CAUSE NO. _____

CITY OF ROUND ROCK, TEXAS,	§	**IN THE DISTRICT COURT**
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**_____ JUDICIAL DISTRICT**
GLENN HEGAR, IN HIS OFFICIAL CAPACITY AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS,	§	
	§	
Defendant.	§	**TRAVIS COUNTY, TEXAS**

PLAINTIFF'S ORIGINAL PETITION FOR DECLARATORY JUDGMENT AND VERIFIED APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, City of Round Rock, Texas, Plaintiff ("Round Rock" or "Plaintiff"), and files this its Original Petition for Declaratory Judgment and Verified Application for Temporary and Permanent Injunction, and in support thereof, respectfully shows as follows:

INTRODUCTION

1. Pursuant to the Administrative Procedure Act ("APA"), TEX. GOVT. CODE §§ 2001.001–.902, this is a challenge to a rule adopted by the Comptroller of Public Accounts for the State of Texas ("Comptroller"). Plaintiff will notify the Local Administrative Judge of this filing, in compliance with Travis County Local Rule 10.2.

2. The challenged rule is found at 34 TEX. ADMIN. CODE § 3.334 ("Rule 3.334"). A copy of Rule 3.334, as amended, is attached hereto as Exhibit A.

3. **The rule amendments that are the subject of this dispute take effect October 1, 2021**.

PARTIES

4. Plaintiff, City of Round Rock, Texas is a home-rule city located in Williamson and Travis Counties, Texas.

5. Defendant Glenn Hegar is sued in his official capacity as the Comptroller of Public Accounts of the State of Texas and may be served at the Lyndon B. Johnson State Office Building, 111 East 17th Street, 9th Floor, Austin, Texas 78774 or wherever he may be found.

JURISDICTION

6. Round Rock seeks relief from an invalid and illegal rule under the waiver of sovereign immunity found in Section 2001.038 of the Texas Government Code. In this case, the validity or applicability of amendments to Rule 3.334 must be determined by this Court. The amendments to Rule 3.334 were incorporated and formally adopted by the Comptroller on May 22, 2020. The amendments challenged by this lawsuit have an effective date of October 1, 2021.

7. The application of Rule 3.334, as amended, interferes with or impairs, or threatens to interfere with or impair, the legal right or privilege of Round Rock to receive local sales tax revenue. This Court must determine the invalidity of Rule 3.334, as amended, and has jurisdiction to decide this case and grant the requested declaratory and injunctive relief. Further, Round Rock has a legal right to and interest in the sales tax revenue that it will no longer receive if the invalid rule amendments take effect in contravention of the Texas Tax Code. The resulting harm to Round Rock and its citizens is a drastic reduction of millions of dollars of sales tax revenue annually. Round Rock cannot absorb such a devastating reduction in revenue without cutting its budget and city services, raising property tax rates, or a combination of both. Relatedly, Round Rock's contractual obligations stand to be

impaired along with its municipal bond rating, in contravention of the protections of contract found in the Texas Constitution. Consequently, this Court has jurisdiction to hear Round Rock's claims that the amendments to Rule 3.334 are unconstitutional. Because this Court has jurisdiction over Round Rock's causes of action, it also has jurisdiction to grant the declaratory, injunctive, and other relief requested herein.

VENUE

8. Venue is mandatory in Travis County, Texas pursuant to Section 2001.038(b) of the Texas Government Code.

DISCOVERY CONTROL PLAN AND RULE 47 DISCLOSURE

9. Round Rock intends to conduct discovery under Level 2 pursuant to the Texas Rules of Civil Procedure.

10. Pursuant to Tex. R. Civ. P. 47, Round Rock seeks only non-monetary relief.

CONDITIONS PRECEDENT

11. All conditions precedent to Round Rock's claims for relief have been performed or have occurred.

FACTUAL AND PROCEDURAL BACKGROUND

12. Local sales tax collections are the largest source of revenue for many cities in Texas, including Round Rock. The law established by the Legislature for the collection of local sales tax, including the definition of where a sale is consummated for the purpose of determining which municipality receives sales tax revenue, has remained largely unchanged for more than 40 years. At issue in this case are newly adopted amendments to Rule 3.334, which undisputedly and dramatically change where a sale is consummated if the sale is made online using a retailer's website.

13. Section 321.203 of the Texas Tax Code will largely govern this Court's determinations in this cause. A copy of Section 321.203 is attached hereto as Exhibit B. Section 321.203 provides that a "sale of a taxable item occurs within the municipality in which the sale is consummated."[1] Specifically, Section 321.203(b) states that:

> If a retailer has **only one place of business in this state**, all of the retailer's retail sales of taxable items are consummated at that place of business . . ..[2]

14. Section 321.203 has been applied consistently in Texas, including in its application to a retailer's taxable sales made online. Until the Comptroller adopted the recent rule amendments that are the subject of this proceeding, Texas generally applied what is known as "origin sourcing," where the "source" of the local sales tax to be collected is the location where the sale originates (the seller's location). This is consistent with the statutory theme found in Tax Code § 321.203, which mandates that all sales of taxable items made by a retailer with one place of business in Texas are consummated at that place of business. This longstanding statutory framework is very different from what is known as "destination sourcing," in which the source of the local sales tax to be collected is the destination of the goods (generally, the buyer's location). It is plain from the language and structure of the Tax Code that the Legislature intended for origin sourcing to apply to the collection and distribution of local sales tax, particularly in the case of a retailer with one place of business in Texas.

15. The longstanding statutory authority for "origin sourcing" in Texas is found in Tax Code Chapters 321 (Municipal) and 323 (County), specifically in subsection 203 of both chapters. Traditionally, origin sourcing has been seen as a fair and straightforward way for local taxes to be assessed, collected, and allocated. Under Texas's origin-sourcing statutory framework,

[1] TEX. TAX CODE § 321.203(a).

retailers know where their place of business is located and what the tax rate is at their location. Retailers with one place of business in the state are not burdened with the time and expense required to determine the proper sales tax rates and allocations for the many different jurisdictions in Texas. Texas has over 1,200 incorporated cities and 254 counties, which is more than any other state in the U.S.

16. The Comptroller has targeted online commerce in Texas and the cities that rely upon the resulting sales tax revenue by adopting changes to Rule 3.334. Unless the Comptroller's amendments are invalidated by this Court, the *sourcing of online sales* of taxable items will switch on October 1, 2021, from "origin sourcing" to "destination sourcing," in direct contravention of the Tax Code, regardless of whether a business has only one place of business in the state. This type of sweeping change should be effectuated only by state law carefully considered and passed by the Legislature, not by an abstruse agency rule. Such a change will especially harm municipalities such as Round Rock by drastically reducing the amount of sales tax revenue that they receive.

17. The Comptroller's efforts to amend Rule 3.334 have followed a circuitous route. The Comptroller's first batch of proposed amendments to Rule 3.334 were published on January 3, 2020.[3] These first proposed amendments included a new definition of "Internet order" and a provision declaring, confoundingly, that Internet orders are no longer "received" at a "place of business of the seller." *Id.*

18. Many groups and cities, including Round Rock, submitted comments pointing out the obvious conflicts between the first draft of proposed amendments and the Texas Tax Code. Many groups and cities, including Round Rock, questioned the untenable assertion in the

[2] TEX. TAX CODE § 321.203(b) (emphases added).

proposed amendments that Internet orders are not "received" anywhere and, therefore, should be destination sourced instead of consummated at the location specified by Tax Code Section 321.203.

19. In response to this outcry, the Comptroller deleted the proposed definition of "Internet order" and made other changes, allegedly to address the numerous concerns. However, through sleight-of-hand drafting, the Comptroller then formally adopted a revised set of Rule 3.334 amendments using different words, but achieving the same unlawful result. The Comptroller did so by defining what a place of business is *not* and by using other terms such as "shopping website" and "shopping software application" to replicate the "Internet" definitional exclusion in the first draft of proposed rule amendments.

20. The adopted amendments to Rule 3.334, read together, achieve the following absurd result: If a sale of a taxable item is received through a retailer's website, that sale is NOT received at a place of business. That sale is then destination sourced and the city in which the retailer is located no longer receives local sales tax for that sale.

21. The Texas Legislature, in its most recent legislative session ending May 31, 2021, considered, but ultimately declined, changing sections of the Tax Code relevant to this case, even though certain bills had proposed changes similar to the Comptroller's amendments to Rule 3.334. Nevertheless, the Comptroller attempts to unlawfully accomplish with rulemaking what the legislative branch of Texas government refused to enact. In doing so, the Comptroller has aggressively overstepped his rulemaking authority.

[3] *See* 45 TEX.REG. 98.

IMPAIRMENT OF ROUND ROCK'S RIGHT TO RECEIVE SALES TAX REVENUE UNDER TEXAS LAW AND OTHER HARM

22. The Comptroller is responsible, under Section 321.301 of the Tax Code, for administering, collecting, and enforcing local sales and use tax. Pursuant to the unambiguous language of Tax Code § 321.203, Round Rock has been legally entitled to receive and has received local sales tax on sales consummated in Round Rock.

23. Local sales tax collections are the largest source of revenue for Round Rock. Round Rock receives local sales tax revenue based on sales consummated in Round Rock. For decades, the Comptroller has collected and remitted local sales tax to Round Rock associated with online sales made over the Internet. Round Rock is unaware of any time that the Comptroller's office has destination sourced online orders for businesses with one place of business in Round Rock when allocating local sales tax revenue to Round Rock. To Round Rock's knowledge, the Comptroller has never treated orders received through shopping websites or software applications or over the Internet any differently than any other method of communicating orders to retailers. Amended Rule 3.334 is a dramatic change in the way Round Rock's local sales tax will be allocated to Round Rock.

24. With the adopted amendments to Rule 3.334, the Comptroller has announced that he will no longer remit local sales tax for those types of online sales to Round Rock, even if those sales are consummated in Round Rock by retailers that have only one place of business located in Round Rock.

25. The change of sourcing resulting from amended Rule 3.334 will have a profoundly negative impact on Round Rock. Based on Round Rock's historic sales tax revenue received in the fiscal year ending September 30, 2020, such a change in sourcing found within amended Rule 3.334 could have reduced Round Rock's sales tax revenues by as much as

$30,000,000.00 per year. Going forward, amended Rule 3.334 will reduce Round Rock's sales tax revenue by millions of dollars each year. This is harmful to Round Rock because Round Rock will not have the incoming revenue it needs to provide the increasing level of support and services needed by the citizens and businesses located within its city limits. Round Rock will be forced to reduce its ability to meet the needs of a rapidly growing city, including reductions in essential services such as police and fire protection, road maintenance, water, wastewater, park maintenance, to name only a few, in an effort to absorb this unexpected loss in revenue. Also, because of this reduction in sales tax revenue, Round Rock will not be able to add the additional services needed by a city growing by thousands of residents per year.

26. In addition, Round Rock has issued millions of dollars in bonds to fund, in whole or in part, infrastructure improvements such as SH 45, local roads, water and wastewater lines, and fire stations in support of and as required by local businesses such as Dell, IKEA, and other businesses located within Round Rock's city limits. Round Rock has dedicated its sales tax and property tax revenues to pay for those obligations and related services and maintenance. The origin-sourced framework for remitting local sales tax revenue that the Comptroller has historically followed provides Round Rock with the revenue to pay for these services and infrastructure. A loss or reduction of such revenue impairs Round Rock's ability to pay for these services and infrastructure and therefore impairs its continued support for businesses and citizens.

27. Further, it is expected that this reduction of sales tax revenue will not escape the attention of the bond rating agencies. It is likely that this will have a trickle-down effect on the bond ratings of cities in Texas that currently have the right to receive local sales tax revenue as

historically remitted before the adoption of amended Rule 3.334. Such a scenario would have a negative impact on Round Rock's rating for future bond issues, which then will result in increased costs to the citizens of Round Rock due to higher interest rates on its debt.

28. Dell Technologies ("Dell"), a computer hardware and software company, has located its world headquarters within the city limits of Round Rock. Dell opened for business in Round Rock on September 2, 1994, and has been a success story and source of sales tax revenue for Round Rock and for the State of Texas. Almost 30 years ago, on August 26, 1993, Round Rock entered into an Economic Development Program Agreement ("EDP Agreement") with Dell pursuant to Chapter 380 of the Local Government Code. The EDP Agreement is still in existence and remains in full force and effect until December 31, 2053. Because of Round Rock's willingness to enter into this agreement, it is understood that Dell chose to locate in Round Rock rather than move its headquarters to Tennessee.

29. The local sales tax revenue Round Rock receives annually based on Dell's taxable sales alone is substantial, but Dell is only one example. The problem with amended Rule 3.334 is much bigger. The sourcing of online sales for all of the retailers located in Round Rock with one place of business in the state would shift to destination sourcing under amended Rule 3.334, reducing Round Rock's revenue and its abilities and tools to attract new businesses and to provide the same level of core services to its residents and local businesses.

30. Despite this imminent loss in revenue, however, Round Rock will still be responsible for maintaining and paying for the infrastructure and services already in place and associated with businesses located within Round Rock's city limits, such as the use and maintenance of roads, utilities, fire and police protection, and other similar city services.

31. Round Rock will suffer specific and detrimental injuries because of amended Rule 3.334. The economic harm suffered by Round Rock is the loss of local sales tax revenue required to be remitted to Round Rock. Round Rock will have to amend its estimated budget to match its estimated revenues pursuant to its charter and the Local Government Code, resulting in a reduction or stagnation of city services and significant uncertainty in the planning of its future budgets.

32. When the proposed amendments to Rule 3.334 were announced, Round Rock participated actively and openly by communicating with the Comptroller and his staff, and by submitting comments and objections to the proposed amendments expressing Round Rock's concerns. Throughout that process and to date, Round Rock has never been provided by the Comptroller with an estimate of the loss in local sales tax revenue Round Rock would suffer or any other type of study or analysis of the impact of amended Rule 3.334 on Round Rock. This lack of information hinders Round Rock's ability to assess the full impact of amended Rule 3.334. However, there is no doubt that the amended rule, if implemented, will result in a loss of millions of dollars each year in sales tax revenue that would otherwise be received by Round Rock.

33. Rule 3.334, as amended, denies Round Rock a portion of local sales tax it would otherwise be legally entitled to receive under Section 321.203 of the Tax Code. Consequently, the rule and its threatened application interferes with, impairs, and/or threatens to interfere with or impair, a legal right or privilege of Round Rock. Further, Round Rock's rights and privileges have been impaired and injured due to the Comptroller's failure to conduct an impact study demonstrating the effect of the rule amendments on Round Rock and other municipalities, as

required by the APA. This and other violations of the APA, which will be discussed more fully *infra* and are incorporated herein, also injure Round Rock and impair its rights.

34. The application of Rule 3.334 also unlawfully and unconstitutionally impairs the obligation of contracts entered into by Round Rock, specifically including Round Rock's Chapter 380 agreement with Dell.

35. In summary, amended Rule 3.334 directly conflicts with the Texas Tax Code and is invalid. The Comptroller has exceeded his rulemaking authority, imposed a rule that is legally infirm and unconstitutional, and adopted the amended rule in a manner that violates the APA. For these reasons and others as specified herein, Round Rock seeks declaratory and injunctive relief from this Court.

CAUSES OF ACTION AND AUTHORITIES

THE AMENDMENTS TO RULE 3.334 ARE INVALID FACIALLY AND AS-APPLIED TO ROUND ROCK

36. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

37. A rule is facially invalid if it (1) conflicts with statutory language, (2) runs counter to the general objectives of the statute, or (3) imposes burdens, conditions, or restrictions in excess of or inconsistent with statutory provisions.[4] Each of these three prohibitions are violated by the amendments to Rule 3.334.

38. Construction of a rule to determine facial invalidity and construction of relevant Tax Code provisions are matters of law. A court's primary concern in construing a statute is the express statutory language. A court must also construe the text according to its plain and common meaning unless a contrary intention is apparent from the context or unless such a

construction leads to absurd results. Finally, a court considers the entire statutory scheme, not isolated portions of the statute.

39. Chapter 321 of the Tax Code contains an express and unambiguous framework for determining where the sale of a taxable item occurs for purposes of a Texas-based retailer like Dell, which has one place of business located in Round Rock. Specifically, Section 321.203(a) provides that:

> A sale of a taxable item occurs within the municipality in which the sale is consummated. A sale is consummated as provided by this section regardless of the place where transfer of title or possession occurs.

40. Most importantly, Section 321.203(b) provides that:

> If a retailer has **only one place of business in this state, all of the retailer's retail sales of taxable items are consummated at that place of business** except as provided by Subsection (e).[5]

41. Section 321.203 also establishes two mutually exclusive categories of retailers: (1) those which have only one place of business; and (2) those which have more than one place of business. Subsection (b) applies to retailers with only one place of business. Subsections (c) through (d) apply to retailers with more than one place of business.

42. By redefining what constitutes "a place of business" and then declaring that online sales made through a shopping website or shopping software application are "not received at a place of business," the Comptroller has adopted rule amendments that directly conflict with the plain language of Tax Code § 321.203.

43. The Comptroller even recognizes this statutory conflict by stating:

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[4] *Hegar v. Ryan, LLC*, No. 03-13-00400-CV, 2015 WL 3393917, at *7 (Tex. App.—Austin, May 20, 2015, no pet.) (mem. op.)

[5] TEX. TAX CODE ANN. § 321.203(b) (emphases added). Subsection (e) contains provisions that do not apply to businesses that have only one place of business in the state of Texas. *See* TEX. TAX CODE 321.203(e) and (e-1) (provisions for itinerant vendors; orders received outside the state; orders places with suppliers; and marketplace sellers).

> The following rules . . . apply to all sellers engaged in business in this state, **regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state**.[6]

44. There would be no need to include this language in the rule amendments if the amendments were harmonious with the Tax Code. Instead, this admonition expressly highlights the Comptroller's attempt to contradict the plain language of Tax Code § 321.203(b), relating to retailers with "only one place of business in this state."

45. Further, there is no way to reconcile the rule amendments with Tax Code § 321.203. If implemented, the rule will change existing law in this way: sellers with only one place of business in the state will now have online sales of taxable items "consummated" in a variety of different destination jurisdictions, instead of at the seller's one place of business as mandated by Section 321.203. This will put a costly compliance burden on all Texas businesses making online sales to track this data, and will change the way businesses have been calculating, collecting, and remitting sales tax for decades. It also will have a tremendously harmful impact on Round Rock.

46. On this basis, Round Rock asks this Court to declare invalid the specific amendments to Rule 3.334 discussed below.

AMENDED RULE 3.334(a)(9)
CONFLICTS WITH STATUTORY LANGUAGE

47. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

48. Subsection (a)(9) of Amended Rule 3.334 states:

> (a) Definitions.
>
> ***

[6] 34 TEX. ADMIN. CODE § 3.334(c)(emphasis added).

> (9) Fulfill--To complete an order by transferring a taxable item directly to a purchaser at a Texas location, or to ship or deliver a taxable item to a location in Texas designated by the purchaser. The term does not include tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

49. Read in conjunction with the other problematic amendments to Rule 3.334, the definition of "fulfill" now contradicts both the specific language of the Tax Code and its overall purpose and structure. Specifically, Section 321.203(a) of the Tax Code provides that:

> A sale of a taxable item occurs within the municipality in which the sale is consummated. A sale is consummated as provided by this section **regardless of the place where transfer of title or possession occurs.**[7]

50. The Legislature has already set forth its preference in the controlling statutory authority of Section 321.203 relating to where a sale is consummated, and further makes it clear that *where* the transfer of title or possession of the taxable item occurs does not matter.

51. In fact, the terms "fulfill" and "fulfillment" do not appear in Chapter 321 of the Tax Code. This is for good reason, as such concepts are meaningless given the plain language of the code and the ordinary definitions of the terms used therein. A taxable sale has to be consummated before it can be fulfilled. Any attempt by the Comptroller to substitute the concept of "fulfill" in place of "consummation" is a direct statutory conflict.

52. On this basis, subsection (a)(9) of amended Rule 3.334 is invalid.

AMENDED RULE 3.334(a)(16)
CONFLICTS WITH STATUTORY LANGUAGE

53. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

54. Subsection (a)(16) of Amended Rule 3.334 states:

[7] TEX. TAX CODE ANN. § 321.203(a) (emphasis added).

(a) Definitions.

