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

JETBLUE AIRWAYS CORPORATION & SUBSIDIARIES,

Plaintiff,

v. Case No. 2024 CA 1177

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Defendant.
_____/

MOTION TO DISMISS COMPLAINT

The Defendant, State of Florida, Department of Revenue ("Department"), respectfully requests this Court to dismiss the Complaint filed by Plaintiff, JetBlue Airways Corporation & Subsidiaries ("JetBlue"), for a failure to state a cause of action, for a lack of standing, and for failure to comply with the notice and service requirements of Florida Rule of Civil Procedure 1.071 regarding constitutional challenges to state statutes. In support, the Department states:

BACKGROUND

1. On July 19, 2024, JetBlue filed its Complaint seeking in part a declaration that Florida's statutory formula for apportioning airline income is unconstitutional both facially and as applied to JetBlue.

2. The apportionment formula apportions an airline's income to Florida by multiplying that airline's taxable base (often adjusted federal income) by an apportionment factor defined as "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." § 220.151(2), Fla. Stat. A "revenue mile" with respect to transportation "is the transportation of one passenger [...] the distance of 1 mile for a consideration." § 220.151(2)(a), Fla. Stat.

3. For airlines, the term "revenue miles in this state" is a defined term and means:

> 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.

§ 220.151(2)(c), Fla. Stat. Colloquially, this area is sometimes referred to as "the Box."

4. It is undisputed that "fly-over" miles—for flights that merely fly over the Box but do not originate or terminate in Florida—were excluded from the apportionment factor's numerator as it relates to JetBlue's assessment. *See* Complaint at ¶ 29. JetBlue accordingly does not allege that the apportionment formula apportioned JetBlue's income to Florida based on flights that neither originated nor terminated in Florida.

5. Rather, JetBlue objects to the apportionment formula because the numerator used in the apportionment factor—which consists of the statutorily defined "revenue miles in this state"—apportions a larger portion of the income from flights to and from Florida than would be the case if the apportionment

factor included in its numerator *only* those miles flown over the geopolitical boundaries of the state established in the Florida Constitution.

6. JetBlue therefore contends that section 220.151(2)(c), Florida Statutes violates: (1) Article II, Section 1 of the Florida Constitution, which defines Florida's boundaries; (2) the Supremacy Clause of the United States Constitution by "extending [Florida's] jurisdiction outside the territory of the United States"; (3) the Dormant Commerce Clause, for a lack of nexus, fair apportionment, and no fair relation to the services provided by the taxing state; (4) the dormant Foreign Commerce Clause, for prohibiting "the federal government from speaking with one voice"; (5) and the Due Process Clause of the 14th Amendment because of a purported lack of a "definite link" or "minimum connection" between the income tax assessed and aircraft flying outside of Florida's geographical border. Complaint at pgs. 8-13.

7. The Complaint ultimately suggests that the alleged constitutional infirmities render the apportionment factor and formula unconstitutional both on their face and as applied to JetBlue.

LEGAL STANDARDS

8. On a motion to dismiss, the burden remains on JetBlue to sufficiently state a claim for relief. Although well-pleaded factual allegations are presumed to be true for the purposes of a motion to dismiss, conclusory factual allegations are not entitled to any weight. *Stein v. BBX Capital Corp.*, 241 So. 3d 874, 876 (Fla. 4th DCA 2018).

9. A tribunal also "need not accept internally inconsistent factual claims, conclusory allegations, unwarranted deductions, or mere legal conclusions made by a party." *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citation omitted); *Maiden v. Carter*, 234 So.2d 168, 170 (Fla. 1st DCA 1970).

10. The Florida Rules of Civil Procedure require more detailed factual pleadings than the general notice standards that govern federal proceedings. In Florida actions, "[m]ere legal conclusions are fatally defective unless substantiated by sufficient allegations of ultimate fact; and every fact essential to the cause of action must be pleaded distinctly, definitely, and clearly." *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1986); *Louie's Oyster, Inc. v. Villaggio Di Las Olas, Inc.*, 915 So. 2d 220, 222 (Fla. 4th DCA 2005) ("litigants must state their pleadings with sufficient particularity for a defense to be prepared.") (citations omitted).

