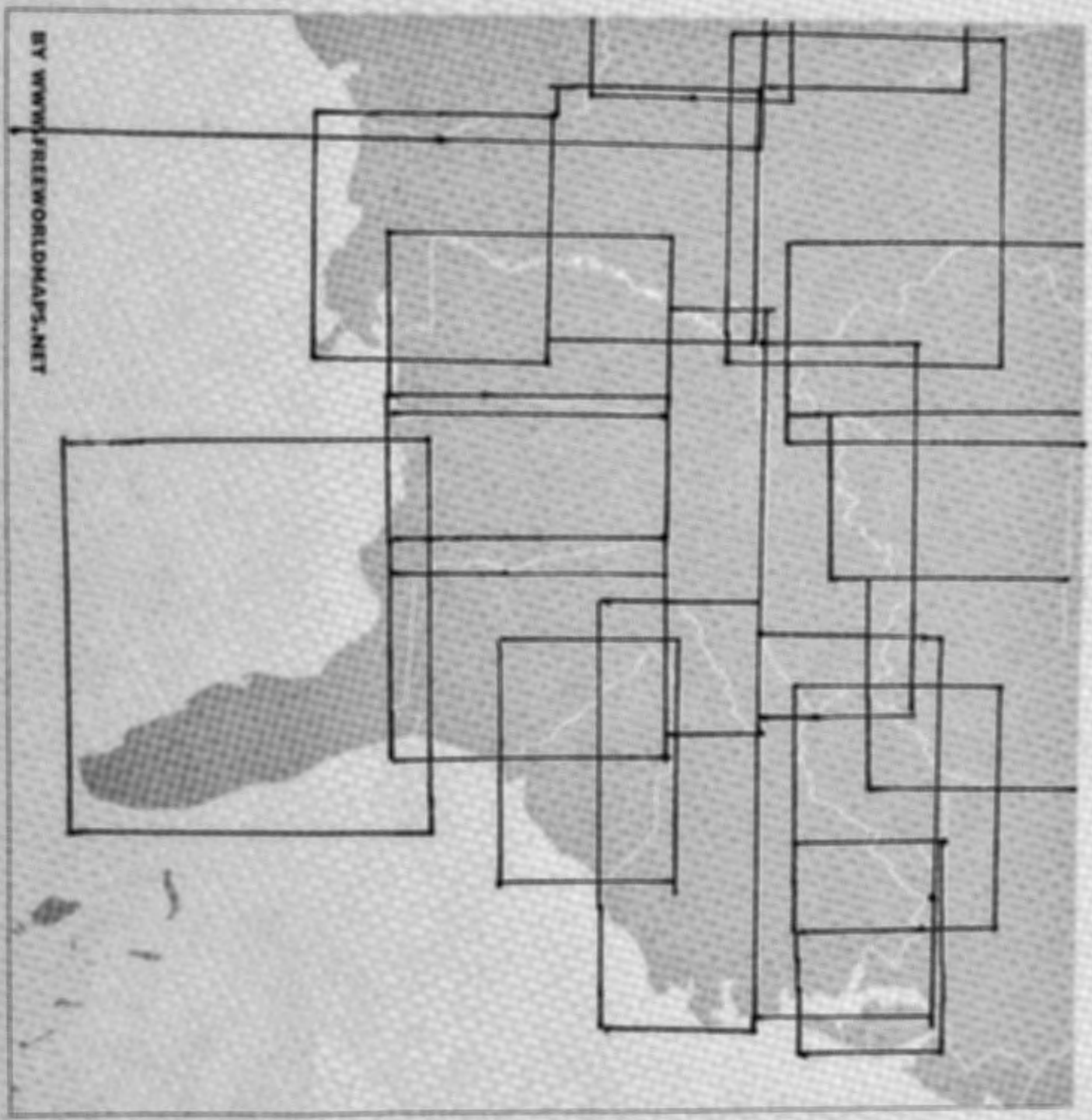
EXHIBIT

A



EXHIBIT

B

EXHIBIT C