***

(16) **Place of business of the seller - general definition**--An established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, independent contractors, and natural persons affiliated with the seller, where sales personnel of the seller receive three or more orders for taxable items during the calendar year. **The term does not include a computer server, Internet protocol address, domain name, website, or software application.** Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b) of this section for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.[8]

55. The language emphasized above within amended Rule 3.334(a)(16) is another portion of the Comptroller's amendments designed to shift online sales to destination sourcing. By defining what a place of business of the seller is *not*, the Comptroller lays the foundation for mandating that online sales are not received at a place of business. Ironically, the items within the Comptroller's definitional exclusion – "computer server, Internet protocol address, domain name, website, or software application" – are considered assets and/or

intellectual property specifically owned by a business.

56. This shift to determining what is or is not a place of business in Texas based on the method of communicating sales orders is a complete reversal in position for the Comptroller. Prior to the amendments to Rule 3.334, the Comptroller treated all online or Internet orders as being received at a place of business. To Round Rock's knowledge, the Comptroller has never treated orders received by Texas retailers through a shopping website any differently than orders received by phone, fax, or other method of communication.

57. The amendment removing "a computer server, Internet protocol address, domain name, website, or software application" from the definition of "Place of business" also conflicts with the definition of "Internet" found in Texas Tax Code § 151.00393. That definition, which has been in place since 1999, reads as follows:

> "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, that comprise the interconnected worldwide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to the protocol to communication information of all kinds by wire or radio.[9]

58. The definition of "Internet," which has been in place since 1999, demonstrates that both the text and spirit of amended Rule 3.334(a)(16) contravene such statutory definition by treating IP addresses, domain names, websites, and the like as something other than a means of communicating orders. Orders placed using a shopping website and the Internet are received by a place of business because the seller charges the buyer a purchase price and collects the appropriate sales tax, then proceeds to transfer possession of the item to the buyer.

59. The Comptroller's effort to isolate certain methods of communication and treat them differently from other forms of communication, such as telecommunication facilities or

[8] 34 TEX. ADMIN. CODE § 3.334(a)(16) (emphasis added).

VoIP, also results in convoluted rule language that is difficult to understand, especially in light of the conflicts with the Tax Code.

60. On this basis, the pertinent language in subsection (a)(16) of amended Rule 3.334 is invalid.

AMENDED RULE 3.334(b)(4)
CONFLICTS WITH STATUTORY LANGUAGE

61. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

62. Subsection (b)(4) of amended Rule 3.334 states:

> (b) Determining the place of business of a seller.
>
> ***
>
> (4) Orders received by sales personnel who are not at a place of business of the seller in Texas when they receive the order, including orders received by mail, telephone, **including Voice over Internet Protocol and cellular phone calls, facsimile, and email**. This type of order is treated as being received at the location from which the salesperson operates, that is, the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller **only if the location meets the definition of a "place of business of a seller" in subsection (a)(16)** of this section on its own, without regard to the orders imputed to that location by this paragraph. Orders received prior to October 1, 2021, may also be treated as being received at the outlet, office, or location operated by the seller that serves as a base of operations or that provides administrative support to the salesperson, and these locations will be treated as places of business of the seller for purposes of subsection (c) of this section.[10]

63. Read in conjunction with the problematic definition of "place of business" and with the flawed mandate relating to online orders within Sections (a)(16) and (b)(5), the above language and application of Subsection (b)(4) now conflict with the Texas Tax Code. This provision treats online orders differently than VoIP, cell phone, fax, and email orders when

[9] TEX. TAX CODE ANN. § 151.00393 (emphasis added).
[10] 34 TEX. ADMIN. CODE § 3.334(b)(4) (emphasis added).

the Tax Code draws no such distinction. Subsection (b)(4) also operates in conjunction with the other amendments to now destination-source online sales for retailers with one place of business in Texas, contrary to Tax Code § 321.203(a) and (b).

64. On this basis, the pertinent language of subsection (b)(4) of amended Rule 3.334 is invalid.

AMENDED RULE 3.334(b)(5)
CONFLICTS WITH STATUTORY LANGUAGE

65. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

66. Subsection (b)(5) of amended Rule 3.334 states:

> (b) Determining the place of business of a seller.
>
> ***
>
> (5) Orders not received by sales personnel, including orders received by a shopping website or shopping software application. Effective October 1, 2021, these orders **are received at locations that are not places of business** of the seller.[10]

67. Subsection (b)(5) presents the most obvious and egregious conflict with Tax Code § 321.203. When read in conjunction with the other amended provisions of Rule 3.334, the effect is as follows: If an order for a taxable item is communicated to a Texas retailer via the Internet, then that order is not received at the retailer's place of business, even if the retailer has only one place of business in Texas. Therefore, the taxable sale is no longer origin sourced for local sales tax purposes.

68. Subsection (b)(5) makes a distinction between orders that are received by sales personnel and orders that are not. This distinction is created by the subsection's decree that orders received by a shopping website are *not* received by sales personnel. However, the Tax Code draws no such distinction. Specifically, Section 321.203(b) provides that if a retailer has only one place of business in this state, *all* of the retailer's retail sales of taxable items are

consummated at that place of business. There is no distinction or different treatment by the Tax Code of retail orders received (or not received) by sales personnel if a business has only one place of business in Texas.

69. Subsection (b)(5) also effectively mandates that sales personnel can *never* receive orders placed on a shopping website or shopping software application. No legal authority or factual study has been offered by the Comptroller to support such a mandate, and such a pronouncement also conflicts with the Tax Code.

70. The awkward language of subsection (b)(5) is the foundation of the Comptroller's attempt to destination-source online sales in Texas, despite the overall statutory scheme and plain language of the Tax Code to the contrary. Subsection (b)(5) becomes effective on October 1, 2021.

71. In addition, the arbitrary method-of-communication factor allows inconsistent applications of the rule. For example, if a buyer selected a product and placed an order using a retailer's shopping website and then also called to give credit card information by phone, it would be impossible for the retailer to accurately source the sale of the taxable item. In addition to harming Round Rock, this rule will be confusing and difficult for Texas retailers to understand.

72. On this basis, subsection (b)(5) of amended Rule 3.334 is invalid.

AMENDED RULE 3.334(c)(1)-(2)(including subsections)
CONFLICT WITH STATUTORY LANGUAGE

73. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

74. Subsection (c) of amended Rule 3.334 states:

> (c) Local sales tax – Consummation of sale – determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to

[10] 34 TEX. ADMIN. CODE § 3.334(b)(5)(emphasis added).

> remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. **The following rules, taken from Tax Code § 321.203 and § 323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state**.[11]

75. The first paragraph of amended Rule 3.334(c) demonstrates a head-to-head conflict between Rule 3.334 and the Tax Code. Tax Code § 321.203 contains words carefully chosen by the Legislature governing *where* sales of taxable items are consummated. The prefatory statement within subsection (c) of Rule 3.334 that the following rules were "taken from Tax Code § 321.203" is demonstrably false. The rules were not taken from the Tax Code at all. Instead, the rules present a conflict that cannot be harmonized with the Tax Code's plain language governing consummation of sale.

76. Continuing and adding to the conflict with statutory authority, Subsection (c)(1) of amended Rule 3.334 states:

> (1) Consummation of sale - order received at a place of business of the seller in Texas.
>
> (A) Order placed in person. Except as provided by paragraph (3) of this subsection, when an order for a taxable item is placed in person at a seller's place of business in Texas, including at a temporary place of business of the seller in Texas, the sale of that item is consummated at that place of business of the seller, regardless of the location where the order is fulfilled.
>
> (B) Order not placed in person.
>
> (i) Order fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.
> (ii) Order not fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the

[11] 34 TEX. ADMIN. CODE § 3.334(b)(emphasis added).

> seller in Texas and is fulfilled at a location that is not a place of business of the seller in Texas, the sale is consummated at the place of business where the order is received.

77. This section of amended Rule 3.334 is also subject to the invalid mandate within subsection (b)(5) relating to online orders and thus conflicts with the Tax Code.

78. The term "consummation" of the sale is used throughout Chapter 321 of the Tax Code to determine the sourcing of the local tax to a municipality. The term "consummation" is broad and encompassing, and is the term specifically chosen by the Legislature.

79. Read in conjunction with the problematic definition of what a "place of business" is *not* and with the flawed mandate relating to shopping websites within Section (b)(5), the language and application of subsections (c)(1) and (c)(2) now conflict with the Tax Code.

80. Subsection (c)(2) of amended Rule 3.334 further states:

> (c) Local sales tax – Consummation of sale – determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code § 321.203 and § 323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state.
>
> ***
>
> (2) Consummation of sale - order not received at a place of business of the seller in Texas.
>
> > (A) Order fulfilled at a place of business of the seller in Texas. When an order is received at a location that is not a place of business of the seller in Texas or is received outside of Texas, and is fulfilled from a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.
> >
> > (B) Order not fulfilled from a place of business of the seller in Texas.

> (i) Order fulfilled in Texas. When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.
> (ii) Order not fulfilled in Texas. When an order is received by a seller at a location outside of Texas or by a remote seller, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession.

81. Round Rock realleges and incorporates the foregoing analysis relating to subsection (c)(1) as if set forth in full and applies the same analysis to subsection (c)(2).

82. On this basis, Subsections (c)(2) and (c)(2), including all sub-subsections, of amended Rule 3.334 are invalid.

AMENDMENTS TO RULE 3.334 RUN COUNTER TO THE GENERAL OBJECTIVES OF THE TAX CODE

83. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

84. When the Comptroller's rule amendments are compared to the overall structure of the Tax Code as well as to pertinent sections therein, Rule 3.334 creates a direct and irreconcilable conflict with a controlling statute. As previously discussed, the Tax Code contemplates and effectuates an origin sourcing method for Texas that has been in place for over 40 years. The Comptroller's rule amendments attempt to override certain portions of the Tax Code relating to the sourcing of local sales tax. These amendments run counter to the general objectives of the Tax Code as expressed by the plain and unambiguous language of the

pertinent code sections.

85. The Legislature chose to treat Texas retailers with only one place of business differently than others, mandating that all sales of taxable items be consummated at that retailer's one place of business. If a retailer's one place of business is located within a municipality, then the sales are consummated within that municipality. Pursuant to Tax Code § 321.203(a), "[a] sale is consummated as provided by this section regardless of where transfer of title or possession occurs."

86. With this language, the Legislature made it clear that the provisions of Section 321.203 of the Tax Code control the sourcing of local sales tax. Because the amendments to Rule 3.334 drastically conflict with this overall statutory structure, the rule amendments are facially invalid and void.

AMENDMENTS TO RULE 3.334 IMPOSE BURDENS, CONDITIONS, OR RESTRICTIONS IN EXCESS OF OR INCONSISTENT WITH THE TAX CODE

87. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

88. By adopting the amendments to Rule 3.334, the Comptroller has violated black letter law that rules adopted by an agency may not impose additional burdens, conditions, or restrictions in excess of the statutory provisions.

89. As amended, Rule 3.334 now forces sellers with only one place of business in the state to treat certain online sales of taxable items as being "consummated" in a variety of different destination jurisdictions, instead of at the seller's one place of business as mandated by Section 321.203. This will put an excessive compliance burden on small and large businesses in Texas to track this data. This is a burden that is not imposed by the Tax Code.

90. Further, the amendments will change and create uncertainty in the way businesses have been

calculating and collecting sales tax for decades. Orders communicated from purchaser to seller online and using the Internet have been treated by the Comptroller just the same as any other method of communicating an order to a seller, until these rule amendments. Rule 3.334 as amended creates conditions and restrictions on the receipt of a taxable order that are inconsistent with the Tax Code. If the Comptroller interprets the Rule to state that an order which comes to the seller via a shopping website or shopping software application is *not* (or *never*) received by sales personnel, that is inconsistent with the Tax Code. If the Comptroller interprets the Rule to state that an order which comes to the seller via a shopping website or shopping software application is *not* (or *never*) received at a place of business, that is also inconsistent with the Tax Code. These conditions and restrictions are found in the text of Rule 3.334(b)(5), read in conjunction with the definition of "Place of business of the seller" found in Rule 3.334(a)(16). These provisions restrict and burden the seller by forcing the seller to determine how an order was communicated and received, and further requires the seller to determine the destination jurisdiction for purposes of calculating local sales tax. Putting conditions and restrictions on the method by which a Texas retailer receives an order, including the type or method of communication of an order, exceeds and conflicts with what is required by the Tax Code and results in an unlawful rule.

91. As amended, Rule 3.334 creates the artificial and unnecessary restriction or condition that website orders can never be received by sales personnel and, therefore, cannot be received at a place of business. Overall, this restriction or condition attempts to replace the Tax Code's simple and straightforward method of determining where a sale is consummated, particularly for retailers with one place of business in the state.

92. On this basis, the amendments to Rule 3.334 discussed herein are invalid.

AMENDMENTS TO RULE 3.334 EXCEED THE COMPTROLLER'S AUTHORITY

93. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

94. The Comptroller's authority to adopt or amend rules is set forth in Texas Tax Code § 111.002, which provides that "[t]he comptroller may adopt rules **that do not conflict** with the laws of this state. . .."[12] The Comptroller may not adopt rules that conflict with the Tax Code, because the Comptroller cannot collect taxes "that the law has not actually imposed."[13] As discussed herein, the conflicts between the amendments to Rule 3.334 and the Tax Code are fatal and render the rule amendments invalid under Texas law.

95. A close review of the preamble to adopted Rule 3.334, the Comptroller's public statements about the rule amendments, and the full text of Section 111.002(a) demonstrate the improper use of the Comptroller's rulemaking authority. Section 111.002(a) reads in full as follows:

> The comptroller may adopt rules that ***do not conflict with the laws of this state*** or the constitution of this state or the United States for the enforcement of the provisions of this title and the collection of taxes and other revenues under this title. In addition to the discretion to adopt, repeal, or amend such rules permitted under the constitution and laws of this state and under the common law, the comptroller may adopt, repeal, or amend such rules to reflect changes in the power of this state to collect taxes and enforce the provisions of this title ***due to changes in the constitution or laws of the United States and judicial interpretations thereof***.[14]

96. The Comptroller's office has been receiving sales tax collections on online, website, and Internet sales for over 25 years, yet has never taken the position that the sourcing of such sales was so complex or devoid of clarity as to require sweeping change to sourcing. Despite the Comptroller's testimony that "technology" has "rapidly changed" since 2014,[15] there is

[12] TEX. TAX CODE ANN. §111.002(a) (emphasis added).
[13] *TracFone Wireless, Inc. v. Commission on State Emergency Communications*, 397 S.W.3d 173, 183 (Tex. 2013).
[14] TEX. TAX CODE § 111.002(a) (emphases added).
[15] *See* Testimony of Glenn Hegar, Comptroller of Public Accounts; *Ways & Means Committee Public Hearing*, Feb. 2, 2020.

no actual evidence, study, or data put forth by the Comptroller to support such a general assertion, much less tie that assertion, if accurate, in any meaningful way to a legal and rational basis for "clarifying" certain aspects of the new statutes and changing sourcing. Instead, the Comptroller is simply advancing a policy goal of reallocating sales tax revenues to destination cities, without a change in the law or judicial interpretation necessitating such a change.

97. The Comptroller also testified that Internet orders are not received anywhere but instead occur electronically on a server "somewhere off in the cloud,"[16] which demonstrates either a profound misunderstanding of the Internet's role in communication[17] or an attempt to confusingly attenuate Internet orders from any other form of order communicated to a seller by a purchaser. The amendments in questions imbed this flawed reasoning in the rule by allowing Voice over Internet Protocol orders to fall within the definition of "a place of business," despite the fact that VoIP systems are simply another form of Internet communication and often hosted "in the cloud."

98. In the preamble to the adopted rule amendments, the Comptroller states as follows:

> The comptroller adopts this amendment under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to amend rules to reflect changes in the constitution or laws of the United States and judicial interpretations thereof.
>
> **The amendments implement** Tax Code, §§151.0595 (Single Local Tax Rate for Remote Sellers), **321.203, and 323.203, and *South Dakota v. Wayfair, Inc.***, 138 S. Ct. 2080 (June 21, 2018).[18]

99. However, there have been changes neither to Tax Code §§ 321.203 or 323.203 nor to the

[16] *Id.*

[17] The term "cloud" is simply a metaphor for the Internet, based on the cloud drawing used in the past to represent the telephone network, and later to depict the Internet in computer network diagrams as an abstraction of the underlying infrastructure it represents. *See* https://www.investopedia.com/terms/c/cloud-computing.asp (last visited March 30, 2019).

constitution, any law, or judicial interpretation thereof, that would require the Comptroller's rule amendments at issue in this case. Nothing has happened that requires the Comptroller to adopt rule amendments changing origin sourcing to destination sourcing for online sales of retailers with only one place of business in Texas. The reference to the *Wayfair* opinion[19] is simply inapposite.

100. The amendments that are the subject of this suit are not required to ensure that "marketplace providers" such as Amazon or Wayfair pay appropriate sales tax in Texas. In fact, the Tax Code and rule amendments necessitated by *Wayfair* are already in effect and have been since 2019.[20] Consequently, the Comptroller is not amending Rule 3.334 to reflect changes in the power of this state to collect taxes and enforce the provisions of the Tax Code due to changes in the constitution or laws of the United States and judicial interpretations thereof.

101. Instead, the rule amendments at issue seem driven by the Comptroller's recent policy preference to shift Texas to destination sourcing of online sales, even though the Legislature specifically rejected such a change. Therefore, the Comptroller has exceeded his authority as circumscribed by Section 111.002(a). The amendments in question are void and invalid on this basis.

102. Moreover, the Comptroller repeatedly cites *Wayfair* in the preamble to the adopted rule amendments to suggest that *Wayfair* compels the Comptroller to amend Rule 3.334 and that Texas is not compliant with *Wayfair* unless and until the Comptroller amends Rule 3.334. This is incorrect. The Comptroller broadly misconstrues *Wayfair*. A copy of the *Wayfair* opinion is attached hereto as Exhibit C.

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[18] 45 TEX.REG. 98 (*Preamble* at p. 21) (emphasis added).

[19] *South Dakota v, Wayfair, Inc*., 138 S. Ct. 2080 (June 21, 2018).

[20] *See* 34 Tex. Admin. Code § 3.286 and https://comptroller.texas.gov/taxes/tax-policy-news/2018-december.php#rules-adopt (last visited July 6, 2021).

103. The issue in *Wayfair* was limited to whether a "physical presence" is necessary to establish a substantial nexus with a state.[21] The Supreme Court ultimately held that "[p]hysical presence is not necessary to create a substantial nexus."[22] After deciding the sole legal issue, the Supreme Court remanded the case for further consideration of whether South Dakota's new sales and use tax law was valid.[23] In other words, the Supreme Court's holding in *Wayfair* was far narrower than the Comptroller suggests.

104. Contrary to what the Comptroller suggests in the preamble to the adopted rule amendments, the Supreme Court did not *require* that states alter their existing tax laws. As explained by one commentor, the Supreme Court's decision in *Wayfair* merely "opened the door for collecting taxes on out-of-state online transactions."[24] Another commentator wrote about "[t]he limited scope of *Wayfair*" and explained:

> Therefore, while *Wayfair* clearly overruled the long-standing physical presence requirement of *Bellas Hess* and *Quill*, it provided only limited guidance on what constitutes substantial nexus for remote sellers. All we know for sure is that it applies to remote sellers who avail themselves of the privileges of the state by meeting the requisite economic nexus.[25]

105. Thus, the Texas Legislature is free to amend the Tax Code under the Supreme Court's decision in *Wayfair*. However, until the Texas Legislature amends Tax Code § 321.203, the Supreme Court's decision in *Wayfair* does not affect existing state tax law, because *Wayfair* only advises state legislators on what is permissible—not what is mandatory.

106. A court's primary objective when construing a statute is to ascertain and give effect to the Legislature's intent. If a statute uses a term with a particular meaning or assigns a particular

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[21] *Wayfair*, 138 S. Ct. at 2093.
[22] *Id*. at 2093.
[23] *Id*. at 2100.
[24] Rifat Azam, Online Taxation Post Wayfair, 51 N.M.L.R. 116, 130 (Winter 2021).
[25] Doti, Frank J., Wayfair Has Become Way Unfair on Account of Marketplace Facilitator Expansion by the States, 15 CHARLESTON L. REV. 1, 7–8 (Fall 2020).

meaning to a term, courts are bound by the statutory usage. Texas courts presume that the Legislature chose a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.