11. Additionally, a party raising a claim must allege sufficient facts to establish standing to raise that claim. The party must show that it is a real party in interest with respect to each claim raised and that it has an articulable interest in the judicial resolution of that claim. *Vaughan v. First Union Nat'l Bank*, 740 So. 2d 1216, 1217 (Fla. 2d DCA 1999) ("Any litigant must demonstrate that he or she has standing to invoke the power of the court to determine the merits of an issue.").

12. While lack of standing may be raised as an affirmative defense, it may also be raised as a basis to dismiss a claim when a complaint does not allege

sufficient facts to establish standing to raise that claim. *Webb v. Town Council of Hilliard*, 766 So. 2d 1241 (Fla. 1st DCA 2000) (finding that dismissal without prejudice was appropriate to address a failure to sufficiently allege standing).

13. Dismissal of a claim with prejudice is appropriate where amendment would prejudice the opposing party, the amendment process has been abused, or amendment would be futile. *Morgan v. Bank of N.Y. Mellon*, 200 So. 3d 792, 795 (Fla. 1st DCA 2016).

ARGUMENT

14. JetBlue's Complaint raises nearly identical claims to those already considered and rejected by this Court in *Frontier Airlines, Inc. v. Dep't of Revenue*, Case No. 2023 CA 1433 (Fla. 2d Cir. Ct. Sep. 18, 2023) (Order Dismissing Complaint); *see also* Complaint in *Frontier Airlines, Inc.*, filed April 28, 2023.

15. JetBlue's Complaint misunderstands principles of state income tax apportionment and is founded on conclusory legal assertions devoid of supporting factual allegations. Thus, the Complaint is insufficient under Florida's pleading standards and should be dismissed in its entirety.

16. Counts I, II, and VIII fail to state a cause of action and cannot be cured via amendment, and so should be dismissed with prejudice. They each are based on the same faulty premise that section 220.151(2)(c), Florida Statutes, expands the state's political boundaries, which it does not purport to do. That section merely defines an apportionment factor to apportion taxable income for specific industries.

17. Count III should also be dismissed with prejudice because it cannot be cured via amendment. Count III charges that "aircraft flying outside the geographic boundaries of Florida are not engaged in an activity having the requisite substantial nexus with the state" in violation of the dormant Commerce Clause. However, as the Complaint admits, the "dispute in this case relates solely to the inclusion [according to the Box] of revenue miles in the numerator of JetBlue's apportionment formula for flights *originating or terminating in Florida.*" Nexus is readily satisfied for purposes of the Commerce Clause for these flights, where JetBlue by its own allegations has availed itself of the privilege of carrying on business activities in the state with respect to these flights. None of them could exist without originating or terminating in Florida.

18. Counts IV, V, VI, and VII should also be dismissed. These counts raise conclusory allegations that section 220.151(2)(c) violates the dormant Commerce Clause of the United States Constitution by not being fairly apportioned and fairly related to the services or benefits provided by the state, and because section 220.151(2)(c) supposedly interferes with foreign commerce. No specific facts are alleged to support these contentions aside from the general allegation that section 220.151(2)(c), Florida Statutes, includes in its apportionment factor miles that are not located within the political boundaries of the state.

19. To the extent that the Complaint relies on any allegation that the Box describes an area that is within the jurisdiction of Alabama or Georgia, and that this grounds for invalidation JetBlue has failed to allege standing to

challenge the validity of the Box on this basis. JetBlue has not alleged that any JetBlue flights that originate or terminate in Florida fly over any portion of the Box that is allegedly within the political boundaries of any other state, such that JetBlue would be affected in any manner by any such alleged overlap.