107. A relevant and recent case concerning the scope of the Comptroller's authority is *Hegar v. Ryan, LLC*.[26] In *Ryan*, the court discussed how and when the Comptroller exceeds authority in rulemaking. The court noted that "[t]he applicable test for a facial rule challenge. . . is 'whether the rule is contrary to the relevant statute.'"[27] Following Texas Supreme Court criteria for determining a rule's facial invalidity, the court found that the Comptroller exceeded his authority, in part, because the rule in question expressly imposed additional burdens, conditions, and restrictions in excess of the provisions of the Tax Code.[28] The court in Ryan also concluded that "[t]he statutory time period… directly conflicts with the rules' requirement" and that the rule in question was therefore facially invalid.[29]

108. In another relevant case, *Combs v. City of Webster*,[30] the court specifically considered the statutory scheme under Texas Tax Code Chapter 321. The court stated that, "[f]or purposes of local sales tax, the sale of a taxable item occurs within the municipality in which the sale is consummated."[31] The court also noted that "[g]enerally, the location at which a sale is consummated is a 'place of business' of the retailer."[32] The parties did not dispute that the retail store locations were places of business. The court concluded that, pursuant to Tax Code § 321.203, the sales would be considered consummated at the retail store locations in Webster, which were "the retailer's place of business in this state where the order

[26] No. 03-13-00400-CV, 2015 WL 3393917 (Tex. App.—Austin, May 20, 2015, no pet.) (mem. op.).
[27] *See Ryan*, 2015 WL 3393917, at *7.
[28] *Id.* at *15 (citing *DuPont Photomasks, Inc. v. Strayhorn*, 219 S.W.3d 414420 (Tex.App.—Austin 2006, pet. denied); *State v. Pub. Util. Comm'n*, 131 S.W.3d 314, 321 (Tex.App.—Austin 2004, pet. denied).
[29] *Id.* (internal citations omitted) (quoting TEX. TAX CODE ANN. § 111.104(c)(2)).
[30] 311 S.W.3d 85, 95 (Tex. App.—Austin 2009, pet. denied).
[31] *Id. (*citing TEX. TAX CODE ANN. § 321.203(a) (West 2008)).

is received."[33]

109. As demonstrated by the court's analysis in *Webster*, the amendments to Rule 3.334 are contrary to Tax Code § 321.203. Here, the Comptroller adds a definition of "Place of business" and the term "fulfill" that are contrary to the statutory scheme for a retailer that has only one place of business in Texas.

110. The court in *Webster* also referred to the following statements made by the Comptroller about Internet orders in particular:

> According to statements by the Comptroller in the documents attached to the plea to the jurisdiction and appellees' responsive filings, the three orders required for a distribution center to be considered a place of business under the tax code may be received at the distribution center itself, or by any of the following…(3) a showroom or clearance center with regular hours of operation open to the public for sales of merchandise; or (4) ***an internet computer system receiving orders***.[34]

111. The Comptroller's argument to the court in *Webster* is exactly opposite of the position on Internet computer systems receiving orders found in amended Rule 3.334. Further, amended Rule 3.334 directly contradicts voluminous prior statements, published guidelines, periodicals, and actions of the Comptroller, who has consistently treated website orders as being received at a place of business and consummated pursuant to Tax Code § 321.203.

112. The reversal of position by the Comptroller on this issue, especially with no changes in the constitution, laws, or judicial interpretations relating to Tax Code § 321.203 that would require the rule amendments in question, further demonstrates the extent to which the Comptroller has exceeded his authority.

AMENDMENTS TO RULE 3.334 ARE ARBITRARY AND CAPRICIOUS

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[32] *Id.* (citing § 321.203(b)-(d)).
[33] *Id.* (*citing* § 321.203(d)(1)).
[34] *City of Webster*, 331 S.W.2d at 97 (emphasis added).

113. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

114. Nothing triggered the Comptroller's authority or need to adopt rule provisions determining that website orders are never received by Texas sales personnel or that website orders are never received at a place of business. In this way, the rule amendments are arbitrary and capricious, and void on that basis.

115. Further, amended Rule 3.334 draws an arbitrary and illogical distinction between website orders and every other method of communicating an order, such as in-person orders, email orders, mail orders, fax orders, telephone orders, cell phone orders, and even VoIP orders. The Comptroller simply decided, without a rational basis or statutory authority, that all orders except website orders can be received at a place of business.

116. The Comptroller provides no rational explanation for why one method of ordering can never be received at a location when other functionally equivalent methods of communicating an order are received at such locations. The Comptroller offered no technical study or analysis of shopping websites that would justify or explain such a distinction. In all likelihood, no such study exists because the distinction is untenable.

117. When a rule lacks a legitimate reason to support itself, it is arbitrary and capricious. The amendments to Rule 3.334 that arbitrarily mandate that website orders cannot be received by either sales personnel or by a place of business lacks a legitimate reason to support it. The Comptroller failed to establish that the rule is a reasonable means to a legitimate objective as required by Section 2001.035(c) of the APA. Therefore, these provisions in amended Rule 3.334 are void.

COMPTROLLER'S VIOLATIONS OF THE APA

118. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

119. Round Rock seeks a declaration and/or finding from the Court that the amended provisions of Rule 3.334 at issue in this case are invalid and void due to the Comptroller's failure to follow the mandatory procedures set forth in the APA.

120. Pursuant to Section 2001.033 of the APA, the Comptroller was required to provide a justification and legitimate factual basis for the rule amendments as well as an analysis of why the Comptroller disagreed with comments by Round Rock and others. The Comptroller failed to do so.

121. Pursuant to Section 2001.030, the Comptroller was also required to provide the reasons for and against adoption of the rule and the reasons for overruling any objections. The Comptroller failed to substantially comply with this requirement.

122. Section 2001.024(5) of the APA requires the Comptroller to provide in the notice of a proposed rule: "a note about public benefits and costs showing the name and title of the officer or employee responsible for preparing or approving the note and stating for each year of the first five years that the rule will be in effect: (A) the public benefits expected as a result of adoption of the proposed rule; and (B) the probable economic cost to persons required to comply with the rule." The Comptroller failed to comply with this requirement.

123. Section 2001.024(4)(C) requires "that the agency provide the estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rule." Accordingly, the Comptroller was required to estimate the loss of or increase in local sales tax revenue for: (1) every local government in Texas with a local sales tax and (2) the aggregate loss of local sales tax revenue that will result from a destination-based sourcing approach. This requirement is of critical importance, given that the rule amendments in question directly result in substantial and harmful losses in revenue to Round Rock and other

local governments. The Comptroller utterly failed to estimate the loss of local sales tax revenue that would be suffered by Round Rock as well as failed to substantially comply with the requirement regarding an analysis of the aggregate loss of local sales tax revenue to the state.

124. Neither the Comptroller's notice of the proposed amendments nor the order adopting amended Rule 3.334 substantially complied with the above requirements. Because amended Rule 3.334 was not adopted in accordance with the APA, this Court must declare the amendments void and invalid on this basis. In the alternative, the Court should declare all procedurally deficient provisions of the rule invalid and void.

AMENDMENTS TO RULE 3.334
VIOLATE THE TEXAS CONSTITUTION

125. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

126. Article 1, section 16 of the Texas Constitution provides: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." Amended Rule 3.334 impairs existing economic development agreements and existing bond obligations of Round Rock in violation of Article 1, section 16.

127. The Legislature intended Chapter 380 agreements to be a tool for economic development.[35] The Texas Constitution, in art. III, § 52-a, focuses on the state's economic development and diversification to eliminate unemployment and permits the legislature to enact legislation for economic development. Local Government Code Chapter 380 covers economic development programs and grants by certain municipalities.[36] Section 380.001 allows a city to set up a program "to promote state or local economic development and to stimulate business and

[35] *See* TEX. LOC. GOV'T CODE ANN. §§ 380.001, 381.003 (West 2005), § 380.002 (West Supp. 2017).
[36] *See* TEX. LOC. GOV'T CODE ANN. §§ 380.001, 381.003 (West 2005), § 380.002 (West Supp. 2017).

commercial activity in the municipality."[37]

128. The Legislature therefore specifically allowed and contemplated that municipalities would enter into economic development agreements with private parties engaged in the sale of taxable items to encourage economic development, pursuant to Chapters 380 and 381 of the Local Government Code. Certain of these agreements allow a municipality to share a portion of the local sales tax with the private party whose sales of taxable items were consummated in the municipality and result in local sales tax revenue. These agreements provide municipalities with great economic development tools.

129. Round Rock entered into an Economic Development Program Agreement with Dell in 1993. This EDP Agreement is still in effect and will not terminate until 2053. As such, it was entered into 28 years before the effective date of amended Rule 3.334, and will be in existence and impaired by amended Rule 3.334.

130. The consideration for a city like Round Rock to take the risk of entering into an economic development agreement with a business like Dell, knowing the costs that would be incurred through the provision of roads, utilities, services, and other costly infrastructure, is the offsetting and increasing amount of local sales tax revenues that would be generated and received by the city. Round Rock relied on and had a reasonable expectation that local sales tax would continue to be collected and remitted to it on the basis of Section 321.203 of the Tax Code and the prior version of Rule 3.334 then enforcing that statutory provision. Rule 3.334 as amended now has a specific and harmful effect on Round Rock and its EDP Agreement with Dell, in that online sales will no longer be sourced to their origin (Round Rock) despite the fact that Dell has only one place of business in the state.

131. To the extent that amended Rule 3.334 is intended to operate as a *de facto* destruction or

[37] *Id.* § 380.001(a).

elimination of Chapter 380 agreements due to its reduction of local sales tax revenue from online sales that a city would receive, it impairs Round Rock's contracts and is unconstitutional on this basis. Such an attack on existing Chapter 380 agreements is an additional way in which the rule conflicts with state law and exceeds the Comptroller's authority.

132. It is understood from testimony offered by the Comptroller and others at the Ways & Means Committee Public Hearing held on February 2, 2020, that the City of San Marcos entered into a Chapter 380 agreement with Best Buy that drew the attention or ire of the Comptroller and his staff. The particulars of such agreement are not known, but its existence is understood to be the unwritten impetus for the amendments to Rule 3.334 aimed at eliminating origin sourcing for online sales by retailers with only one place of business in the state. The San Marcos/Best Buy arrangement seemingly pushed these rule amendments to the top of the Comptroller's priority list. However, it is understood anecdotally that the San Marcos/Best Buy arrangement now no longer in exists or has been substantially limited.

133. Because the amendments to Rule 3.334 violate Article 1, section 16 of the Texas Constitution by impairing Round Rock's obligation of contracts, as discussed herein, amended Rule 3.334 must be declared void and unenforceable with respect to economic development agreements and bond obligations existing as the date the amendments become effective.

REQUEST FOR DECLARATORY JUDGMENT

134. Round Rock realleges and incorporates the foregoing facts and analysis as if set forth in full.

135. The amendments to Rule 3.334, including subsections (a)(9), (a)(16), (b)(1)(A), (b)(4) and (b)(5), (c)(1) and (c)(2), provide, when read in conjunction with each other, that certain

online sales and sales received via the Internet, specifically items ordered through a shopping website or shopping website application using a computer server, Internet protocol address, domain name, website and/or software application, are not received at a place of business in Texas, are not received by sales personnel, and no longer result in a taxable sale at the location receiving the order. Instead, the taxable sale of goods occurs at the delivery destination. These provisions of the Rule directly conflict with the pertinent Texas Tax Code sections discussed herein.

136. Based on the foregoing, Round Rock requests a declaratory judgment as follows:

a) Amended Rule 3.334(a)(9) conflicts with state law and is contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code and is invalid, void, and of no effect;

b) Amended Rule 3.334(a)(16) conflicts with state law and is contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code and is invalid, void, and of no effect;

c) Amended Rule 3.334(b)(4) conflicts with state law and is contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code and is invalid, void, and of no effect;

d) Amended Rule 3.334(b)(5) conflicts with state law and is contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code and is invalid, void, and of no effect;

e) Amended Rule 3.334(c)(1) and (2) (including all subsections) conflict with state law and are contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code and are invalid, void, and of no effect;

f) Amended Rule 3.334(a)(9), (a)(16), (b)(1)(A), (b)(4), (b)(5), (c)(1) and/or (c)(2) exceed the Comptroller's authority to adopt or amend rules under Section 111.002 of the Tax Code and, therefore, are void and of no force and effect;

g) The amendments to Rule 3.334 exceed the Comptroller's authority because they conflict with state law, run counter to the general objectives of the statute, and/or impose burdens, conditions, or restrictions in excess of or inconsistent with statutory provisions of Chapter 321 of the Tax Code, and, in whole or in pertinent part, they are invalid, void, and of no force and effect;

h) Amended Rule 3.334 was adopted in violation of the APA and is wholly invalid on that basis, or, alternatively, each such section or part of Amended Rule 3.334 that was adopted in violation of the APA is invalid and of no effect;

i) The amendments to Rule 3.334, in whole or in pertinent part, violate the Texas Constitution's ban on impairing contracts, and are invalid, void, and of no effect to the extent they impair Round Rock's contracts existing as of the date amendments to Rule 3.334 would or did become effective;

j) Amended Rule 3.334(a)(9), (a)(16), (b)(1)(A), (b)(4), (b)(5), (c)(1) and/or (c)(2) are irrational or arbitrary and capricious and, therefore, are void and of no effect; and/or

k) Such other declaratory relief as required to invalidate the rule amendments that are the subject of Round Rock's requested relief and all other relief to which it is entitled.

REQUEST FOR TEMPORARY INJUNCTION

137. Round Rock realleges and incorporates the foregoing facts, allegations, and analysis as if set

forth in full.

138. This Court has jurisdiction to grant Round Rock's request for injunctive relief.[38] Round Rock's application for a temporary injunction is authorized by TEX. CIV. PRAC. & REM. CODE §§ 65.011 and 65.021,[39] among other authorities. The facts supporting this application are verified by Susan Morgan, Round Rock's Chief Financial Officer, in the verification page attached hereto. Additionally, Round Rock will ask the Court to grant its request for a temporary injunction after an evidentiary hearing.

139. The purpose of a temporary injunction is to preserve the status quo of the subject matter of the litigation until a trial on the merits.[40] This standard is easily met here because the status quo has been the same for decades. Online sales of taxable items by Texas retailers with one place of business in the state have been origin sourced pursuant to Tax Code § 321.203 (a) and (b) for decades. The status quo will be upended by the invalid amendments to Rule 3.334 that take effect on October 1, 2021. Enjoining the implementation and enforcement of amended Rule 3.334 is necessary to preserve the status quo and the subject matter of this suit.

140. To be entitled to a temporary injunction, an applicant must plead a cause of action, show a probable right to relief on that cause of action, and demonstrate a probable, imminent, and irreparable injury.[41]

141. Round Rock has a probable right to the relief it seeks in its causes of action after a trial on

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[38] Tex. Const. Art. 5 § 8; Tex. Gov't Code Ann. §§ 24.008; Tex. Civ. Prac. & Rem. Code Ann. §65.021.

[39] *See Texas Alcoholic Beverage Comm'n v. Amusement and Music Operators of Texas, Inc.*, 997 S.W.2d 651, 659 (Tex. App.–Austin 1999, pet. dism'd w.o.j.).

[40] *Clint ISD v. Marquez*, 487 S.W.3d 538, 555 (Tex. 2016).

[41] *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191 (Tex. App.—Fort Worth 2005, no pet.).

the merits because the Comptroller has adopted rule amendments that directly conflict with state law, specifically the Tax Code, and has exceeded his authority in doing so. Therefore, the rule amendments are invalid, void, and of no force and effect. Additionally, the Comptroller adopted a rule that is procedurally invalid by failing to comply with the requisites of the APA. Additionally, the rule amendments are unconstitutional and infirm on other grounds.

142. If Round Rock's application for temporary injunction is not granted, harm is imminent because the Comptroller's rule amendments go into effect on October 1, 2021. Round Rock will suffer interim harm during the pendency of these proceedings if the temporary injunction is not granted because it will suffer a loss of the status quo, be deprived of its full right to seek relief and redress through the courts, and will suffer the injuries of a substantial loss of local sales tax revenues.

143. The harm that will result if the temporary injunction is not issued is also irreparable because Round Rock's annual sales tax revenues will be substantially and harmfully reduced. This injury cannot be compensated in damages or otherwise recovered by a remedy at law. Further, these special injuries are distinct from any injuries to the general public in that the rule amendments lower Round Rock's sales tax revenues, diminish Round Rock's ability to attract new businesses and residents, and decrease Round Rock's ability to provide necessary services for its residents.

144. For the same reasons, Round Rock has no adequate remedy at law and it will suffer irreparable harm if injunctive relief is not granted.

145. Round Rock therefore asks the Court to enjoin the Comptroller from implementing and enforcing amended Rule 3.334(a)(9), (a)(16), (b)(1)(A), (b)(4), (b)(5), (c)(1) and/or (c)(2) on

October 1, 2021 or any other date pending the final outcome of these proceedings. Round Rock also requests other injunctive relief necessary to prevent the Comptroller from implementing and enforcing Rule 3.334 in a way that conflicts with Section 321.203 of the Tax Code, but in a manner that does not preclude the Comptroller from all lawful activities or exercise of his duties.

146. Pursuant to TEX. CIV. PRAC. & REM. CODE § 6.002, security or bond is not required of Round Rock. Round Rock's charter properly reflects this exemption. In the alternative, Round Rock will comply with all requisites of obtaining the injunctive relief it seeks, including posting a bond, if required by the Court under applicable law.

REQUEST FOR PERMANENT INJUNCTION

147. Round Rock realleges and incorporates the foregoing facts, allegations, and analysis as if set forth in full.

148. Round Rock asks the Court to set its request for a permanent injunction for a full trial on the merits and, after such trial, issue a permanent injunction against the Comptroller on the same terms and specifics as set forth above, which are incorporated herein by reference, and as are relevant to the permanent injunctive relief sought.

PRAYER

WHEREFORE, PREMISES CONSIDERED, City of Round Rock, Texas prays that judgment be entered against the Comptroller as follows:

a) Upon final hearing or trial, a judgment declaring that the amendments to Rule 3.334 conflict with state law and are contrary to the intent of the Legislature as manifested in the statutory text of Section 321.203 of the Tax Code, and finding that in whole or in pertinent part they are invalid, void, and of no force and effect;

b) Upon final hearing or trial, a judgment declaring that the amendments to Rule 3.334 exceed the Comptroller's authority because they conflict with state law, run counter to the general objectives of the statute, and/or impose burdens, conditions, or restrictions in excess of or inconsistent with statutory provisions of Chapter 321 of the Tax Code, and finding that in whole or in pertinent part they are invalid, void, and of no force and effect;

c) Upon final hearing or trial, a judgment declaring that the amendments to Rule 3.334 are in whole or in pertinent part irrational or arbitrary and capricious and finding that in whole or in pertinent part they are invalid, void, and of no effect;

d) Upon final hearing or trial, a judgment declaring that the amendments to Rule 3.334 in whole or in pertinent part violate the Texas Constitution's ban on impairing contracts, and finding that, in whole or in pertinent part, they are invalid, void, and of no effect to the extent they impair Round Rock's contracts existing as of the date amendments to Rule 3.334 would or did become effective;

e) Upon final hearing or trial, a judgment declaring that the amendments to Rule 3.334 were adopted in a procedurally defective manner and are invalid, void, and of no effect, and remanding the amendments to the Comptroller for further consideration;

f) Upon notice and hearing, a temporary injunction as specified and requested herein;

g) Upon final hearing or trial, a permanent injunction as specified and requested herein; and

h) Such other and further relief to which Round Rock may show itself justly entitled to receive.

Respectfully submitted,

BOURLAND LAW FIRM, PC
P.O. Box 546
Round Rock, Texas 78680
512.477.0100 tel.
512.477.0154 fax

By: /s/ *Cindy Olson Bourland*
Cindy Olson Bourland
State Bar No. 00790343
bourland@bourlandlaw.com

RYAN LAW FIRM, PLLC
Doug Sigel
State Bar No. 18347650
Terrace 1, 2600 Via Fortuna Drive
Suite 150
Austin, Texas 78746
512.459.6600 tel.
512.459.6601 fax
doug.sigel@ryanlawyers.com

ATTORNEYS FOR CITY OF ROUND ROCK

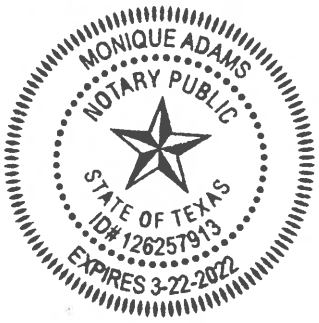
VERIFICATION

STATE OF TEXAS §
§
COUNTY OF WILLIAMSON §

BEFORE ME, the undersigned authority, on this day personally appeared Susan Morgan, who, after being by me duly sworn, on her oath deposed and said that she is the Chief Financial Officer for the City of Round Rock, Texas; that she has read the foregoing Original Petition and Verified Application for Temporary and Permanent Injunction; and that the factual statements contained therein within Paragraphs 23–32, 132 are within her personal knowledge and are true and correct.

Susan Morgan, CPA
Chief Financial Officer
City of Round Rock

SUBSCRIBED AND SWORN TO BEFORE ME on this the 12th day of July 2021, to certify which witness my hand and seal of office.



NOTARY PUBLIC, STATE OF TEXAS

EXHIBIT A

ction (h) with a change only to the title of the subsection d places of business of the seller.

The comptroller deletes subsection (g) concerning sellers' and purchasers' responsibilities for collecting or accruing local taxes, as those provisions, except for subsection (g)(3), which was deleted in its entirety, are contained in new subsection (i) with changes.

The comptroller deletes existing subsection (h) concerning local sales tax, as this information is contained in new subsection (c) with changes.

The comptroller deletes existing subsection (i) concerning use tax, as this information is contained in new subsection (d) with changes.

The comptroller adds new subsection (k)(5) to implement House Bill 1525, to address sales of taxable items through marketplace providers. Subsequent paragraphs are renumbered.

Mr. Kroll commented that House Bill 1525 could be interpreted to only source third-party marketplace seller transactions to destination. He commented that the provision should be amended to ensure that all taxable sales made via a marketplace, either by the marketplace provider itself or on behalf of a marketplace seller, should be sourced to destination. He suggested language to that effect. The comptroller declines to make this revision because House Bill 1525 is specific to the sales made by marketplace providers on behalf of marketplace sellers. It does not provide for sourcing on the marketplace provider's own sales. Additionally, amending §3.286 of this title in this section is not appropriate.

The provisions related to remote sellers, the single local use tax rate, and marketplace providers took effect October 1, 2019.

Joe Strong, on behalf of Microsoft, made comments pertaining to marketplace providers and marketplace sellers, registration, good faith, and information requirements, which are addressed in §3.286 of this title and not this amendment. Mr. Howard and Ms. Howard commented that they strongly disagree with the amendment.

Mr. Pannell requested guidance on the information that will be audited by the comptroller and the penalties for incorrect application of local tax. Mr. Kroll commented that the comptroller does not have any training or audit materials for this rule, so it appears businesses will not face compliance scrutiny under audit. The comptroller declines to make revisions based on this comment because this section addresses local sales and use tax administration. The comptroller will provide audit guidelines regarding this section in the appropriate audit materials.

Ms. May urged that the amendment continue to designate purchasing offices as places of business if it is deemed that they do not exist solely to avoid or rebate sales tax. The comptroller did not make any amendments to the definition of purchasing offices.

The comptroller adopts this amendment under Tax Code, §111.002 (Comptroller's Rules; Compliance; Forfeiture), which provides the comptroller with the authority to amend rules to reflect changes in the constitution or laws of the United States and judicial interpretations thereof.

The amendments implement Tax Code, §§151.0595 (Single Local Tax Rate for Remote Sellers), 321.203, and 323.203, and *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080 (June 21, 2018).

§3.334. Local Sales and Use Taxes.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Cable system--The system through which a cable service provider delivers cable television or bundled cable service, as those terms are defined in §3.313 of this title (relating to Cable Television Service and Bundled Cable Service).

(2) City--An incorporated city, municipality, town, or village.

(3) City sales and use tax--The tax authorized under Tax Code, §321.101(a), including the additional municipal sales and use tax authorized under Tax Code, §321.101(b), the municipal sales and use tax for street maintenance authorized under Tax Code, §327.003, the Type A Development Corporation sales and use tax authorized under Local Government Code, §504.251, the Type B Development Corporation sales and use tax authorized under Local Government Code, §505.251, a sports and community venue project sales and use tax adopted by a city under Local Government Code, §334.081, and a municipal development corporation sales and use tax adopted by a city under Local Government Code, §379A.081. The term does not include the fire control, prevention, and emergency medical services district sales and use tax authorized under Tax Code, §321.106, or the municipal crime control and prevention district sales and use tax authorized under Tax Code, §321.108.

(4) Comptroller's website--The agency's website concerning local taxes located at: https://comptroller.texas.gov/taxes/sales/.

(5) County sales and use tax--The tax authorized under Tax Code, §323.101, including a sports and community venue project sales and use tax adopted by a county under Local Government Code, §334.081. The term does not include the county health services sales and use tax authorized under Tax Code, §324.021, the county landfill and criminal detention center sales and use tax authorized under Tax Code, §325.021, or the crime control and prevention district sales and use tax authorized under Tax Code, §323.105.

(6) Drop shipment--A transaction in which an order is received by a seller at one location, but the item purchased is shipped by the seller from another location, or is shipped by the seller's third-party supplier, directly to a location designated by the purchaser.

(7) Engaged in business--This term has the meaning given in §3.286 of this title (relating to Seller's and Purchaser's Responsibilities).

(8) Extraterritorial jurisdiction--An unincorporated area that is contiguous to the corporate boundaries of a city as defined in Local Government Code, §42.021.

(9) Fulfill--To complete an order by transferring a taxable item directly to a purchaser at a Texas location, or to ship or deliver a taxable item to a location in Texas designated by the purchaser. The term does not include tracking an order, determining shipping costs, managing inventory, or other activities that do not involve the transfer, shipment, or delivery of a taxable item to the purchaser or a location designated by the purchaser.

(10) Itinerant vendor--A seller who travels to various locations for the purpose of receiving orders and making sales of taxable items and who has no place of business in this state. A person who sells items through vending machines is also an itinerant vendor. A salesperson that operates out of a place of business in this state is not an itinerant vendor.

(11) Kiosk--A small stand-alone area or structure:

(A) that is used solely to display merchandise or to submit orders for taxable items from a data entry device, or both;

(B) that is located entirely within a location that is a place of business of another seller, such as a department store or shopping mall; and

(C) at which taxable items are not available for immediate delivery to a purchaser.

(12) Local taxes--Sales and use taxes imposed by any local taxing jurisdiction.

(13) Local taxing jurisdiction--Any of the following:

(A) a city that imposes sales and use tax as provided under paragraph (3) of this subsection;

(B) a county that imposes sales and use tax as provided under paragraph (5) of this subsection;

(C) a special purpose district created under the Special District Local Laws Code or other provisions of Texas law that is authorized to impose sales and use tax by the Tax Code or other provisions of Texas law and as governed by the provisions of Tax Code, Chapters 321 or 323 and other provisions of Texas law; or

(D) a transit authority that imposes sales and use tax as authorized by Transportation Code, Chapters, 451, 452, 453, 457, or 460 and governed by the provisions of Tax Code, Chapter, 322.

(14) Marketplace provider--This term has the meaning given in §3.286 of this title.

(15) Order placed in person--An order placed by a purchaser with the seller while physically present at the seller's place of business regardless of how the seller subsequently enters the order.

(16) Place of business of the seller - general definition--An established outlet, office, or location operated by a seller for the purpose of selling taxable items to those other than employees, independent contractors, and natural persons affiliated with the seller, where sales personnel of the seller receive three or more orders for taxable items during the calendar year. The term does not include a computer server, Internet protocol address, domain name, website, or software application. Additional criteria for determining when a location is a place of business of the seller are provided in subsection (b) of this section for distribution centers, manufacturing plants, storage yards, warehouses and similar facilities; kiosks; and purchasing offices. An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business, is not a place of business of the seller if the comptroller determines that the outlet, office, facility, or location functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or exists solely to rebate a portion of the tax imposed by those chapters to the contracting business. An outlet, office, facility, or location does not exist to avoid the tax legally due under Tax Code, Chapters 321, 322, and 323 or solely to rebate a portion of the tax imposed by those chapters if the outlet, office, facility, or location provides significant business services, beyond processing invoices, to the contracting business, including logistics management, purchasing, inventory control, or other vital business services.

(17) Purchasing office--An outlet, office, facility, or any location that contracts with a retail or commercial business to process for that business invoices, purchase orders, bills of lading, or other equivalent records onto which sales tax is added, including an office operated for the purpose of buying and selling taxable goods to be used or consumed by the retail or commercial business.

(18) Remote Seller--As defined in §3.286 of this title, a remote seller is a seller engaged in business in this state whose only activity in the state is:

(A) engaging in regular or systematic solicitation of sales of taxable items in this state by the distribution of catalogs, periodicals, advertising flyers, or other advertising, by means of print, radio, or television media, or by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system for the purpose of effecting sales of taxable items; or

(B) soliciting orders for taxable items by mail or through other media including the Internet or other media that may be developed in the future.

(19) Seller--This term has the meaning given in §3.286 of this title and also refers to any agent or employee of the seller.

(20) Special purpose district--A local governmental entity authorized by the Texas legislature for a specific purpose, such as crime control, a local library, emergency services, county health services, or a county landfill and criminal detention center.

(21) Storage--This term has the meaning given in §3.346 of this title (relating to Use Tax).

(22) Temporary place of business of the seller--A location operated by a seller for a limited period of time for the purpose of selling and receiving orders for taxable items and where the seller has inventory available for immediate delivery to a purchaser. For example, a person who rents a booth at a weekend craft fair or art show to sell and take orders for jewelry, or a person who maintains a facility at a job site to rent tools and equipment to a contractor during the construction of real property, has established a temporary place of business. A temporary place of business of the seller includes a sale outside of a distribution center, manufacturing plant, storage yard, warehouse, or similar facility of the seller in a parking lot or similar space sharing the same physical address as the facility but not within the walls of the facility.

(23) Transit authority--A metropolitan rapid transit authority (MTA), advanced transportation district (ATD), regional or subregional transportation authority (RTA), city transit department (CTD), county transit authority (CTA), regional mobility authority (RMA) or coordinated county transportation authority created under Transportation Code, Chapters 370, 451, 452, 453, 457, or 460.

(24) Two percent cap--A reference to the general rule that, except as otherwise provided by Texas law and as explained in this section, a seller cannot collect, and a purchaser is not obligated to pay, more than 2.0% of the sales price of a taxable item in total local sales and use taxes for all local taxing jurisdictions.

(25) Use--This term has the meaning given in §3.346 of this title.

(26) Use tax--A tax imposed on the storage, use or other consumption of a taxable item in this state.

(b) Determining the place of business of a seller.

(1) Distribution centers, manufacturing plants, storage yards, warehouses, and similar facilities.

(A) A distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller for the purpose of selling taxable items where sales personnel of the seller receive three or more orders for taxable items during the calendar year from persons

other than employees, independent contractors, and natural persons affiliated with the seller is a place of business of the seller.

(B) If a location that is a place of business of the seller, such as a sales office, is in the same building as a distribution center, manufacturing plant, storage yard, warehouse, or similar facility operated by a seller, then the entire facility is a place of business of the seller.

(2) Kiosks. A kiosk is not a place of business of the seller for the purpose of determining where a sale is consummated for local tax purposes. A seller who owns or operates a kiosk in Texas is, however, engaged in business in this state as provided in §3.286 of this title.

(3) Purchasing offices.

(A) A purchasing office is not a place of business of the seller if the purchasing office exists solely to rebate a portion of the local sales and use tax imposed by Tax Code, Chapters 321, 322, or 323 to a business with which it contracts; or if the purchasing office functions or exists to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323. A purchasing office does not exist solely to rebate a portion of the local sales and use tax or to avoid the tax legally due under Tax Code, Chapters 321, 322, or 323 if the purchasing office provides significant business services to the contracting business beyond processing invoices, including logistics management, purchasing, inventory control, or other vital business services.

(B) In making a determination under subparagraph (A) of this paragraph, as to whether a purchasing office provides significant business services to the contracting business beyond processing invoices, the comptroller will compare the total value of the other business services to the value of processing invoices. If the total value of the other business services, including logistics management, purchasing, inventory control, or other vital business services, is less than the value of the service to process invoices, then the purchasing office will be presumed not to be a place of business of the seller.

(C) If the comptroller determines that a purchasing office is not a place of business of the seller, the sale of any taxable item is deemed to be consummated at the place of business of the seller from whom the purchasing office purchased the taxable item for resale and local sales and use taxes are due according to the following rules.

(i) When taxable items are purchased from a Texas seller, local sales taxes are due based on the location of the seller's place of business where the sale is deemed to be consummated, as determined in accordance with subsection (c) of this section.

(ii) When the sale of a taxable item is deemed to be consummated at a location outside of this state, local use tax is due based on the location where the items are first stored, used or consumed by the entity that contracted with the purchasing office in accordance with subsection (d) of this section.

(4) Orders received by sales personnel who are not at a place of business of the seller in Texas when they receive the order, including orders received by mail, telephone, including Voice over Internet Protocol and cellular phone calls, facsimile, and email. This type of order is treated as being received at the location from which the salesperson operates, that is, the principal fixed location where the salesperson conducts work-related activities. The location from which a salesperson operates will be a place of business of the seller only if the location meets the definition of a "place of business of a seller" in subsection (a)(16) of this section on its own, without regard to the orders imputed to that location by this paragraph. Orders received prior to October 1, 2021, may also be treated as being received at the outlet, office, or location operated by the seller that serves as a base of operations or that provides administrative support to the salesperson, and these locations will be treated as places of business of the seller for purposes of subsection (c) of this section.

(5) Orders not received by sales personnel, including orders received by a shopping website or shopping software application. Effective October 1, 2021, these orders are received at locations that are not places of business of the seller.

(c) Local sales tax - Consummation of sale - determining the local taxing jurisdictions to which sales tax is due. Except for the special rules applicable to remote sellers in subsection (i)(3) of this section, direct payment permit purchases in subsection (j) of this section, and certain taxable items, including taxable items sold by a marketplace provider, as provided in subsection (k) of this section, each sale of a taxable item is consummated at the location indicated by the provisions of this subsection. The following rules, taken from Tax Code, §321.203 and §323.203, apply to all sellers engaged in business in this state, regardless of whether they have no place of business in Texas, a single place of business in Texas, or multiple places of business in the state.

(1) Consummation of sale - order received at a place of business of the seller in Texas.

(A) Order placed in person. Except as provided by paragraph (3) of this subsection, when an order for a taxable item is placed in person at a seller's place of business in Texas, including at a temporary place of business of the seller in Texas, the sale of that item is consummated at that place of business of the seller, regardless of the location where the order is fulfilled.

(B) Order not placed in person.

(i) Order fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(ii) Order not fulfilled at a place of business of the seller in Texas. When an order is received at a place of business of the seller in Texas and is fulfilled at a location that is not a place of business of the seller in Texas, the sale is consummated at the place of business where the order is received.

(2) Consummation of sale - order not received at a place of business of the seller in Texas.

(A) Order fulfilled at a place of business of the seller in Texas. When an order is received at a location that is not a place of business of the seller in Texas or is received outside of Texas, and is fulfilled from a place of business of the seller in Texas, the sale is consummated at the place of business where the order is fulfilled.

(B) Order not fulfilled from a place of business of the seller in Texas.

(i) Order fulfilled in Texas. When an order is received at a location that is not a place of business of the seller in Texas and is fulfilled from a location in Texas that is not a place of business of the seller, the sale is consummated at the location in Texas to which the order is shipped or delivered, or at which the purchaser of the item takes possession.

(ii) Order not fulfilled in Texas. When an order is received by a seller at a location outside of Texas or by a remote seller, and is fulfilled from a location outside of Texas, the sale is not consummated in Texas. However, local use tax is due based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section. Except as provided in subsection (i)(3) of this section, a

remote seller required to collect state use tax under §3.286(b)(2) of this title must also collect local use tax based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession.

(3) Exception for qualifying economic development agreements entered into before January 1, 2009, pursuant to Tax Code, §321.203(c-4) - (c-5) or §323.203(c-4) - (c-5). This paragraph is effective until September 1, 2024. If applicable, the local sales tax due on the sale of a taxable item is based on the location of the qualifying warehouse, which is a place of business of the seller, from which the item is shipped or delivered or at which the purchaser of the item takes possession.

(4) Local sales taxes are due to each local taxing jurisdiction with sales tax in effect where the sale is consummated. Local use tax may also be due if the total amount of local sales taxes due does not reach the two percent cap, and the item purchased is shipped or delivered to a location in one or more different local taxing jurisdictions, as provided in subsection (d) of this section.

(5) Multiple special purpose district taxes, multiple transit authority sales taxes, or a combination of the two may apply to a single transaction. If the sale of a taxable item is consummated at a location within the boundaries of multiple special purpose districts or transit authorities, local sales tax is owed to each of the jurisdictions in effect at that location. For example, a place of business of the seller located in the city of San Antonio is within the boundaries of both the San Antonio Advanced Transportation District and the San Antonio Metropolitan Transit Authority, and the seller is required to collect sales tax for both transit authorities. Similarly, a place of business of the seller in Flower Mound is located within the boundaries of two special purpose districts, the Flower Mound Crime Control District and the Flower Mound Fire Control District, and the seller is responsible for collecting sales tax for both special purpose districts.

(6) Itinerant vendors; vending machines.

(A) Itinerant vendors. Sales made by itinerant vendors are consummated at, and itinerant vendors must collect sales tax based upon, the location where the item is delivered or at which the purchaser of the item takes possession. Itinerant vendors do not have any responsibility to collect use tax.

(B) Vending machines. Sales of taxable items made from a vending machine are consummated at the location of the vending machine. See §3.293 of this title (relating to Food; Food Products; Meals; Food Service) for more information about vending machine sales.

(d) Local use tax. The provisions addressing the imposition of state use tax in §3.346 of this title also apply to the imposition of local use tax. For example, consistent with §3.346(e) of this title, all taxable items that are shipped or delivered to a location in this state that is within the boundaries of a local taxing jurisdiction are presumed to have been purchased for use in that local taxing jurisdiction as well as presumed to have been purchased for use in the state.

(1) General rules.

(A) When local use taxes are due in addition to local sales taxes as provided by subsection (c) of this section, all applicable use taxes must be collected or accrued in the following order until the two percent cap is reached: city, county, special purpose district, and transit authority. If more than one special purpose district use tax is due, all such taxes are to be collected or accrued before any transit authority use tax is collected or accrued. See subparagraphs (D) and (E) of this paragraph.

(B) If a local use tax cannot be collected or accrued at its full rate without exceeding the two percent cap, the seller cannot collect it, or any portion of it, and the purchaser is not responsible for accruing it.

(C) If a seller collects a local sales tax on an item, or a purchaser accrues a local sales tax on an item, a use tax for the same type of jurisdiction is not due on the same item. For example, after a city sales tax has been collected or accrued for an item, no use tax is due to that same or a different city on that item, but use tax may be due to a county, special purpose district, or transit authority. Similarly, if one or more special purpose district sales taxes have been collected or accrued for an item, no special purpose district use tax is due on that item, and if one or more transit authority sales taxes have been collected or accrued for an item, no transit authority use tax is due on that item.

(D) Collection or accrual of use tax for multiple special purpose districts. If more than one special purpose district use tax is in effect at the location where use of an item occurs, the special purpose district taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all special purpose district taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the district with the earliest effective date would exceed the two percent cap, the tax for that district is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (C) of this paragraph, whether use tax is due for the district that next became effective.

(i) If the competing special purpose district taxes became effective on the same date, the special purpose district taxes are due in the order of the earliest date for which the election in which the district residents authorized the imposition of sales and use tax by the district was held.

(ii) If the elections to impose the local taxes were held on the same date, the special purpose district taxes are due in the order of the earliest date for which the enabling legislation under which each district was created became effective.

(E) Collection or accrual of use tax for multiple transit authorities. If more than one transit authority use tax is in effect at the location where use of an item occurs, and the two percent cap has not been met, the transit authority taxes are due in the order of their effective dates, beginning with the earliest effective date, until the two percent cap is met. The effective dates of all transit authority taxes are available on the comptroller's website. However, if the collection or accrual of use tax for the authority with the earliest effective date would exceed the two percent cap, the tax for that authority is not due and the seller or purchaser should determine, following the criteria in subparagraphs (A) - (D) of this paragraph, whether use tax is due for the authority that next became effective.

(i) If the competing transit authorities became effective on the same date, the transit authority taxes are due in the order of the earliest date for which the election in which the authority residents authorized the imposition of sales and use tax by the authority was held.

(ii) If the elections to impose local taxes were held on the same date, the transit authority use taxes are due in the order of the earliest date for which the enabling legislation under which each authority was created became effective.

(2) General use tax rules applied to specific situations. The following fact patterns explain how local use tax is to be collected or accrued and remitted to the comptroller based on, and subject to, the general rules in paragraph (1) of this subsection.