20. JetBlue also fails to properly present a facial constitutional challenge to section 220.151(2)(c). To do so, the Complaint would have to demonstrate through its allegations that there is "no set of circumstances...under which the statute would be valid." *Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008). The Complaint does not satisfy this requirement, and should be dismissed to the extent it purports to challenge the facial validity of section 220.151(2)(c).

21. Finally, JetBlue's failure to comply with the notice and service requirements of Florida Rule of Civil Procedure 1.071, applicable to constitutional challenges to state statutes, bars the Court from hearing JetBlue's constitutional challenges to section 220.151(2)(c), Florida Statutes. *Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1042 (Fla. 2018) ("failure to comply with rule 1.071 bars consideration of a claim that would result in the striking of a state statute as unconstitutional.") (citations omitted).

I. Counts I, II, and VIII Misunderstand the Concept of Income Apportionment for State Income Tax Purposes and Cannot be Remedied by Amendment.

22. Contrary to the Complaint's allegations, the Florida Legislature in 1971 did not devise a devious scheme to extend the state's political boundaries in contravention of the federal and state constitutions and international law.

Florida's airline income apportionment factor simply does not expand the territorial boundaries of the state as JetBlue contends. Counts I, II, and VIII of the Complaint miss this obvious point entirely and cannot be amended to fix this fault, which is the sole premise of those counts.

23. Apportionment is a mechanism by which a state may identify, for taxability purposes in that state, a portion of the entire income of an entity that is engaged in commerce across many jurisdictions. Apportionment contrasts to the jurisdictional allocation of income, which attempts to assign discrete income entirely to one jurisdiction through separate accounting. *See, e.g., Roger Dean Enters. v. State*, 387 So. 2d 358, 361 (Fla. 1980) (distinguishing between allocation and apportionment).

24. Allocation may not be feasible in many instances, for example where the activities of a multistate entity outside of a state may drive the income generated within the state, and conversely where the activities within a state may generate income outside the state. *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (noting that apportionment "'rejects geographical or transactional accounting,' which is 'subject to manipulation' and does not fully capture 'the many subtle and largely unquantifiable transfers of value that take place among components of a single enterprise.'") (citing *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164-65 (1983)).

25. Because of the limitations of income allocation or separate accounting, apportionment has long been the primary tool that states use to define what share of a multistate business's total income can be subject to

taxation in that state. *Container Corp. of Am.*, 463 U.S. at 165 (noting that apportionment "has now gained wide acceptance"). The United States Supreme Court has routinely rejected the suggestion that apportionment of business income of a unitary business enterprise doing business across state and national lines must strictly look to geographical boundaries when determining the source of that income. Such an approach would "fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale." *Container Corp. of Am.*, 463 U.S. at 181 (further noting that "[b]ecause these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.'").

26. In sum, even an apportionment formula that takes into account extraterritorial business income to determine the income tax liability within a state is simply *not an attempt to expand the geopolitical boundaries* of the state, notwithstanding that the validity of an apportionment formula may nevertheless be questioned under the Due Process and Commerce Clauses. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425 (1980) (rejecting a taxpayer's claim that dividend income from a foreign subsidiaries could not be subject to apportionment by Vermont); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159 (1983) (allowing the property of foreign subsidiaries to be apportioned as part of the franchise tax base); *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 303, 312, fn. 10 (1994) (holding that while the Due Process and Commerce Clauses preclude a state from imposing on non-residents an income

tax that taxes the value earned outside the state's borders, the state could "reference the income of corporations worldwide with whom those taxpayers are closely intertwined in order to approximate the taxpayer's California income" subject to apportionment).

27. An apportionment formula is not per se unconstitutional merely because it may result in the taxation of some income that does not have its source in the taxing state. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978) ("appellant's claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing state is incorrect.").

28. Florida's 1971 adoption of the income apportionment factor in section 220.151(2)(c), Florida Statutes, was not an attempt to increase Florida's territorial boundaries beyond those recognized under the state and federal constitutions any more than the apportionment formulas in *Mobil Oil*, *Container Corp. of Am.*, or *Barclays Bank* were attempts by Vermont and California respectively to annex sovereign countries, or the formula in *Moorman* was an attempt by Iowa to annex Illinois. The apportionment factor in section 220.151(2)(c) is merely one component of a broader apportionment formula devised to reasonably apportion the income of airlines that derive income within and without the state, such as JetBlue, and that may otherwise be taxed by the state.

29. JetBlue's Counts I, II, and VIII are all based on the incorrect premise that an apportionment formula, such as section 220.151(2)(c), Florida Statutes,

can be equated with a state's political boundaries, and that Florida's formula is an attempt to enlarge the political boundaries of the state in violation of: (1) the federal Supremacy Clause; (2) Article I, Section 2 of the Florida Constitution; and (3) federal process protections.

30. This Court has recently considered and rejected identical arguments in *Frontier Airlines, Inc. v. Dep't of Revenue*, and implicitly recognized the obvious—section 220.151(2)(c) is merely a component of an apportionment formula, not an attempt by the state of expand its political boundaries. Case No. 2023 CA 1433 (Fla. 2d Cir. Ct. Sep. 18, 2023) (Order Dismissing Complaint); *see also* Complaint in *Frontier Airlines, Inc. v. Dep't of Revenue*, filed April 28, 2023.

31. Because JetBlue's premise on this point is fundamentally flawed and cannot be remedied with amendment, Counts I, II, and VIII should be dismissed with prejudice.

II. Because Nexus Is Readily Satisfied, Count III Should be Dismissed with Prejudice.

32. Count III's conclusory contention that the Notice of Proposed Assessment violates the Commerce Clause's nexus requirement misses the mark entirely, and is contradicted by the remainder of the Complaint.

33. Physical presence within a state is not a required element of nexus under the dormant Commerce Clause. *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 188 (2018) (holding that a physical presence rule for nexus purposes is "unsound and incorrect"—"nexus is established when the taxpayer 'avails itself of the substantial business of carrying on business' in that jurisdiction.")(*citing*

Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009)). Section 220.151(2)(c), as applied to JetBlue's assessment, easily meets this test according to the Complaint itself.

34. JetBlue admits that the "dispute in this case relates *solely* to the inclusion of revenue miles in the numerator of JetBlue's apportionment formula for flights *originating or terminating in Florida* where such flights travel outside the geographical boundaries of Florida, but within the box as defined by Section 220.151(2)(c), Florida Statutes." Complaint at ¶ 25 (emphasis added). As a result, the apportionment numerator and assessment at issue do not include flyover miles, or miles "flights that fly over the geographical boundaries of the state of Florida, but neither originate or terminate in the state." Complaint at ¶ 24.

35. JetBlue also admits to maintaining a substantial presence in this state vis-à-vis the Florida flights considered in the apportionment process— "JetBlue operates flights originating from and/or terminating at several Florida-based commercial airports." Complaint at ¶ 13.

36. In short, the methodology challenged by JetBlue only uses a fraction of miles from those flights *to and from Florida*—flights directly connected to Florida and events where JetBlue transacts significant business in Florida—for the purpose of apportioning JetBlue's unitary business income for income tax purposes. This methodology readily satisfies nexus for purposes of the dormant Commerce Clause.

37. Because Count III is fatally defective and cannot be cured, it should be dismissed with prejudice.

III. Counts IV, V, VI, and VII Do Not Properly Allege a Commerce Clause Violation.

38. Florida's pleading standards require that a complaint include more than conclusory legal allegations. The specific factual predicates underlying a legal claim must be set out plainly. *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 716 (Fla. 1st DCA 1986). Counts IV, V, VI, and VII do not satisfy this requirement—while these counts allege that section 220.151(2)(c) violates the dormant Commerce Clause, they lack specific factual allegations to support such a finding.