(A) Sale consummated outside the state, item delivered from outside the state or from a location in Texas that is not operated by the seller - local use tax due. Except as provided in subsection (i)(3) of this section, if a sale is consummated outside of this state according to the provisions of subsection (c) of this section, and the item purchased is either shipped or delivered to a location in this state as designated by the purchaser from a location outside of the state, or if the order is drop shipped directly to the purchaser from a third-party supplier, local use tax is owed based upon the location in this state to which the order is shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use tax due on the sale. If the seller does not collect the local use taxes due on the sale, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller according to the provisions in paragraph (1) of this subsection. For example, if an order for a taxable item is received by a seller at a location outside of Texas, and the order is shipped to the purchaser from a location outside of the state, local use tax is due based upon the location to which the order is shipped or delivered or at which the purchaser of the item takes possession.

(B) Sale consummated in Texas outside a local taxing jurisdiction, item delivered into one or more local taxing jurisdictions - local use tax due. If a sale is consummated at a location in Texas that is outside of the boundaries of any local taxing jurisdiction according to the provisions of subsection (c) of this section, and the order is shipped or delivered to the purchaser at a location in this state that is within the boundaries of one or more local taxing jurisdictions, local use tax is due based on the location to which the items are shipped or delivered or at which the purchaser of the item takes possession. The seller is responsible for collecting the local use taxes due on the sale, regardless of the location of the seller in Texas. If the seller fails to collect any local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(C) Sale consummated in any local taxing jurisdictions imposing less than 2.0% in total local taxes - local sales taxes and use taxes due. If a sale is consummated at a location in Texas where the total local sales tax rate imposed by the taxing jurisdictions in effect at that location does not equal 2.0% according to the provisions of subsection (c) of this section, and the item is shipped or delivered to the purchaser at a location in this state that is inside the boundaries of a different local taxing jurisdiction, additional local use tax may be due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the two percent cap. The seller is responsible for collecting any additional local use taxes due on the sale, regardless of the location of the seller in Texas. See subsection (i) of this section. If the seller fails to collect the additional local use taxes due, the purchaser is responsible for accruing such taxes and remitting them directly to the comptroller.

(i) Example one - if an order is received in person at a place of business of the seller, such that the sale is consummated at the location where the order is received as provided under subsection (c)(1)(A) of this section, and the local sales tax due on the sale does not meet the two percent cap, additional local use taxes are due based on the location to which the order is shipped or delivered or at which the purchaser of the item takes possession, subject to the provisions in paragraph (1) of this subsection.

(ii) Example two - if a seller receives an order for a taxable item at a seller's place of business in Texas, and the seller ships or delivers the item from an out-of-state location to a location in this state as designated by the purchaser, local sales tax is due based upon the location of the place of business of the seller where the order is received. If the local sales tax due on the item does not meet the two percent cap, use taxes, subject to the provisions in paragraph (1) of this subsection, are due based upon the location where the items are shipped or delivered or at which the purchaser of the item takes possession.

(e) Effect of other law.

(1) Tax Code, Title 2, Subtitles A (General Provisions) and B (Enforcement and Collection), Tax Code, Chapter 141 (Multistate Tax Compact) and Tax Code, Chapter 151 (Limited Sales, Excise, and Use Tax) apply to transactions involving local taxes. Related sections of this title and comptroller rulings shall also apply with respect to local taxes. This includes authorities such as court cases and federal law that affect whether an item is taxable or is excluded or exempt from taxation.

(2) Permits, exemption certificates, and resale certificates required by Tax Code, Chapter 151, shall also satisfy the requirements for collecting and remitting local taxes, unless otherwise indicated by this section or other sections of this title. For example, see subsection (n) of this section concerning prior contract exemptions.

(3) Any provisions in this section or other sections of this title related to a seller's responsibilities for collecting and remitting local taxes to the comptroller shall also apply to a purchaser if the seller does not collect local taxes that are due. The comptroller may proceed against the seller or purchaser for the local tax owed by either.

(f) Tax rates. Except as otherwise provided by law, no local governmental entity may adopt or increase a sales and use tax if, as a result of the adoption or increase of the tax, the combined rate of all sales and use taxes imposed by local taxing jurisdictions having territory in the local governmental entity would exceed 2.0% at any location within the boundaries of the local governmental entity's jurisdiction. The following are the local tax rates that may be adopted.

(1) Cities. Cities may impose sales and use tax at a rate of up to 2.0%.

(2) Counties. Counties may impose sales and use tax at rates ranging from 0.5% to 1.5%.

(3) Special purpose districts. Special purpose districts may impose sales and use tax at rates ranging from 0.125% to 2.0%.

(4) Transit authorities. Transit authorities may impose sales and use tax at rates ranging from 0.25% to 1.0%.

(g) Jurisdictional boundaries, combined areas, and city tax imposed through strategic partnership agreements.

(1) Jurisdictional boundaries.

(A) City boundaries. City taxing jurisdictional boundaries cannot overlap one another and a city cannot impose a sales and use tax in an area that is already within the jurisdiction of another city.

(B) County boundaries. County tax applies to all locations within that county.

(C) Special purpose district and transit authority boundaries. Special purpose districts and transit authorities may cross or share boundaries with other local taxing jurisdictions and may encompass, in whole or in part, other local taxing jurisdictions, including cities and counties. A geographic location or address in this state may lie within the boundaries of more than one special purpose district or more than one transit authority.

(D) Extraterritorial jurisdictions. Except as otherwise provided by paragraph (3) of this subsection concerning strategic partnership agreements and subsection (l)(5) of this section concerning the City of El Paso and Fort Bliss, city sales and use tax does not apply to taxable sales that are consummated outside the boundaries of the city, including sales made in a city's extraterritorial jurisdiction. However,

an extraterritorial jurisdiction may lie within the boundaries of a special purpose district, transit authority, county, or any combination of the three, and the sales and use taxes for those jurisdictions would apply to those sales.

(2) Combined areas. A combined area is an area where the boundaries of a city overlap the boundaries of one or more other local taxing jurisdictions as a result of an annexation of additional territory by the city, and where, as the result of the imposition of the city tax in the area in addition to the local taxes imposed by the existing taxing jurisdictions, the combined local tax rate would exceed 2.0%. The comptroller shall make accommodations to maintain a 2.0% rate in any combined area by distributing the 2.0% tax revenue generated in these combined areas to the local taxing jurisdictions located in the combined areas as provided in Tax Code, §321.102 or Health and Safety Code, §775.0754. Combined areas are identified on the comptroller's website. Sellers engaged in transactions on which local sales or use taxes are due in a combined area, or persons who must self-accrue and remit tax directly to the comptroller, must use the combined area local code when reporting the tax rather than the codes for the individual city, county, special purpose districts, or transit authorities that make up the combined area.

(3) City tax imposed through strategic partnership agreements.

(A) The governing bodies of a district, as defined in Local Government Code, §43.0751, and a city may enter into a limited-purpose annexation agreement known as a strategic partnership agreement. Under this agreement, the city may impose sales and use tax within all or part of the boundaries of a district. Areas within a district that are annexed for this limited purpose are treated as though they are within the boundaries of the city for purposes of city sales and use tax.

(B) Counties, transit authorities, and special purpose districts may not enter into strategic partnership agreements. Sales and use taxes imposed by those taxing jurisdictions do not apply in the limited-purpose annexed area as part of a strategic partnership agreement between a city and an authorized district. However, a county, special purpose district, or transit authority sales and use tax, or any combination of these three types of taxes, may apply at locations included in a strategic partnership agreement between a city and an authorized district if the tax is imposed in that area by the applicable jurisdiction as allowed under its own controlling authorities.

(C) Prior to September 1, 2011, the term "district" was defined in Local Government Code, §43.0751 as a municipal utility district or a water control and improvement district. The definition was amended effective September 1, 2011, to mean a conservation and reclamation district operating under Water Code, Chapter 49.

(h) Places of business of the seller and job sites crossed by local taxing jurisdiction boundaries.

(1) Places of business of the seller crossed by local taxing jurisdiction boundaries. If a place of business of the seller is crossed by one or more local taxing jurisdiction boundaries so that a portion of the place of business of the seller is located within a taxing jurisdiction and the remainder of the place of business of the seller lies outside of the taxing jurisdiction, tax is due to the local taxing jurisdictions in which the sales office is located. If there is no sales office, sales tax is due to the local taxing jurisdictions in which any cash registers are located.

(2) Job sites.

(A) Residential repair and remodeling; new construction of an improvement to realty. When a contractor is improving real property under a separated contract, and the job site is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on any separately stated charges for taxable items incorporated into the real property must be allocated to the local taxing jurisdictions based on the total square footage of the real property improvement located within each jurisdiction, including the square footage of any standalone structures that are part of the construction, repair, or remodeling project. For more information about tax due on materials used at residential and new construction job sites, refer to §3.291 of this title (relating to Contractors).

(B) Nonresidential real property repair and improvement. When taxable services are performed to repair, remodel, or restore nonresidential real property, including a pipeline, transmission line, or parking lot, that is crossed by the boundaries of one or more local taxing jurisdictions, the local taxes due on the taxable services, including materials and any other charges connected to the services performed, must be allocated among the local taxing jurisdictions based upon the total mileage or square footage, as appropriate, of the repair, remodeling, or restoration project located in each jurisdiction. For more information about tax due on materials used at nonresidential real property repair and remodeling job sites, refer to §3.357 of this title (relating to Nonresidential Real Property Repair, Remodeling, and Restoration; Real Property Maintenance).

(i) Sellers' and purchasers' responsibilities for collecting or accruing local taxes.

(1) Sale consummated in Texas; seller responsible for collecting local sales taxes and applicable local use taxes. When a sale of a taxable item is consummated at a location in Texas as provided by subsection (c) of this section, the seller must collect each local sales tax in effect at the location. If the total rate of local sales tax due on the sale does not reach the two percent cap, and the seller ships or delivers the item into another local taxing jurisdiction, then the seller is required to collect additional local use taxes due, if any, based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession, regardless of the location of the seller in Texas. For more information regarding local use taxes, refer to subsection (d) of this section.

(2) Out-of-state sale; seller engaged in business in Texas. Except as provided in paragraph (3) of this subsection, when a sale is not consummated in Texas, a seller who is engaged in business in this state is required to collect and remit local use taxes due, if any, on orders of taxable items shipped or delivered at the direction of the purchaser into a local taxing jurisdiction in this state based upon the location in this state to which the item is shipped or delivered or at which the purchaser of the item takes possession as provided in subsection (d) of this section.

(3) Local use tax rate for remote sellers.

(A) A remote seller required to collect and remit one or more local use taxes in connection with a sale of a taxable item must compute the amount using:

(i) the combined tax rate of all applicable local use taxes based on the location to which the item is shipped or delivered or at which the purchaser of the item takes possession; or

(ii) at the remote seller's election, the single local use tax rate published in the *Texas Register.*

(B) A remote seller that is storing tangible personal property in Texas to be used for fulfillment at a facility of a marketplace provider that has certified that it will assume the rights and duties of a seller with respect to the tangible personal property, as provided for in §3.286 of this title, may elect the single local use tax rate under subparagraph (A)(ii) of this paragraph.

(C) Notice to the comptroller of election and revocation of election.

(i) Before using the single local use tax rate, a remote seller must notify the comptroller of its election using a form prescribed by the comptroller. A remote seller may also notify the comptroller of the election on its use tax permit application form. The remote seller must use the single local use tax rate for all of its sales of taxable items until the election is revoked as provided in clause (ii) of this subparagraph.

(ii) A remote seller may revoke its election by filing a form prescribed by the comptroller. If the comptroller receives the notice by October 1, the revocation will be effective January 1 of the following year. If the comptroller receives the notice after October 1, the revocation will be effective January 1 of the year after the following year. For example, a remote seller must notify the comptroller by October 1, 2020, for the revocation to be effective January 1, 2021. If the comptroller receives the revocation on November 1, 2020, the revocation will be effective January 1, 2022.

(D) Single local use tax rate.

(i) The single local use tax rate in effect for the period beginning October 1, 2019, and ending December 31, 2019, is 1.75%.

(ii) The single local use tax rate in effect for the period beginning January 1, 2020, and ending December 31, 2020, is 1.75%.

(E) Annual publication of single local use tax rate. Before the beginning of a calendar year, the comptroller will publish notice of the single local use tax rate in the *Texas Register* that will be in effect for that calendar year.

(F) Calculating the single local use tax rate. The single local use tax rate effective in a calendar year is equal to the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year. As soon as practicable after the end of a state fiscal year, the comptroller must determine the estimated average rate of local sales and use taxes imposed in this state during the preceding state fiscal year by:

(i) dividing the total amount of net local sales and use taxes remitted to the comptroller during the state fiscal year by the total amount of net state sales and use tax remitted to the comptroller during the state fiscal year;

(ii) multiplying the amount computed under clause (i) of this subparagraph by the rate provided in Tax Code, §151.051; and

(iii) rounding the amount computed under clause (ii) of this subparagraph to the nearest .0025.

(G) Direct refund. A purchaser may request a refund based on local use taxes paid in a calendar year for the difference between the single local use tax rate paid by the purchaser and the amount the purchaser would have paid based on the combined tax rate for all applicable local use taxes. Notwithstanding the refund requirements under §3.325(a)(1) of this title (relating to Refunds and Payments Under Protest), a non-permitted purchaser may request a refund directly from the comptroller for the tax paid in the previous calendar year, no earlier than January 1 of the following calendar year within the statute of limitation under Tax Code, 111.104 (Refunds).

(H) Marketplace providers. Notwithstanding subparagraph (A) of this paragraph, marketplace providers may not use the single local use tax rate and must compute the amount of local use tax to collect and remit using the combined tax rate of all applicable local use taxes.

(4) Purchaser responsible for accruing and remitting local taxes if seller fails to collect.

(A) If a seller does not collect the state sales tax, any applicable local sales taxes, or both, on a sale of a taxable item that is consummated in Texas, then the purchaser is responsible for filing a return and paying the tax. The local sales taxes due are based on the location in this state where the sale is consummated as provided in subsection (c) of this section.

(B) A purchaser who buys an item for use in Texas from a seller who does not collect the state use tax, any applicable local use taxes, or both, is responsible for filing a return and paying the tax. The local use taxes due are based on the location where the item is first stored, used, or consumed by the purchaser.

(C) For more information about how to report and pay use tax directly to the comptroller, see §3.286 of this title.

(5) Local tax is due on the sales price of a taxable item, as defined in Tax Code, §151.007, in the report period in which the taxable item is purchased or the period in which the taxable item is first stored, used, or otherwise consumed in a local taxing jurisdiction.

(6) A purchaser is not liable for additional local use tax if the purchaser pays local use tax using the rate elected by an eligible remote seller according to paragraph (3) of this subsection. The remote seller must be identified on the comptroller's website as electing to use the single local use tax rate. A purchaser must verify that the remote seller is listed on the comptroller's website. If the remote seller is not listed on the comptroller's website, the purchaser will be liable for additional use tax due in accordance to paragraph (4) of this subsection.

(j) Items purchased under a direct payment permit.

(1) When taxable items are purchased under a direct payment permit, local use tax is due based upon the location where the permit holder first stores the taxable items, except that if the taxable items are not stored, then local use tax is due based upon the location where the taxable items are first used or otherwise consumed by the permit holder.

(2) If, in a local taxing jurisdiction, storage facilities contain taxable items purchased under a direct payment exemption certificate and at the time of storage it is not known whether the taxable items will be used in Texas, then the taxpayer may elect to report the use tax either when the taxable items are first stored in Texas or are first removed from inventory for use in Texas, as long as use tax is reported in a consistent manner. See also §3.288(i) of this title (relating to Direct Payment Procedures and Qualifications) and §3.346(g) of this title.

(3) If local use tax is paid on stored items that are subsequently removed from Texas before they are used, the tax may be recovered in accordance with the refund and credit provisions of §3.325 of this title and §3.338 of this title (relating to Multistate Tax Credits and Allowance of Credit for Tax Paid to Suppliers).

(k) Special rules for certain taxable goods and services. Sales of the following taxable goods and services are consummated at, and local tax is due based upon, the location indicated in this subsection.

(1) Amusement services. Local tax is due based upon the location where the performance or event occurs. For more information on amusement services, refer to §3.298 of this title (relating to Amusement Services).

(2) Cable services. When a service provider uses a cable system to provide cable television or bundled cable services to cus-

tomers, local tax is due as provided for in §3.313 of this title. When a service provider uses a satellite system to provide cable services to customers, no local tax is due on the service in accordance with the Telecommunications Act of 1996, §602.

(3) Florists. Local sales tax is due on all taxable items sold by a florist based upon the location where the order is received, regardless of where or by whom delivery is made. Local use tax is not due on deliveries of taxable items sold by florists. For example, if the place of business of the florist where an order is taken is not within the boundaries of any local taxing jurisdiction, no local sales tax is due on the item and no local use tax is due regardless of the location of delivery. If a Texas florist delivers an order in a local taxing jurisdiction at the instruction of an unrelated florist, and if the unrelated florist did not take the order within the boundaries of a local taxing jurisdiction, local use tax is not due on the delivery. For more information about florists' sales and use tax obligations, refer to §3.307 of this title (relating to Florists).

(4) Landline telecommunications services. Local taxes due on landline telecommunications services are based upon the location of the device from which the call or other transmission originates. If the seller cannot determine where the call or transmission originates, local taxes due are based on the address to which the service is billed. For more information, refer to §3.344 of this title (relating to Telecommunications Services).

(5) Marketplace provider sales. Local taxes are due on sales of taxable items through a marketplace provider based on the location in this state to which the item is shipped or delivered or at which the purchaser takes possession. For more information, refer to §3.286 of this title.

(6) Mobile telecommunications services. Local taxes due on mobile telecommunications services are based upon the location of the customer's place of primary use as defined in §3.344(a)(8) of this title, and local taxes are to be collected as indicated in §3.344(h) of this title.

(7) Motor vehicle parking and storage. Local taxes are due based on the location of the space or facility where the vehicle is parked. For more information, refer to §3.315 of this title (relating to Motor Vehicle Parking and Storage).

(8) Natural gas and electricity. Any local city and special purpose taxes due are based upon the location where the natural gas or electricity is delivered to the purchaser. As explained in subsection (l)(1) of this section, residential use of natural gas and electricity is exempt from all county sales and use taxes and all transit authority sales and use taxes, most special purpose district sales and use taxes, and many city sales and use taxes. A list of the cities and special purpose districts that do impose, and those that are eligible to impose, local sales and use tax on residential use of natural gas and electricity is available on the comptroller's website. For more information, also refer to §3.295 of this title (relating to Natural Gas and Electricity).

(9) Nonresidential real property repair and remodeling services. Local taxes are due on services to remodel, repair, or restore nonresidential real property based on the location of the job site where the remodeling, repair, or restoration is performed. See also subsection (h)(2)(B) of this section and §3.357 of this title.

(10) Residential real property repair and remodeling and new construction of a real property improvement performed under a separated contract. When a contractor constructs a new improvement to realty pursuant to a separated contract or improves residential real property pursuant to a separated contract, the sale is consummated at the job site at which the contractor incorporates taxable items into the customer's real property. See also subsection (h)(2)(A) of this section and §3.291 of this title.

(11) Waste collection services. Local taxes are due on garbage or other solid waste collection or removal services based on the location at which the waste is collected or from which the waste is removed. For more information, refer to §3.356 of this title (relating to Real Property Service).

(l) Special exemptions and provisions applicable to individual jurisdictions.

(1) Residential use of natural gas and electricity.

(A) Mandatory exemptions from local sales and use tax. Residential use of natural gas and electricity is exempt from most local sales and use taxes. Counties, transit authorities, and most special purpose districts are not authorized to impose sales and use tax on the residential use of natural gas and electricity. Pursuant to Tax Code, §321.105, any city that adopted a local sales and use tax effective October 1, 1979, or later is prohibited from imposing tax on the residential use of natural gas and electricity. See §3.295 of this title.

(B) Imposition of tax allowed in certain cities. Cities that adopted local sales tax prior to October 1, 1979, may, in accordance with the provisions in Tax Code, §321.105, choose to repeal the exemption for residential use of natural gas and electricity. The comptroller's website provides a list of cities that impose tax on the residential use of natural gas and electricity, as well as a list of those cities that do not currently impose the tax, but are eligible to do so.

(C) Effective January 1, 2010, a fire control, prevention, and emergency medical services district organized under Local Government Code, Chapter 344 that imposes sales tax under Tax Code, §321.106, or a crime control and prevention district organized under Local Government Code, Chapter 363 that imposes sales tax under Tax Code, §321.108, that is located in all or part of a municipality that imposes a tax on the residential use of natural gas and electricity as provided under Tax Code, §321.105 may impose tax on residential use of natural gas and electricity at locations within the district. A list of the special purpose districts that impose tax on residential use of natural gas and electricity and those districts eligible to impose the tax that do not currently do so is available on the comptroller's website.