39. A state tax can be challenged under the dormant Interstate Commerce Clause if the challenger demonstrates that the tax does not tax an activity sufficiently connected to the state (i.e., there is no nexus), the tax is not fairly apportioned, the tax is discriminatory, or the tax is not fairly related to the benefits provided to the taxpayer. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

40. Additionally, a state tax law may be invalidated under the dormant Foreign Commerce Clause if it restricts the ability of the federal government to "speak with one voice when regulating commercial relations with foreign governments." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979).

41. Counts IV, V, VI, and VII assert that section 220.151(2)(c) results in an income tax that is not fairly apportioned or fairly related to the services and benefits provided by Florida, and that the Box prevents the United States from "speaking with one voice" on the international stage in contravention of *Japan*

Line's requirements. Complaint at ¶¶ 42-57. However, JetBlue puts forth only conclusory allegations in support of its claims in these counts.

A. Counts IV and V Do Not Allege Sufficient Facts to Show That JetBlue's State Income Tax Was Not Fairly Apportioned.

42. The Complaint does not allege sufficiently specific facts to show that the challenged apportionment methodology resulted in an income tax liability for JetBlue that was unfairly apportioned.

43. An apportionment formula will be struck down as unfairly apportioned if the challenger shows by "'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted...in that State,' or has 'led to a grossly distorted result.'" *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 170, *citing Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931); *Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920).

44. Counts IV and V do not allege any specific facts to contend that JetBlue's state income tax liability in Florida was out of all proportion to the business transacted in the state or was grossly distorted.

45. Courts may examine whether a tax is internally and externally consistent to determine whether the apportionment methodology is fair.

46. Internal consistency is satisfied for income tax apportionment when, if the formula were adopted by all jurisdictions, it would result in no more than all of the entity's income being taxed. However, the *mere risk* of multiple taxation

is insufficient to demonstrate a per se lack of internal consistency. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983) (rejecting the notion that the commerce clause automatically requires the invalidation of any apportionment method that might lead to double taxation).

47. The risk of double taxation must be more than highly speculative. And, potential double taxation is problematic under the Commerce Clause analysis if the scheme is otherwise *impermissibly discriminatory* to interstate (or foreign) commerce. *Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 565-66 (2015). The Complaint does not allege sufficient facts to give rise to a claim of internal inconsistency regarding the Box.

48. To the contrary, if all jurisdictions were to adopt an airline income apportionment formula like Florida's it is highly unlikely that any airline would face a state income tax burden on more than its total income. That is because Florida's formula does not apportion income based on flyover miles, as the Complaint admits. As a result, if all states were to adopt an airline miles methodology like section 220.151(2)(c), much—if not most—airline income would not be taxed by any state. That portion of an airline's income equal to a factor comprised of all "flyover" revenue miles, divided by total revenue miles, would be untaxed by any jurisdiction.[1] In other words, not only would double taxation be avoided in almost every conceivable instance of airline operations, but total state

[1] The Complaint at Exhibit C does not accurately reflect the area delineated in section 220.151(2)(c). The northern land boundary of the Box is coextensive with Florida's boundary, and the western boundary lies at 87°30′ West, which *excludes* the westernmost portion of Florida and does not capture any portion of Alabama, contrary to what is alleged in the Complaint.

income taxation would almost certainly never even be applied against the airline's total income.

49. The Complaint also does not properly allege that section 220.151(2)(c) lacks external consistency. External consistency is satisfied if the factor or factors used "reflect a reasonable sense of how income is generated." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 169. The inquiry is not formalistic, but rather looks to the practical effects of the tax. *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373-74 (1991).

50. The Complaint suggests—in conclusory fashion—that external consistency is not satisfied because the apportionment formula "seeks to tax that portion of the revenues earned with respect to air travel outside the geographical border of the state." Complaint ¶ 50. This assertion is contradicted by the remainder of the Complaint and JetBlue's description of the challenged apportionment formula, which concedes that the method only looks to a portion of revenue for flights to or from the state. Section 220.151(2)(c) is not an imposition of tax on *revenues* earned outside of the state—it is a component of a formula designed to apportion to Florida a fraction of all of JetBlue's unitary business *income* to Florida.

51. Far more expansive taxes have been found to be fairly apportioned and externally consistent. For example, in *Goldberg v. Sweet*, cited in the Complaint, the United States Supreme Court upheld a state communications tax imposed on the *entire* gross charge for on any telecommunication originated or terminated in Illinois was externally consistent. 488 U.S. 252, 262-265 (1989).

That tax was upheld even though the electronic signals carrying that telecommunication could travel almost entirely out of state. The Box, challenged here, is far less ambitious but just as valid—it uses for apportionment purposes only a fraction of the revenue miles generated by flights originating or terminating in Florida. The challenged methodology is externally consistent—holding all else constant, it would increase Florida's apportioned share of income with a corresponding increase in flights to or from Florida, a direct link to the state and JetBlue's income producing activity (i.e. flying passengers to and from Florida).

52. Ultimately, Counts IV and V contain no specific facts directed to whether Florida's methodology is internally or externally inconsistent, or more importantly that the methodology resulted in a grossly distorted income tax liability or one that was out of all proportion to the business JetBlue transacted in Florida. Counts IV and V therefor fail to state a cause of action for unfair apportionment under the Commerce Clause.

B. Count VI Does Not Allege Sufficient Facts to Show That JetBlue's State Income Tax is Not Fairly Related to the State's Services.

53. A challenger bears a heavy burden to demonstrate that a state tax is invalid under the Commerce Clause for not being fairly related to the services provided by the taxing state. "The purpose of this test is to ensure that a State's tax burden is not placed upon persons who do not benefit from services provided by the State." *Goldberg v. Sweet*, 488 U.S. 252, 266-67(1989). JetBlue's Count VI does not come close to meeting its pleading burden under this element of *Complete Auto*.

54. The "fairly related" prong of *Complete Auto* does not demand an accounting of the services provided to the taxpayer and a comparison of the tax burden, "nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." *Okla. Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 199 (1995). Rather, all that is required to sustain a law under this prong is some reasonable relationship or proportion between the tax and the taxpayer's activities or presence in the state. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). Applying this analysis, the United State Supreme Court in *Jefferson Lines* upheld a sales tax on the full sales price of any ticket for bus travel sold in Oklahoma for travel to another state; in *Commonwealth Edison* the Court upheld a severance tax imposed on the removal of all coal in Montana, regardless of its ultimate destination or jurisdiction of sale.

55. Count VI's conclusory allegation that the revenue miles addressed in the numerator of the challenged apportionment factor bear no relation and gain no benefit from Florida because the state "provides no services to aircraft flying outside the geographical border of the state" alone cannot sustain a Commerce Clause challenge to section 220.151(2)(c) under the "fairly related" prong of *Complete Auto*. That allegation is directly contradicted by JetBlue's concession that the flights for which JetBlue's revenue miles in the Box were calculated *are only flights to and from Florida.* Complaint at ¶¶ 24-24.[2]

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[2] This allegation is also a non-sequitur. It simply does not follow the law on the "fairly related" test. As the Supreme Court explained, "[t]he fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue." *Goldberg v. Sweet*, 488 U.S. at 267.

56. The extensive services and protections afforded by the state of Florida to allow flights to arrive and depart from the state, including police and fire services, access to courts, and mass transit, roads, and other infrastructure, are clearly related to and directly benefit the revenue miles of such flights. Without the Florida facilities and public services that permit Florida to be a departure point or destination for JetBlue's flights, those flights would not exist. If JetBlue desires to challenge the Box under the fairly-related prong of *Complete Auto*, more is required than JetBlue's nebulous conclusory allegation raised in Count VI.