(2) Telecommunication services. Telecommunications services are exempt from all local sales taxes unless the governing body of a city, county, transit authority, or special purpose district votes to impose sales tax on these services. However, since 1999, under Tax Code, §322.109(d), transit authorities created under Transportation Code, Chapter 451 cannot repeal the exemption unless the repeal is first approved by the governing body of each city that created the local taxing jurisdiction. The local sales tax is limited to telecommunications services occurring between locations within Texas. See §3.344 of this title. The comptroller's website provides a list of local taxing jurisdictions that impose tax on telecommunications services.

(3) Emergency services districts.

(A) Authority to exclude territory from imposition of emergency services district sales and use tax. Pursuant to the provisions of Health and Safety Code, §775.0751(c-1), an emergency services district wishing to enact a sales and use tax may exclude from the election called to authorize the tax any territory in the district where the sales and use tax is then at 2.0%. The tax, if authorized by the voters eligible to vote on the enactment of the tax, then applies only in the portions of the district included in the election. The tax does not apply to sales made in the excluded territories in the district and sellers in the excluded territories should continue to collect local sales and use taxes

for the local taxing jurisdictions in effect at the time of the election under which the district sales and use tax was authorized as applicable.

(B) Consolidation of districts resulting in sales tax sub-districts. Pursuant to the provisions of Health and Safety Code, §775.018(f), if the territory of a district proposed under Health and Safety Code, Chapter 775 overlaps with the boundaries of another district created under that chapter, the commissioners court of each county and boards of the counties in which the districts are located may choose to create a consolidated district in the overlapping territory. If two districts that want to consolidate under Health and Safety Code, §775.024 have different sales and use tax rates, the territory of the former districts located within the consolidated area will be designated as sub-districts and the sales tax rate within each sub-district will continue to be imposed at the rate the tax was imposed by the former district that each sub-district was part of prior to the consolidation.

(4) East Aldine Management District.

(A) Special sales and use tax zones within district; separate sales and use tax rate. As set out in Special District Local Laws Code, §3817.154(e) and (f), the East Aldine Management District board may create special sales and use tax zones within the boundaries of the District and, with voter approval, enact a special sales and use tax rate in each zone that is different from the sales and use tax rate imposed in the rest of the district.

(B) Exemptions from special zone sales and use tax. The sale, production, distribution, lease, or rental of; and the use, storage, or other consumption within a special sales and use tax zone of; a taxable item sold, leased, or rented by the entities identified in clauses (i) - (vi) of this subparagraph are exempt from the special zone sales and use tax. State and all other applicable local taxes apply unless otherwise exempted by law. The special zone sales and use tax exemption applies to:

(i) a retail electric provider as defined by Utilities Code, §31.002;

(ii) an electric utility or a power generation company as defined by Utilities Code, §31.002;

(iii) a gas utility as defined by Utilities Code, §101.003 or §121.001, or a person who owns pipelines used for transportation or sale of oil or gas or a product or constituent of oil or gas;

(iv) a person who owns pipelines used for the transportation or sale of carbon dioxide;

(v) a telecommunications provider as defined by Utilities Code, §51.002; or

(vi) a cable service provider or video service provider as defined by Utilities Code, §66.002.

(5) Imposition of city sales tax and transit tax on certain military installations; El Paso and Fort Bliss. Pursuant to Tax Code, §321.1045 (Imposition of Sales and Use Tax in Certain Federal Military Installations), for purposes of the local sales and use tax imposed under Tax Code, Chapter 321, the city of El Paso includes the area within the boundaries of Fort Bliss to the extent it is in the city's extraterritorial jurisdiction. However, the El Paso transit authority does not include Fort Bliss. See Transportation Code, §453.051 concerning the Creation of Transit Departments.

(m) Restrictions on local sales tax rebates and other economic incentives. Pursuant to Local Government Code, §501.161, Section 4A and 4B development corporations may not offer to provide economic incentives, such as local sales tax rebates authorized under Local Government Code, Chapters 380 or 381, to persons whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80% of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.

(n) Prior contract exemptions. The provisions of §3.319 of this title (relating to Prior Contracts) concerning definitions and exclusions apply to prior contract exemptions.

(1) Certain contracts and bids exempt. No local taxes are due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of any local tax if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of any local tax if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(2) Annexations. Any annexation of territory into an existing local taxing jurisdiction is also a basis for claiming the exemption provided by this subsection.

(3) Local taxing jurisdiction rate increase; partial exemption for certain contracts and bids. When an existing local taxing jurisdiction raises its sales and use tax rate, the additional amount of tax that would be due as a result of the rate increase is not due on the sale, use, storage, or other consumption in this state of taxable items used:

(A) for the performance of a written contract executed prior to the effective date of the tax rate increase if the contract may not be modified because of the tax; or

(B) pursuant to the obligation of a bid or bids submitted prior to the effective date of the tax rate increase if the bid or bids and contract entered into pursuant thereto are at a fixed price and not subject to withdrawal, change, or modification because of the tax.

(4) Three-year statute of limitations.

(A) The exemption in paragraph (1) of this subsection and the partial exemption in paragraph (3) of this subsection have no effect after three years from the date the adoption or increase of the tax takes effect in the local taxing jurisdiction.

(B) The provisions of §3.319 of this title apply to this subsection to the extent they are consistent.

(C) Leases. Any renewal or exercise of an option to extend the time of a lease or rental contract under the exemptions provided by this subsection shall be deemed to be a new contract and no exemption will apply.

(5) Records. Persons claiming the exemption provided by this subsection must maintain records which can be verified by the comptroller or the exemption will be lost.

(6) Exemption certificate. An identification number is required on the prior contract exemption certificates furnished to sellers. The identification number should be the person's 11-digit Texas taxpayer number or federal employer's identification (FEI) number.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on May 11, 2020.

EXHIBIT B

Vernon's Texas Statutes and Codes Annotated
Tax Code (Refs & Annos)
Title 3. Local Taxation
Subtitle C. Local Sales and Use Taxes
Chapter 321. Municipal Sales and Use Tax Act (Refs & Annos)
Subchapter C. Computation of Taxes

V.T.C.A., Tax Code § 321.203

§ 321.203. Consummation of Sale

Effective: October 1, 2019
Currentness

<Subsecs. (c-4), (c-5) expire pursuant to the terms of subsec. (c-5).>

(a) A sale of a taxable item occurs within the municipality in which the sale is consummated. A sale is consummated as provided by this section regardless of the place where transfer of title or possession occurs.

(b) If a retailer has only one place of business in this state, all of the retailer's retail sales of taxable items are consummated at that place of business except as provided by Subsection (e).

(c) If a retailer has more than one place of business in this state, each sale of each taxable item by the retailer is consummated at the place of business of the retailer in this state where the retailer first receives the order, provided that the order is placed in person by the purchaser or lessee of the taxable item at the place of business of the retailer in this state where the retailer first receives the order.

(c-1) If the retailer has more than one place of business in this state and Subsection (c) does not apply, the sale is consummated at the place of business of the retailer in this state:

(1) from which the retailer ships or delivers the item, if the retailer ships or delivers the item to a point designated by the purchaser or lessee; or

(2) where the purchaser or lessee takes possession of and removes the item, if the purchaser or lessee takes possession of and removes the item from a place of business of the retailer.

(c-2) Expired.

(c-3) Expired.

(c-4) Subsection (c) does not apply if:

(1) the taxable item is shipped or delivered from a warehouse:

(A) located in a municipality with a population of 5,000 or less;

(B) that is a place of business of the retailer;

(C) in relation to which the retailer has an economic development agreement with the municipality that was entered into under Chapter 380, 504, or 505, Local Government Code, or a predecessor statute, before January 1, 2009; and

(D) in relation to which the municipality provided information relating to the economic development agreement as required by Subsection (c-3), as that subsection existed immediately before its expiration; and

(2) the place of business of the retailer at which the retailer first receives the order in the manner described by Subsection (c) is a retail outlet identified in the information required by Subsection (c-3), as that subsection existed immediately before its expiration, as being served by the warehouse on January 1, 2009.

(c-5) This subsection and Subsection (c-4) expire September 1, 2024.

(d) If the retailer has more than one place of business in this state and Subsections (c) and (c-1) do not apply, the sale is consummated at:

(1) the place of business of the retailer in this state where the order is received; or

(2) if the order is not received at a place of business of the retailer, the place of business from which the retailer's agent or employee who took the order operates.

(e) A sale of a taxable item is consummated at the location in this state to which the item is shipped or delivered or at which possession is taken by the customer if transfer of possession of the item occurs at, or shipment or delivery of the item originates from, a location in this state other than a place of business of the retailer and if:

(1) the retailer is an itinerant vendor who has no place of business in this state;

(2) the retailer's place of business where the purchase order is initially received or from which the retailer's agent or employee who took the order operates is outside this state; or

(3) the purchaser places the order directly with the retailer's supplier and the item is shipped or delivered directly to the purchaser by the supplier.

(e-1) Notwithstanding any other provision of this section, a sale of a taxable item made by a marketplace seller through a marketplace as provided by Section 151.0242 is consummated at the location in this state to which the item is shipped or delivered or at which possession is taken by the purchaser.

(f) The sale of natural gas and electricity is consummated at the point of delivery to the consumer.

(g) The sale of mobile telecommunications services is consummated in accordance with Section 151.061.

(g-1) The sale of telecommunications services sold based on a price that is measured by individual calls is consummated at the location where the call originates and terminates or the location where the call either originates or terminates and at which the service address is also located.

(g-2) Except as provided by Subsection (g-3), the sale of telecommunications services sold on a basis other than on a call-by-call basis is consummated at the location of the customer's place of primary use.

(g-3) A sale of post-paid calling services is consummated at the location of the origination point of the telecommunications signal as first identified by the seller's telecommunications system or by information received by the seller from the seller's service provider if the system used to transport the signal is not that of the seller.

(h) The sale of an amusement service is consummated in the municipality in which the performance or other delivery of the service takes place.

(i) If a purchaser who has given a resale certificate makes any use of a taxable item that subjects the taxable item to the sales tax under the provisions of Section 151.154, the use or other consumption of the taxable item that subjected the taxable item to the tax is consummated at the place where the taxable item is stored or kept at the time of or just before the use or consumption.

(j) The sale of services delivered through a cable system is consummated at the point of delivery to the consumer.

(k) The sale of garbage or other solid waste collection or removal service is consummated at the location at which the garbage or other solid waste is located when its collection or removal begins.

(l) Repealed by Acts 2007, 80th Leg., ch. 1266, § 15(4).

(m) If there is no place of business of the retailer because the comptroller determines that an outlet, office, facility, or location contracts with a retail or commercial business to process for that business invoices or bills of lading and that the outlet, office, facility, or location functions or exists to avoid the tax imposed by this chapter or to rebate a portion of the tax imposed by this chapter to the

contracting business, a sale is consummated at the place of business of the retailer from whom the outlet, office, facility, or location purchased the taxable item for resale to the contracting business.

(n) A sale of a service described by Section 151.0047 to remodel, repair, or restore nonresidential real property is consummated at the location of the job site.

Credits

Added by Acts 1987, 70th Leg., ch. 191, § 1, eff. Sept. 1, 1987. Amended by Acts 1989, 71st Leg., ch. 2, § 14.22(a), eff. Aug. 28, 1989; Acts 1989, 71st Leg., ch. 810, § 1, eff. Oct. 1, 1989; Acts 1991, 72nd Leg., ch. 705, § 26, eff. Sept. 1, 1991; Acts 2001, 77th Leg., ch. 370, § 2, eff. Aug. 1, 2002; Acts 2003, 78th Leg., ch. 209, § 55, eff. Oct. 1, 2003; Acts 2003, 78th Leg., ch. 1155, §§ 2, 3, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 1310, § 115, eff. July 1, 2004; Acts 2005, 79th Leg., ch. 728, § 23.001(83), eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 1266, §§ 11, 15(4), eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 1360, § 5, eff. June 19, 2009; Acts 2013, 83rd Leg., ch. 1342 (S.B. 997), § 1, eff. June 14, 2013; Acts 2019, 86th Leg., ch. 182 (H.B. 1525), § 3, eff. Oct. 1, 2019.

Notes of Decisions (5)

V. T. C. A., Tax Code § 321.203, TX TAX § 321.203

Current through legislation effective June 7, 2021, of the 2021 Regular Session of the 87th Legislature. Some statute sections may be more current, but not necessarily complete through the whole Session. See credits for details.

End of Document

EXHIBIT C

138 S.Ct. 2080
Supreme Court of the United States

SOUTH DAKOTA, Petitioner
v.
WAYFAIR, INC., et al.

No. 17–494.
|
Argued April 17, 2018.
|
Decided June 21, 2018.

Synopsis

Background: State of South Dakota brought action against internet sellers with no employees or real estate in the State, seeking declaration that these sellers had to comply with recently enacted statute requiring internet sellers with no physical presence in the state to collect and remit sales tax. Following an unsuccessful attempt to remove the case to federal court, the Circuit Court, Sixth Judicial District, Hughes County, Mark W. Barnett, J., 2017 WL 4358293, entered summary judgment for sellers. State appealed. The Supreme Court of South Dakota, Severson, J., 901 N.W.2d 754, affirmed, holding that the statute violated the dormant Commerce Clause. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

out-of-state seller's physical presence in taxing state is not necessary for state to require seller to collect and remit its sales tax, overruling *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91; *National Bellas Hess, Inc. v. Department of Revenue of State of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505;

stare decisis did not support Supreme Court's continued adherence to *Quill*'s unsound and incorrect physical presence requirement; and

South Dakota statute satisfied substantial nexus requirement for imposing on internet sellers duty to collect and remit sales tax.

Vacated and remanded.

Justice Thomas filed a concurring opinion.

Justice Gorsuch filed a concurring opinion.

Chief Justice Roberts filed a dissenting opinion, in which Justices Breyer, Sotomayor, and Kagan joined.

West Codenotes

Negative Treatment Reconsidered
SDCL § 10–64–2

***2084** *Syllabus*[*]

South Dakota, like many States, taxes the retail sales of goods and services in the State. Sellers are required to collect and remit the tax to the State, but if they do not then in-state consumers are responsible for paying a use tax at the same rate. Under *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505,

and *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91, South Dakota may not require a business that has no physical presence in the State to collect its sales tax. Consumer compliance rates are notoriously low, however, and it is estimated that *Bellas Hess* and *Quill* cause South Dakota to lose between $48 and $58 million annually. Concerned about the erosion of its sales tax base and corresponding loss of critical funding for state and local services, the South Dakota Legislature enacted a law requiring out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the State." The Act covers only sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. Respondents, top online retailers with no employees or real estate in South Dakota, each meet the Act's minimum sales or transactions requirement, but do not collect the State's sales tax. South Dakota filed suit in state court, seeking a declaration that the Act's requirements are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit the sales tax. Respondents sought summary judgment, arguing that the Act is unconstitutional. The trial court granted their motion. The State Supreme Court affirmed on the ground that *Quill* is controlling precedent.

Held : Because the physical presence rule of *Quill* is unsound and incorrect, *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91, and *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505, are overruled. Pp. 2089 – 2120.

(a) An understanding of this Court's Commerce Clause principles and their application to state taxes is instructive here. Pp. 2089 – 2092.

(1) Two primary principles mark the boundaries of a State's authority to regulate interstate commerce: State regulations may not discriminate against interstate commerce; and States may not impose undue burdens on interstate commerce. These principles guide the courts in adjudicating challenges to state laws under the Commerce Clause. Pp. 2089 – 2091.

***2085** (2) They also animate Commerce Clause precedents addressing the validity of state taxes, which will be sustained so long as they (1) apply to an activity with a substantial nexus with the taxing State, (2) are fairly apportioned, (3) do not discriminate against interstate commerce, and (4) are fairly related to the services the State provides. See *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S.Ct. 1076, 51 L.Ed.2d 326. Before *Complete Auto,* the Court held in *Bellas Hess* that a "seller whose only connection with customers in the State is by common carrier or ... mail" lacked the requisite minimum contacts with the State required by the Due Process Clause and the Commerce Clause, and that unless the retailer maintained a physical presence in the State, the State lacked the power to require that retailer to collect a local tax. 386 U.S., at 758, 87 S.Ct. 1389. In *Quill,* the Court overruled the due process holding, but not the Commerce Clause holding, grounding the physical presence rule in *Complete Auto* 's requirement that a tax have a "substantial nexus" with the activity being taxed. Pp. 2090 – 2092.

(b) The physical presence rule has long been criticized as giving out-of-state sellers an advantage. Each year, it becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause. Pp. 2091 – 2096.

(1) *Quill* is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of *Complete Auto'* s nexus requirement. That requirement is "closely related," *Bellas Hess,* 386 U.S. at 756, 87 S.Ct. 1389, to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344–345, 74 S.Ct. 535, 98 L.Ed. 744. And, as *Quill* itself recognized, a business need not have a physical presence in a State to satisfy the demands of due process. When considering whether a State may levy a tax, Due Process and Commerce Clause standards, though not identical or coterminous, have significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Other aspects of the Court's doctrine can better and more accurately address potential burdens on interstate commerce, whether or not *Quill* 's physical presence rule is satisfied.

Second, *Quill* creates rather than resolves market distortions. In effect, it is a judicially created tax shelter for businesses that limit their physical presence in a State but sell their goods and services to the State's consumers, something that has become easier and more prevalent as technology has advanced. The rule also produces an incentive to avoid physical presence in multiple States, affecting development that might be efficient or desirable.

Third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow in favor of "a sensitive, case-by-case analysis of purposes and effects," *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 201, 114 S.Ct. 2205, 129 L.Ed.2d 157. It treats economically identical actors differently for arbitrary reasons. For example, a business that maintains a few items of inventory in a small warehouse in a State is required to collect and remit a tax on all of its sales in the State, while a seller with a pervasive Internet presence ***2086** cannot be subject to the same tax for the sales of the same items. Pp. 2092 – 2095.

(2) When the day-to-day functions of marketing and distribution in the modern economy are considered, it becomes evident that *Quill'* s physical presence rule is artificial, not just "at its edges," 504 U.S. at 315, 112 S.Ct. 1904, but in its entirety. Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. And the Court should not maintain a rule that ignores substantial virtual connections to the State. Pp. 2094 – 2095.

(3) The physical presence rule of *Bellas Hess* and *Quill* is also an extraordinary imposition

by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia have asked the Court to reject *Quill* 's test. Helping respondents' customers evade a lawful tax unfairly shifts an increased share of the taxes to those consumers who buy from competitors with a physical presence in the State. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. And it is also essential to the confidence placed in the Court's Commerce Clause decisions. By giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes, *Quill* 's physical presence rule has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field. Pp. 2095 – 2096.

(c) *Stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power. If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. The Internet revolution has made *Quill'* s original error all the more egregious and harmful. The *Quill* Court did not have before it the present realities of the interstate marketplace, where the Internet's prevalence and power have changed the dynamics of the national economy. The expansion of e-commerce has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes, leading the South Dakota Legislature to declare an emergency. The argument, moreover, that the physical presence rule is clear and easy to apply is unsound, as attempts to apply the physical presence rule to online retail sales have proved unworkable.

Because the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, arguments for reliance based on its clarity are misplaced. *Stare decisis* may accommodate "legitimate reliance interest[s]," *United States v. Ross,* 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572, but a business "is in no position to found a constitutional right ... on the practical opportunities for tax avoidance," *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 366, 61 S.Ct. 586, 85 L.Ed. 888. Startups and small businesses may benefit from the physical presence rule, but here South Dakota affords small merchants a reasonable degree of protection. Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. The potential for such issues to arise in some later case cannot justify retaining an artificial, anachronistic rule that deprives States of vast revenues from major businesses. Pp. 2096 – 2099.

***2087** (d) In the absence of *Quill* and *Bellas Hess,* the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State, 430 U.S., at 279, 97 S.Ct. 1076. Here, the nexus is clearly sufficient. The Act applies only to sellers who engage in a significant quantity of business in the State,

and respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Any remaining claims regarding the Commerce Clause's application in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand. Pp. 2099 – 2100.

2017 S.D. 56, 901 N.W.2d 754, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which THOMAS, GINSBURG, ALITO, and GORSUCH, JJ., joined. THOMAS, J., and GORSUCH, J., filed concurring opinions. ROBERTS, C.J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

Attorneys and Law Firms

Marty J. Jackley, Pierre, SD, for Petitioner.