57. Count VI therefore fails to state a cause of action for no fair relationship between the tax and the state's services under the Commerce Clause, and should be dismissed.

C. Count VII Does Not Allege Sufficient Facts to Show That Section 220.151(2)(c) Prevents the Federal Government From Speaking With One Voice to Foreign Governments.

58. As with JetBlue's other challenges to section 220.151(2)(c) under the Commerce Clause, JetBlue entirely fails to identify specific facts to demonstrate that the Box prevents the federal government from speaking with "one voice" on any issue of foreign policy. The notion that the state of Florida, through the apportionment formula in section 220.151(2)(c), has been thwarting federal foreign policy for over half a century, and the federal government has taken no steps to address this supposed hindrance over that time, defies logic. JetBlue's allegations on this point are insufficient.

59. To show that a state tax prevents the federal government from speaking with "one voice," the challenger must allege that the tax "either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. at 194. Some *specific* area of foreign policymaking must be identified to sustain a challenge under the "one voice" prong of the Foreign Commerce Clause—merely identifying a general area of interest to the national government is insufficient. *See Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 324-330 (1994) (finding the unified reporting required by California in administering its apportionment calculations that included income from foreign subsidiaries did not preclude the federal government from speaking with "one voice" in the absence of "specific indications of congressional intent" to preclude such a methodology).

60. Here, no specific facts are adduced respecting any foreign policy issue implicated by the Box, nor does JetBlue posit any clear federal directive that the Box might arguably impede or contravene.

61. JetBlue's mere contention that the Box attempts "to regulate (tax) flights over international waters" standing alone is insufficient to state a violation under the Foreign Commerce Clause. First, this allegation is factually incorrect and inconsistent with the remainder of the allegations Complaint—the Box is part of an apportionment formula used to determine *income tax liability in Florida* and is not the imposition of a standalone tax or regulation directed to foreign commerce. Notably, JetBlue does not allege anywhere any specific facts that the

income that Florida taxes by use of the Box is generated over "international waters." JetBlue's general allegation that Florida is regulating and taxing commerce occurring in international waters can therefore carry no weight.

62. What is more, states are not categorically prohibited under the Foreign Commerce Clause from imposing income taxes that take into consideration international components of commerce, whether occurring over international waters or even *within* foreign jurisdictions. *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, (1980) (holding that "Mobil's business entails numerous 'taxable events' that occur outside Vermont. That fact alone does not prevent the State from including income earned from those events in the preapportionment tax base."); *Barclays Bank Plc v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994) (allowing the consideration of the income of foreign subsidiaries in determining the apportionable income within the state); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 164-65 (1983).

63. Ultimately, if JetBlue would challenge the Box on the basis that it prevents the federal government from speaking with "one voice," it must allege sufficient and specific factual grounds that, if proven, could support the claim. Count VII fails to do so in this respect, and so should be dismissed.

IV. The Complaint Cannot Properly Present a Facial Challenge to Section 220.151(2)(c).

64. JetBlue's Complaint seeks an invalidation of its assessment in part based on its contention that section 220.151(2)(c) violates various constitutional provisions on its face. Complaint at pages 13-14.

65. A facial constitutional challenge to a statute presents a high pleading and evidentiary threshold. A challenger must demonstrate that "no set of circumstances exists under which the statute would be valid." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004) (also noting that a facial "challenge must fail unless no set of circumstances exist in which the statute can be constitutionally applied.") (citations omitted).

66. The Complaint fails entirely to meet the pleading standards to set forth a facial challenge to section 220.151(2)(c), and could not conceivably do so.

67. One hypothetical demonstrates why JetBlue cannot sustain a facial challenge to section 220.151(2)(c). One might consider an airline that is located and transacts business entirely in Florida, and flies exclusively from Jacksonville to Miami, with a portion of the flight flying outside of Florida's territorial waters but still within the Box. Application of the apportionment methodology in section 220.151(2)(c) would apportion all of the airline's income to Florida, as the factor of revenue miles in the Box divided by all revenue miles would be one. No constitutional theory, whether grounded in the Due Process or dormant Commerce Clauses, or any other constitutional provision, would prohibit Florida from taxing all[3] of the income of this hypothetical airline. Countless other hypothetical scenarios exist where application of the apportionment methodology in section 220.151(2)(c) could not be subject to any articulable constitutional challenge.

[3] That is to say, in this hypothetical Florida could apply an income tax rate, whatever it might be, to *all* of the airline's income, and not just to a portion of it.

68. The Complaint should therefore be dismissed with prejudice to the extent it proposes a facial constitutional challenge to section 220.151(2)(c).

V. JetBlue's Failure to Follow Florida Rule of Civil Procedure 1.071 Requires Dismissal.

69. Florida Rule of Civil Procedure 1.071 imposes notice and service requirements on any party challenging the constitutional validity of a statute.

70. Specifically, rule 1.071 requires such a party to file a notice of constitutional question, and to serve the notice and the pleading raising the constitutional question on the Attorney General or the state attorney of the circuit in which the action is pending. A failure to comply with these requirements bars a court from hearing the constitutional issues. *Lee Mem'l Health Sys. v. Progressive Select Ins. Co.*, 260 So. 3d 1038, 1042 (Fla. 2018) ("failure to comply with rule 1.071 bars consideration of a claim that would result in the striking of a state statute as unconstitutional.") (citations omitted); *Ramle Int'l Corp. v. Miami-Dade Cty.*, 48 Fla. L. Weekly D 2010 (Fla. 3d DCA 2023).

71. JetBlue has failed to follow the notice and service requirements of rule 1.071, yet its Complaint is entirely predicated on arguments regarding the constitutionality of section 220.151(2)(c). Accordingly, the Complaint must be dismissed.

Conclusion

72. Counts I, II, and VIII are inextricably linked to the mistaken notion that an apportionment formula can be equated with the political boundaries of a state. The concepts are fundamentally different. Because Counts I, II, and VIII cannot be cured by amendment, they should be dismissed with prejudice.

73. Count III's lack of nexus claim is contradicted by the Complaint's concession that the only flights at issue for the apportionment factor's numerator originated or terminated in Florida, and that JetBlue operates flights to and from multiple Florida airports. This readily satisfies nexus. Because Count III cannot be cured by amendment, it should also be dismissed with prejudice.

74. With respect to Counts IV, V, VI, and VII, the Complaint at a minimum must allege specific grounds that could support JetBlue's contentions that the tax resulting from the application of the Box is not fairly apportioned, fairly related to the services provided by the state, or somehow prevents the federal government from speaking with one voice when regulating international commerce. The Complaint lacks such specificity and would leave the Department and the Court guessing as to what factual basis JetBlue expects to rely on to establish its general allegations in Counts IV, V, VI, and VII. This is inappropriate, and is a basis for dismissal.

75. JetBlue's facial challenges to section 220.151(2)(c) should be dismissed with prejudice, as JetBlue cannot allege that there is no set of circumstances under which the apportionment methodology could be applied constitutionally.

76. Finally, JetBlue's failure to comply with Florida Rule of Civil Procedure 1.071, where its Complaint is entirely predicated on constitutional challenges to section 220.151(2)(c), requires dismissal of the Complaint.

WHEREFORE, the Department respectfully requests that Counts I, II, III, and VIII of the Complaint be dismissed with prejudice, that Counts IV, V, VI, and

VII of the Complaint be dismissed, that the Complaint be dismissed with prejudice to the extent it presents a facial challenge to section 220.151(2)(c), and that the Court grant such other relief as may be appropriate.

Respectfully submitted this August 27, 2024.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was e-filed on August 27, 2024, through the Florida Courts E-filing portal for service on all parties registered in this matter:

/s Jacek Stramski
JACEK P. STRAMSKI