Malcolm L. Stewart, Washington, D.C., for the United States as amicus curiae, by special leave of the Court, supporting the petitioner.

George S. Isaacson, Lewiston, ME, for Respondents.

Marty J. Jackley, Attorney General, Richard M. Williams, Deputy Attorney General, Kirsten E. Jasper, Assistant Attorney General, Andrew L. Fergel, Special Assistant Attorney General & Chief Legal Counsel, Department of Revenue, Pierre, SD, Eric F. Citron, Thomas C. Goldstein, Jeanne Jeong, Erica Oleszczuk Evans, Goldstein & Russell, P.C., Bethesda, MD, for Petitioner.

Lisa Soronen, Executive Director, State and Local Legal Center, Tillman J. Breckenridge, Bailey & Glasser LLP, Washington, DC, Patricia E. Roberts, William & Mary Law, School Appellate and, Supreme Court Clinic, Williamsburg, VA, for Amici Curiae.

Noel J. Francisco, Solicitor General, Chad A. Readler, Acting Assistant Attorney General, Malcolm L. Stewart, Deputy Solicitor General, Hashim M. Mooppan, Deputy Assistant Attorney General, Robert A. Parker, Assistant to the Solicitor General, Mark B. Stern, Nicolas Y. Riley, Attorneys, Department of Justice, Washington, D.C., for the United States.

George S. Isaacson, Martin I. Eisenstein, Matthew P. Schaefer, Brann & Isaacson, Lewiston, ME, for Respondents.

Opinion

Justice KENNEDY delivered the opinion of the Court.

When a consumer purchases goods or services, the consumer's State often imposes a sales tax. This case requires the Court to determine when an out-of-state seller can be required to collect and remit that tax. All concede that taxing the sales in question here is lawful. The question is whether the out-of-state seller can be held responsible for its payment, and this turns on a proper interpretation of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3.

In two earlier cases the Court held that an out-of-state seller's liability to collect and remit the tax to the consumer's State depended on whether the seller had a physical presence in that State, but that mere shipment of goods into the consumer's ***2088** State, following an order from a catalog, did not satisfy the physical

presence requirement. *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967); *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). The Court granted certiorari here to reconsider the scope and validity of the physical presence rule mandated by those cases.

I

Like most States, South Dakota has a sales tax. It taxes the retail sales of goods and services in the State. S.D. Codified Laws §§ 10–45–2, 10–45–4 (2010 and Supp. 2017). Sellers are generally required to collect and remit this tax to the Department of Revenue. § 10–45–27.3. If for some reason the sales tax is not remitted by the seller, then in-state consumers are separately responsible for paying a use tax at the same rate. See §§ 10–46–2, 10–46–4, 10–46–6. Many States employ this kind of complementary sales and use tax regime.

Under this Court's decisions in *Bellas Hess* and *Quill,* South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota instead must rely on its residents to pay the use tax owed on their purchases from out-of-state sellers. "[T]he impracticability of [this] collection from the multitude of individual purchasers is obvious." *National Geographic Soc. v. California Bd. of Equalization,* 430 U.S. 551, 555, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). And consumer compliance rates are notoriously low. See, *e.g.,* GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely to Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report); California State Bd. of Equalization, Revenue Estimate: Electronic Commerce and Mail Order Sales 7 (2013) (Table 3) (estimating a 4 percent collection rate). It is estimated that *Bellas Hess* and *Quill* cause the States to lose between $8 and $33 billion every year. See Sales Taxes Report, at 11–12 (estimating $8 to $13 billion); Brief for Petitioner 34–35 (citing estimates of $23 and $33.9 billion). In South Dakota alone, the Department of Revenue estimates revenue loss at $48 to $58 million annually. App. 24. Particularly because South Dakota has no state income tax, it must put substantial reliance on its sales and use taxes for the revenue necessary to fund essential services. Those taxes account for over 60 percent of its general fund.

In 2016, South Dakota confronted the serious inequity *Quill* imposes by enacting S. 106—"An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency." S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016) (S.B. 106). The legislature found that the inability to collect sales tax from remote sellers was "seriously eroding the sales tax base" and "causing revenue losses and imminent harm ... through the loss of critical funding for state and local services." § 8(1). The legislature also declared an emergency: "Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist." § 9. Fearing further erosion of the tax base, the legislature expressed its intention to "apply South Dakota's sales and use tax

obligations to the limit of federal and state constitutional doctrines" and noted the urgent need for this Court to reconsider its precedents. §§ 8(11), (8).

***2089** To that end, the Act requires out-of-state sellers to collect and remit sales tax "as if the seller had a physical presence in the state." § 1. The Act applies only to sellers that, on an annual basis, deliver more than $100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State. *Ibid.* The Act also forecloses the retroactive application of this requirement and provides means for the Act to be appropriately stayed until the constitutionality of the law has been clearly established. §§ 5, 3, 8(10).

Respondents Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online retailer of home goods and furniture and had net revenues of over $4.7 billion last year. Overstock.com, Inc., is one of the top online retailers in the United States, selling a wide variety of products from home goods and furniture to clothing and jewelry; and it had net revenues of over $1.7 billion last year. Newegg, Inc., is a major online retailer of consumer electronics in the United States. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax. 2017 S.D. 56, ¶¶ 10–11, 901 N.W.2d 754, 759–760.

Pursuant to the Act's provisions for expeditious judicial review, South Dakota filed a declaratory judgment action against respondents in state court, seeking a declaration that the requirements of the Act are valid and applicable to respondents and an injunction requiring respondents to register for licenses to collect and remit sales tax. App. 11, 30. Respondents moved for summary judgment, arguing that the Act is unconstitutional. 901 N.W.2d, at 759–760. South Dakota conceded that the Act cannot survive under *Bellas Hess* and *Quill* but asserted the importance, indeed the necessity, of asking this Court to review those earlier decisions in light of current economic realities. 901 N.W.2d, at 760; see also S.B. 106, § 8. The trial court granted summary judgment to respondents. App. to Pet. for Cert. 17a.

The South Dakota Supreme Court affirmed. It stated: "However persuasive the State's arguments on the merits of revisiting the issue, *Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." 901 N.W.2d, at 761. This Court granted certiorari. 583 U.S. ——, 138 S.Ct. 735, 199 L.Ed.2d 602 (2018).

II

The Constitution grants Congress the power "[t]o regulate Commerce ... among the several States." Art. I, § 8, cl. 3. The Commerce Clause "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would

have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma,* 441 U.S. 322, 325–326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). Although the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action. Of course, when Congress exercises its power to regulate commerce by enacting legislation, the legislation controls. *Southern Pacific Co. v. Arizona ex rel.* ***2090** *Sullivan,* 325 U.S. 761, 769, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). But this Court has observed that "in general Congress has left it to the courts to formulate the rules" to preserve "the free flow of interstate commerce." *Id.,* at 770, 65 S.Ct. 1515.

To understand the issue presented in this case, it is instructive first to survey the general development of this Court's Commerce Clause principles and then to review the application of those principles to state taxes.

A

From early in its history, a central function of this Court has been to adjudicate disputes that require interpretation of the Commerce Clause in order to determine its meaning, its reach, and the extent to which it limits state regulations of commerce. *Gibbons v. Ogden,* 9 Wheat. 1, 6 L.Ed. 23 (1824), began setting the course by defining the meaning of commerce. Chief Justice Marshall explained that commerce included both "the interchange of commodities" and "commercial intercourse." *Id.,* at 189, 193. A concurring opinion further stated that Congress had the exclusive power to regulate commerce. See *id.,* at 236 (opinion of Johnson, J.). Had that latter submission prevailed and States been denied the power of concurrent regulation, history might have seen sweeping federal regulations at an early date that foreclosed the States from experimentation with laws and policies of their own, or, on the other hand, proposals to reexamine *Gibbons*' broad definition of commerce to accommodate the necessity of allowing States the power to enact laws to implement the political will of their people.

Just five years after *Gibbons,* however, in another opinion by Chief Justice Marshall, the Court sustained what in substance was a state regulation of interstate commerce. In *Willson v. Black–Bird Creek Marsh Co.,* 2 Pet. 245, 7 L.Ed. 412 (1829), the Court allowed a State to dam and bank a stream that was part of an interstate water system, an action that likely would have been an impermissible intrusion on the national power over commerce had it been the rule that only Congress could regulate in that sphere. See *id.,* at 252. Thus, by implication at least, the Court indicated that the power to regulate commerce in some circumstances was held by the States and Congress concurrently. And so both a broad interpretation of interstate commerce and the concurrent regulatory power of the States can be traced to *Gibbons* and *Willson*.

Over the next few decades, the Court refined the doctrine to accommodate the necessary balance between state and federal power. In *Cooley v. Board of Wardens of Port of*

Philadelphia ex rel. Soc. for Relief of Distressed Pilots, 12 How. 299, 13 L.Ed. 996 (1852), the Court addressed local laws regulating river pilots who operated in interstate waters and guided many ships on interstate or foreign voyages. The Court held that, while Congress surely could regulate on this subject had it chosen to act, the State, too, could regulate. The Court distinguished between those subjects that by their nature "imperatively deman[d] a single uniform rule, operating equally on the commerce of the United States," and those that "deman[d] th[e] diversity, which alone can meet ... local necessities." *Id.,* at 319. Though considerable uncertainties were yet to be overcome, these precedents still laid the groundwork for the analytical framework that now prevails for Commerce Clause cases.

This Court's doctrine has developed further with time. Modern precedents rest upon two primary principles that mark the boundaries of a State's authority to regulate interstate commerce. ***2091** First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce. State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Granholm v. Heald,* 544 U.S. 460, 476, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005) (internal quotation marks omitted). State laws that "regulat[e] even-handedly to effectuate a legitimate local public interest ... will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970); see also *Southern Pacific, supra,* at 779, 65 S.Ct. 1515. Although subject to exceptions and variations, see, *e.g., Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 96 S.Ct. 2488, 49 L.Ed.2d 220 (1976); *Brown–Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986), these two principles guide the courts in adjudicating cases challenging state laws under the Commerce Clause.

B

These principles also animate the Court's Commerce Clause precedents addressing the validity of state taxes. The Court explained the now-accepted framework for state taxation in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). The Court held that a State "may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause." *Id.,* at 285, 97 S.Ct. 1076. After all, "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 31, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988). The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides. See *Complete Auto, supra,* at 279, 97 S.Ct. 1076.

Before *Complete Auto,* the Court had addressed a challenge to an Illinois tax that required out-of-state retailers to collect and remit taxes on sales made to consumers who purchased goods for use within Illinois. *Bellas Hess,* 386 U.S., at 754–755, 87 S.Ct. 1389. The Court held that a mail-order company "whose only

connection with customers in the State is by common carrier or the United States mail" lacked the requisite minimum contacts with the State required by both the Due Process Clause and the Commerce Clause. *Id.,* at 758, 87 S.Ct. 1389. Unless the retailer maintained a physical presence such as "retail outlets, solicitors, or property within a State," the State lacked the power to require that retailer to collect a local use tax. *Ibid.* The dissent disagreed: "There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax." *Id.,* at 761–762, 87 S.Ct. 1389 (opinion of Fortas, J., joined by Black and Douglas, JJ.).

In 1992, the Court reexamined the physical presence rule in *Quill*. That case presented a challenge to North Dakota's "attempt to require an out-of-state mail-order house that has neither outlets nor sales representatives in the State to collect and pay a use tax on goods purchased for use within the State." 504 U.S., at 301, 112 S.Ct. 1904. Despite the fact that *Bellas Hess* linked due process and the Commerce Clause together, the Court in *Quill* overruled the due process holding, but not the Commerce Clause holding; and it thus ***2092** reaffirmed the physical presence rule. 504 U.S., at 307–308, 317–318, 112 S.Ct. 1904.

The Court in *Quill* recognized that intervening precedents, specifically *Complete Auto,* "might not dictate the same result were the issue to arise for the first time today." 504 U.S., at 311, 112 S.Ct. 1904. But, nevertheless, the *Quill* majority concluded that the physical presence rule was necessary to prevent undue burdens on interstate commerce. *Id.,* at 313, and n. 6, 112 S.Ct. 1904. It grounded the physical presence rule in *Complete Auto* 's requirement that a tax have a " 'substantial nexus' " with the activity being taxed. 504 U.S., at 311, 112 S.Ct. 1904.

Three Justices based their decision to uphold the physical presence rule on *stare decisis* alone. *Id.,* at 320, 112 S.Ct. 1904 (Scalia, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment). Dissenting in relevant part, Justice White argued that "there is no relationship between the physical-presence/nexus rule the Court retains and Commerce Clause considerations that allegedly justify it." *Id.,* at 327, 112 S.Ct. 1904 (opinion concurring in part and dissenting in part).

III

The physical presence rule has "been the target of criticism over many years from many quarters." *Direct Marketing Assn. v. Brohl,* 814 F.3d 1129, 1148, 1150–1151 (C.A.10 2016) (Gorsuch, J., concurring). *Quill,* it has been said, was "premised on assumptions that are unfounded" and "riddled with internal inconsistencies." Rothfeld, *Quill* : Confusing the Commerce Clause, 56 Tax Notes 487, 488 (1992). *Quill* created an inefficient "online sales tax loophole" that gives out-of-state businesses an advantage. A. Laffer & D. Arduin, Pro–Growth Tax Reform and E–Fairness 1, 4 (July 2013). And "while nexus rules are clearly necessary," the Court "should focus on rules that are appropriate to the twenty-first century, not the nineteenth."

Hellerstein, Deconstructing the Debate Over State Taxation of Electronic Commerce, 13 Harv. J.L. & Tech. 549, 553 (2000). Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States. These critiques underscore that the physical presence rule, both as first formulated and as applied today, is an incorrect interpretation of the Commerce Clause.

A

Quill is flawed on its own terms. First, the physical presence rule is not a necessary interpretation of the requirement that a state tax must be "applied to an activity with a substantial nexus with the taxing State." *Complete Auto,* 430 U.S., at 279, 97 S.Ct. 1076. Second, *Quill* creates rather than resolves market distortions. And third, *Quill* imposes the sort of arbitrary, formalistic distinction that the Court's modern Commerce Clause precedents disavow.

1

All agree that South Dakota has the authority to tax these transactions. S.B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." § 1 (emphasis added). "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995); see also 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003) ("Generally speaking, ***2093** a sale is attributable to its destination").

The central dispute is whether South Dakota may require remote sellers to collect and remit the tax without some additional connection to the State. The Court has previously stated that "[t]he imposition on the seller of the duty to insure collection of the tax from the purchaser does not violate the [C]ommerce [C]lause." *McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33, 50, n. 9, 60 S.Ct. 388, 84 L.Ed. 565 (1940). It is a " 'familiar and sanctioned device.' " *Scripto, Inc. v. Carson,* 362 U.S. 207, 212, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960). There just must be "a substantial nexus with the taxing State." *Complete Auto, supra,* at 279, 97 S.Ct. 1076.

This nexus requirement is "closely related," *Bellas Hess,* 386 U.S., at 756, 87 S.Ct. 1389 to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Brothers Co. v. Maryland,* 347 U.S. 340, 344–345, 74 S.Ct. 535, 98 L.Ed. 744 (1954). It is settled law that a business need not have a physical presence in a State to satisfy the demands of due process. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Although physical presence " 'frequently will enhance' " a business' connection with a State, " 'it is an inescapable fact of modern commercial life that a substantial amount of business is transacted ... [with no] need for physical presence within a

State in which business is conducted.' " *Quill,* 504 U.S., at 308, 112 S.Ct. 1904. *Quill* itself recognized that "[t]he requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State." *Ibid.*

When considering whether a State may levy a tax, Due Process and Commerce Clause standards may not be identical or coterminous, but there are significant parallels. The reasons given in *Quill* for rejecting the physical presence rule for due process purposes apply as well to the question whether physical presence is a requisite for an out-of-state seller's liability to remit sales taxes. Physical presence is not necessary to create a substantial nexus.

The *Quill* majority expressed concern that without the physical presence rule "a state tax might unduly burden interstate commerce" by subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions. *Id.,* at 313, n. 6, 112 S.Ct. 1904. But the administrative costs of compliance, especially in the modern economy with its Internet technology, are largely unrelated to whether a company happens to have a physical presence in a State. For example, a business with one salesperson in each State must collect sales taxes in every jurisdiction in which goods are delivered; but a business with 500 salespersons in one central location and a website accessible in every State need not collect sales taxes on otherwise identical nationwide sales. In other words, under *Quill,* a small company with diverse physical presence might be equally or more burdened by compliance costs than a large remote seller. The physical presence rule is a poor proxy for the compliance costs faced by companies that do business in multiple States. Other aspects of the Court's doctrine can better and more accurately address any potential burdens on interstate commerce, whether or not *Quill* ' s physical presence rule is satisfied.

2

The Court has consistently explained that the Commerce Clause was ***2094** designed to prevent States from engaging in economic discrimination so they would not divide into isolated, separable units. See *Philadelphia v. New Jersey,* 437 U.S. 617, 623, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978). But it is "not the purpose of the [C]ommerce [C]lause to relieve those engaged in interstate commerce from their just share of state tax burden." *Complete Auto, supra,* at 288, 97 S.Ct. 1076 (internal quotation marks omitted). And it is certainly not the purpose of the Commerce Clause to permit the Judiciary to create market distortions. "If the Commerce Clause was intended to put businesses on an even playing field, the [physical presence] rule is hardly a way to achieve that goal." *Quill, supra,* at 329, 112 S.Ct. 1904 (opinion of White, J.).

Quill puts both local businesses and many interstate businesses with physical presence at a competitive disadvantage relative to remote sellers. Remote sellers can avoid the regulatory burdens of tax collection and can offer *de facto* lower prices caused by the widespread failure of consumers to pay the tax on their own. This "guarantees a competitive benefit to certain firms simply because of the organizational form they choose" while

the rest of the Court's jurisprudence "is all about preventing discrimination between firms." *Direct Marketing,* 814 F.3d, at 1150–1151 (Gorsuch, J., concurring). In effect, *Quill* has come to serve as a judicially created tax shelter for businesses that decide to limit their physical presence and still sell their goods and services to a State's consumers—something that has become easier and more prevalent as technology has advanced.

Worse still, the rule produces an incentive to avoid physical presence in multiple States. Distortions caused by the desire of businesses to avoid tax collection mean that the market may currently lack storefronts, distribution points, and employment centers that otherwise would be efficient or desirable. The Commerce Clause must not prefer interstate commerce only to the point where a merchant physically crosses state borders. Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents. This Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State.

3

The Court's Commerce Clause jurisprudence has "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 201, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994). *Quill,* in contrast, treats economically identical actors differently, and for arbitrary reasons.

Consider, for example, two businesses that sell furniture online. The first stocks a few items of inventory in a small warehouse in North Sioux City, South Dakota. The second uses a major warehouse just across the border in South Sioux City, Nebraska, and maintains a sophisticated website with a virtual showroom accessible in every State, including South Dakota. By reason of its physical presence, the first business must collect and remit a tax on all of its sales to customers from South Dakota, even those sales that have nothing to do with the warehouse. See *National Geographic,* 430 U.S., at 561, 97 S.Ct. 1386; *Scripto, Inc.,* 362 U.S., at 211–212, 80 S.Ct. 619. But, under *Quill,* the second, hypothetical seller cannot be subject to the same tax for the sales of the same items made through a pervasive Internet presence. This distinction simply makes no sense. So long as a state law avoids "any effect forbidden by ***2095** the Commerce Clause," *Complete Auto,* 430 U.S., at 285, 97 S.Ct. 1076 courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States can and should consider those realities in enacting and enforcing their tax laws.

B

The *Quill* Court itself acknowledged that the physical presence rule is "artificial at its edges." 504 U.S., at 315, 112 S.Ct. 1904. That was an understatement when *Quill* was decided; and when the day-to-day functions of marketing and distribution in the modern economy are

considered, it is all the more evident that the physical presence rule is artificial in its entirety.

Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*. In a footnote, *Quill* rejected the argument that "title to 'a few floppy diskettes' present in a State" was sufficient to constitute a "substantial nexus," *id*., at 315, n. 8, 112 S.Ct. 1904. But it is not clear why a single employee or a single warehouse should create a substantial nexus while "physical" aspects of pervasive modern technology should not. For example, a company with a website accessible in South Dakota may be said to have a physical presence in the State via the customers' computers. A website may leave cookies saved to the customers' hard drives, or customers may download the company's app onto their phones. Or a company may lease data storage that is permanently, or even occasionally, located in South Dakota. Cf. *United States v. Microsoft Corp.,* 584 U.S. ——, 138 S.Ct. 1186, 200 L.Ed.2d 610 (2018) (*per curiam*). What may have seemed like a "clear," "bright-line tes[t]" when *Quill* was written now threatens to compound the arbitrary consequences that should have been apparent from the outset. 504 U.S., at 315, 112 S.Ct. 1904.

The "dramatic technological and social changes" of our "increasingly interconnected economy" mean that buyers are "closer to most major retailers" than ever before —"regardless of how close or far the nearest storefront." *Direct Marketing Assn. v. Brohl,* 575 U.S. ——, ——, ——, 135 S.Ct. 1124, 1135, 191 L.Ed.2d 97 (2015) (KENNEDY, J., concurring). Between targeted advertising and instant access to most consumers via any internet-enabled device, "a business may be present in a State in a meaningful way without" that presence "being physical in the traditional sense of the term." *Id.,* at ——, 135 S.Ct., at 1135. A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill,* simply irrelevant. This Court should not maintain a rule that ignores these substantial virtual connections to the State.

C

The physical presence rule as defined and enforced in *Bellas Hess* and *Quill* is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States' authority to collect taxes and perform critical public functions. Forty-one States, two Territories, and the District of Columbia now ask this Court to reject the test formulated in *Quill*. See Brief for Colorado et al. as *Amici Curiae*. *Quill* 's physical presence rule intrudes on States' reasonable choices in enacting their tax systems. And that it allows remote sellers to escape an obligation to remit a lawful state tax is unfair and unjust. It is ***2096** unfair and unjust to those competitors, both local and out of State, who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax, a tax many States for many years have considered an indispensable source for raising revenue.

In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that " '[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.' " Brief for Petitioner 55. What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price," *Quill,* 504 U.S., at 328, 112 S.Ct. 1904 (opinion of White, J.); and help create the "climate of consumer confidence" that facilitates sales, see *ibid.* According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result. Helping respondents' customers evade a lawful tax unfairly shifts to those consumers who buy from their competitors with a physical presence that satisfies *Quill*—even one warehouse or one salesperson—an increased share of the taxes. It is essential to public confidence in the tax system that the Court avoid creating inequitable exceptions. This is also essential to the confidence placed in this Court's Commerce Clause decisions. Yet the physical presence rule undermines that necessary confidence by giving some online retailers an arbitrary advantage over their competitors who collect state sales taxes.

In the name of federalism and free markets, *Quill* does harm to both. The physical presence rule it defines has limited States' ability to seek long-term prosperity and has prevented market participants from competing on an even playing field.

IV

"Although we approach the reconsideration of our decisions with the utmost caution, *stare decisis* is not an inexorable command." *Pearson v. Callahan,* 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009) (quoting *State Oil Co. v. Khan,* 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); alterations and internal quotation marks omitted). Here, *stare decisis* can no longer support the Court's prohibition of a valid exercise of the States' sovereign power.

If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional

premise of this Court's own creation. Courts have acted as the front line of review in this limited sphere; and hence ***2097** it is important that their principles be accurate and logical, whether or not Congress can or will act in response. It is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States.

Further, the real world implementation of Commerce Clause doctrines now makes it manifest that the physical presence rule as defined by *Quill* must give way to the "far-reaching systemic and structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age. *Direct Marketing,* 575 U.S., at ——, 135 S.Ct., at 1135 (KENNEDY, J., concurring). Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful.

The *Quill* Court did not have before it the present realities of the interstate marketplace. In 1992, less than 2 percent of Americans had Internet access. See Brief for Retail Litigation Center, Inc., et al. as *Amici Curiae* 11, and n. 10. Today that number is about 89 percent. *Ibid.,* and n. 11. When it decided *Quill,* the Court could not have envisioned a world in which the world's largest retailer would be a remote seller, S. Li, Amazon Overtakes Wal–Mart as Biggest Retailer, L.A. Times, July 24, 2015, http://www.latimes.com/business/la-fi-amazon-walmart-20150724-story.html (all Internet materials as last visited June 18, 2018).

The Internet's prevalence and power have changed the dynamics of the national economy. In 1992, mail-order sales in the United States totaled $180 billion. 504 U.S., at 329, 112 S.Ct. 1904 (opinion of White, J.). Last year, e-commerce retail sales alone were estimated at $453.5 billion. Dept. of Commerce, U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2017 (CB18–21, Feb. 16, 2018). Combined with traditional remote sellers, the total exceeds half a trillion dollars. Sales Taxes Report, at 9. Since the Department of Commerce first began tracking e-commerce sales, those sales have increased tenfold from 0.8 percent to 8.9 percent of total retail sales in the United States. Compare Dept. of Commerce, U.S. Census Bureau, Retail E–Commerce Sales in Fourth Quarter 2000 (CB01–28, Feb. 16, 2001), https://www.census.gov/mrts/www/data/pdf/00Q4.pdf, with U.S. Census Bureau News, Quarterly Retail E–Commerce Sales: 4th Quarter 2017. And it is likely that this percentage will increase. Last year, e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace. See *ibid*.

This expansion has also increased the revenue shortfall faced by States seeking to collect their sales and use taxes. In 1992, it was estimated that the States were losing between $694 million and $3 billion per year in sales tax revenues as a result of the physical presence rule. Brief for Law Professors et al. as *Amici Curiae* 11, n. 7. Now estimates range from $8 to $33 billion. Sales Taxes Report, at 11–12; Brief for Petitioner 34–35. The South Dakota Legislature has declared an emergency, S.B. 106, § 9, which again demonstrates urgency of overturning the physical presence rule.

The argument, moreover, that the physical presence rule is clear and easy to apply is unsound. Attempts to apply the physical presence rule to online retail sales are proving unworkable. States are already confronting the complexities of defining physical presence in the Cyber Age. For example, Massachusetts proposed a regulation that would have defined physical presence to include making apps available to be downloaded by in-state residents and placing cookies on in-state residents' web ***2098** browsers. See 830 Code Mass. Regs. 64H.1.7 (2017). Ohio recently adopted a similar standard. See Ohio Rev. Code Ann. § 5741.01(I)(2)(i) (Lexis Supp. 2018). Some States have enacted so-called "click through" nexus statutes, which define nexus to include out-of-state sellers that contract with in-state residents who refer customers for compensation. See *e.g.,* N.Y. Tax Law Ann. § 1101(b)(8)(vi) (West 2017); Brief for Tax Foundation as *Amicus Curiae* 20–22 (listing 21 States with similar statutes). Others still, like Colorado, have imposed notice and reporting requirements on out-of-state retailers that fall just short of actually collecting and remitting the tax. See *Direct Marketing,* 814 F.3d, at 1133 (discussing Colo. Rev. Stat. § 39–21–112(3.5)); Brief for Tax Foundation 24–26 (listing nine States with similar statutes). Statutes of this sort are likely to embroil courts in technical and arbitrary disputes about what counts as physical presence.

Reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent. See *Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, —— – ——, 135 S.Ct. 2401, 2410–2411, 192 L.Ed.2d 463 (2015). But even on its own terms, the physical presence rule as defined by *Quill* is no longer a clear or easily applicable standard, so arguments for reliance based on its clarity are misplaced. And, importantly, *stare decisis* accommodates only "legitimate reliance interest[s]." *United States v. Ross,* 456 U.S. 798, 824, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). Here, the tax distortion created by *Quill* exists in large part because consumers regularly fail to comply with lawful use taxes. Some remote retailers go so far as to advertise sales as tax free. See S.B. 106, § 8(3); see also Brief for Petitioner 55. A business "is in no position to found a constitutional right on the practical opportunities for tax avoidance." *Nelson v. Sears, Roebuck & Co.,* 312 U.S. 359, 366, 61 S.Ct. 586, 85 L.Ed. 888 (1941).

Respondents argue that "the physical presence rule has permitted start-ups and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nationwide sales tax collection." Brief for Respondents 29. These burdens may pose legitimate concerns in some instances, particularly for small businesses that make a small volume of sales to customers in many States. State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed and, sometimes, the relevant date of purchase. Eventually, software that is available at a reasonable cost may make it easier for small businesses to cope with these problems. Indeed, as the physical presence rule no longer controls, those systems may well become available in a short period of time, either from private providers or from state taxing agencies themselves. And in all

events, Congress may legislate to address these problems if it deems it necessary and fit to do so.

In this case, however, South Dakota affords small merchants a reasonable degree of protection. The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; the law is not retroactive; and South Dakota is a party to the Streamlined Sales and Use Tax Agreement, see *infra* at 2099.

Finally, other aspects of the Court's Commerce Clause doctrine can protect against any undue burden on interstate commerce, taking into consideration the small businesses, startups, or others who engage in commerce across state lines. ***2099** For example, the United States argues that tax-collection requirements should be analyzed under the balancing framework of *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174. Others have argued that retroactive liability risks a double tax burden in violation of the Court's apportionment jurisprudence because it would make both the buyer and the seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once. See Brief for Law Professors et al. as *Amici Curiae* 7, n. 5. Complex state tax systems could have the effect of discriminating against interstate commerce. Concerns that complex state tax systems could be a burden on small business are answered in part by noting that, as discussed below, there are various plans already in place to simplify collection; and since in-state businesses pay the taxes as well, the risk of discrimination against out-of-state sellers is avoided. And, if some small businesses with only *de minimis* contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories. These issues are not before the Court in the instant case; but their potential to arise in some later case cannot justify retaining this artificial, anachronistic rule that deprives States of vast revenues from major businesses.

For these reasons, the Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court's decisions in *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), should be, and now are, overruled.

V

In the absence of *Quill* and *Bellas Hess,* the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State. 430 U.S., at 279, 97 S.Ct. 1076. "[S]uch a nexus is established when the taxpayer [or collector] 'avails itself of the substantial privilege of carrying on business' in that jurisdiction." *Polar Tankers, Inc. v. City of Valdez,* 557 U.S. 1, 11, 129 S.Ct. 2277, 174 L.Ed.2d 1 (2009).

Here, the nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State. The Act applies only to sellers that deliver more than $100,000 of goods or services into South Dakota or engage in 200 or more separate transactions for the delivery of goods and services into the State on an annual basis.

S.B. 106, § 1. This quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota. And respondents are large, national companies that undoubtedly maintain an extensive virtual presence. Thus, the substantial nexus requirement of *Complete Auto* is satisfied in this case.

The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the Act ensures that no obligation to remit the sales tax may be applied retroactively. S.B. 106, § 5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. ***2100** This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability. See App. 26–27. Any remaining claims regarding the application of the Commerce Clause in the absence of *Quill* and *Bellas Hess* may be addressed in the first instance on remand.

The judgment of the Supreme Court of South Dakota is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

Justice Byron White joined the majority opinion in *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). Twenty-five years later, we had the opportunity to overrule *Bellas Hess* in *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992). Only Justice White voted to do so. See *id.,* at 322, 112 S.Ct. 1904 (opinion concurring in part and dissenting in part). I should have joined his opinion. Today, I am slightly further removed from *Quill* than Justice White was from *Bellas Hess*. And like Justice White, a quarter century of experience has convinced me that *Bellas Hess* and *Quill* "can no longer be rationally justified." 504 U.S., at 333, 112 S.Ct. 1904. The same is true for this Court's entire negative Commerce Clause jurisprudence. See *Comptroller of Treasury of Md. v. Wynne,* 575 U.S. ——, ——, 135 S.Ct. 1787, 1811–1812, 191 L.Ed.2d 813 (2015) (THOMAS, J., dissenting). Although I adhered to that jurisprudence in *Quill,* it is never too late to "surrende[r] former views to a better considered position." *McGrath v. Kristensen,* 340 U.S. 162, 178, 71 S.Ct. 224, 95 L.Ed. 173 (1950) (Jackson, J., concurring). I therefore join the Court's opinion.

Justice GORSUCH, concurring.

Our dormant commerce cases usually prevent States from discriminating between in-state and out-of-state firms. *National Bellas Hess, Inc. v. Department of Revenue of Ill*., 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), and *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), do just the opposite. For years they have enforced a judicially created tax break for out-of-state Internet and mail-order firms at the expense of in-state brick-and-mortar rivals. See *ante,* at 2093 – 2094; *Direct Marketing Assn. v. Brohl,* 814 F.3d, 1129, 1150 (C.A.10 2016) (Gorsuch, J. concurring). As Justice White recognized 26 years ago, judges have no authority to construct a discriminatory "tax shelter" like this. *Quill, supra,* at 329, 112 S.Ct. 1904 (opinion concurring in part and dissenting in part). The Court is right to correct the mistake and I am pleased to join its opinion.

My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine. The Commerce Clause is found in Article I and authorizes *Congress* to regulate interstate commerce. Meanwhile our dormant commerce cases suggest Article III *courts* may invalidate state laws that offend no congressional statute. Whether and how much of this can be squared with the text of the Commerce Clause, justified by *stare decisis,* or defended as misbranded products ***2101** of federalism or antidiscrimination imperatives flowing from Article IV's Privileges and Immunities Clause are questions for another day. See *Energy & Environment Legal Inst. v. Epel,* 793 F.3d 1169, 1171 (C.A.10 2015); *Comptroller of Treasury of Md. v. Wynne,* 575 U.S. ——, —— – ——, 135 S.Ct. 1787, 1808–1809, 191 L.Ed.2d 813 (2015) (Scalia, J., dissenting); *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 610–620, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997) (THOMAS, J., dissenting). Today we put *Bellas Hess* and *Quill* to rest and rightly end the paradox of condemning interstate discrimination in the national economy while promoting it ourselves.

Chief Justice ROBERTS, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In *National Bellas Hess, Inc. v. Department of Revenue of Ill.,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), this Court held that, under the dormant Commerce Clause, a State could not require retailers without a physical presence in that State to collect taxes on the sale of goods to its residents. A quarter century later, in *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992), this Court was invited to overrule *Bellas Hess* but declined to do so. Another quarter century has passed, and another State now asks us to abandon the physical-presence rule. I would decline that invitation as well.

I agree that *Bellas Hess* was wrongly decided, for many of the reasons given by the Court. The Court argues in favor of overturning that decision because the "Internet's prevalence and power have changed the dynamics of the national economy." *Ante,* at 2097. But that is the very reason I oppose discarding the physical-presence rule. E-commerce has grown into a significant and vibrant part of our national economy against the backdrop of established rules, including the physical-

presence rule. Any alteration to those rules with the potential to disrupt the development of such a critical segment of the economy should be undertaken by Congress. The Court should not act on this important question of current economic policy, solely to expiate a mistake it made over 50 years ago.

I

This Court "does not overturn its precedents lightly." *Michigan v. Bay Mills Indian Community,* 572 U.S. ——, ——, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014). Departing from the doctrine of *stare decisis* is an "exceptional action" demanding "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). The bar is even higher in fields in which Congress "exercises primary authority" and can, if it wishes, override this Court's decisions with contrary legislation. *Bay Mills,* 572 U.S., at ——, 134 S.Ct., at 2036 (tribal sovereign immunity); see, *e.g., Kimble v. Marvel Entertainment, LLC,* 576 U.S. ——, ——, 135 S.Ct. 2401, 2409, 192 L.Ed.2d 463 (2015) (statutory interpretation); *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. ——, ——, 134 S.Ct. 2398, 2411, 189 L.Ed.2d 339 (2014) (judicially created doctrine implementing a judicially created cause of action). In such cases, we have said that "the burden borne by the party advocating the abandonment of an established precedent" is "greater" than usual. *Patterson v. McLean Credit Union,* 491 U.S. 164, 172, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). That is so "even where the error is a matter of serious concern, provided correction can be had by legislation." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409, 424, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986) (quoting *Burnet* ***2102** *v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting)).

We have applied this heightened form of *stare decisis* in the dormant Commerce Clause context. Under our dormant Commerce Clause precedents, when Congress has not yet legislated on a matter of interstate commerce, it is the province of "the courts to formulate the rules." *Southern Pacific Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761, 770, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945). But because Congress "has plenary power to regulate commerce among the States," *Quill,* 504 U.S., at 305, 112 S.Ct. 1904 it may at any time replace such judicial rules with legislation of its own, see *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 424–425, 66 S.Ct. 1142, 90 L.Ed. 1342 (1946).

In *Quill,* this Court emphasized that the decision to hew to the physical-presence rule on *stare decisis* grounds was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve." 504 U.S., at 318, 112 S.Ct. 1904 (footnote omitted). Even assuming we had gone astray in *Bellas Hess,* the "very fact" of Congress's superior authority in this realm "g[a]ve us pause and counsel[ed] withholding our hand." *Quill,* 504 U.S., at 318, 112 S.Ct. 1904 (alterations omitted). We postulated that "the better part of both wisdom and valor [may be] to respect the judgment of the other branches of the Government." *Id.,* at 319, 112 S.Ct. 1904; see *id.,* at 320,

112 S.Ct. 1904 (Scalia, J., concurring in part and concurring in judgment) (recognizing that *stare decisis* has "special force" in the dormant Commerce Clause context due to Congress's "final say over regulation of interstate commerce"). The Court thus left it to Congress "to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes." *Id.,* at 318, 112 S.Ct. 1904 (majority opinion).

II

This is neither the first, nor the second, but the third time this Court has been asked whether a State may obligate sellers with no physical presence within its borders to collect tax on sales to residents. Whatever salience the adage "third time's a charm" has in daily life, it is a poor guide to Supreme Court decisionmaking. If *stare decisis* applied with special force in *Quill,* it should be an even greater impediment to overruling precedent now, particularly since this Court in *Quill* "tossed [the ball] into Congress's court, for acceptance or not as that branch elects." *Kimble,* 576 U.S., at ——, 135 S.Ct., at 2409; see *Quill,* 504 U.S., at 318, 112 S.Ct. 1904 ("Congress is now free to decide" the circumstances in which "the States may burden interstate ... concerns with a duty to collect use taxes").

Congress has in fact been considering whether to alter the rule established in *Bellas Hess* for some time. See Addendum to Brief for Four United States Senators as *Amici Curiae* 1–4 (compiling efforts by Congress between 2001 and 2017 to pass legislation respecting interstate sales tax collection); Brief for Rep. Bob Goodlatte et al. as *Amici Curiae* 20–23 (Goodlatte Brief) (same). Three bills addressing the issue are currently pending. See Marketplace Fairness Act of 2017, S. 976, 115th Cong., 1st Sess. (2017); Remote Transactions Parity Act of 2017, H.R. 2193, 115th Cong., 1st Sess. (2017); No Regulation Without Representation Act, H.R. 2887, 115th Cong., 1st Sess. (2017). Nothing in today's decision precludes Congress from continuing to seek a legislative solution. But by suddenly changing the ***2103** ground rules, the Court may have waylaid Congress's consideration of the issue. Armed with today's decision, state officials can be expected to redirect their attention from working with Congress on a national solution, to securing new tax revenue from remote retailers. See, *e.g.,* Brief for Sen. Ted Cruz et al. as *Amici Curiae* 10–11 ("Overturning *Quill* would undo much of Congress' work to find a workable national compromise under the Commerce Clause.").

The Court proceeds with an inexplicable sense of urgency. It asserts that the passage of time is only increasing the need to take the extraordinary step of overruling *Bellas Hess* and *Quill* : "Each year, the physical presence rule becomes further removed from economic reality and results in significant revenue losses to the States." *Ante,* at 2092. The factual predicates for that assertion include a Government Accountability Office (GAO) estimate that, under the physical-presence rule, States lose billions of dollars annually in sales tax revenue. See *ante,* at 2088, 2097 (citing GAO, Report to Congressional Requesters: Sales Taxes, States Could Gain Revenue from Expanded Authority, but Businesses Are Likely

to Experience Compliance Costs 5 (GAO–18–114, Nov. 2017) (Sales Taxes Report)). But evidence in the same GAO report indicates that the pendulum is swinging in the opposite direction, and has been for some time. States and local governments are already able to collect approximately 80 percent of the tax revenue that would be available if there were no physical-presence rule. See Sales Taxes Report 8. Among the top 100 Internet retailers that rate is between 87 and 96 percent. See *id.,* at 41. Some companies, including the online behemoth Amazon,* now voluntarily collect and remit sales tax in every State that assesses one—even those in which they have no physical presence. See *id.,* at 10. To the extent the physical-presence rule is harming States, the harm is apparently receding with time.

The Court rests its decision to overrule *Bellas Hess* on the "present realities of the interstate marketplace." *Ante,* at 2096. As the Court puts it, allowing remote sellers to escape remitting a lawful tax is "unfair and unjust." *Ante,* at 2096. "[U]nfair and unjust to ... competitors ... who must remit the tax; to the consumers who pay the tax; and to the States that seek fair enforcement of the sales tax." *Ante,* at 2096. But "the present realities of the interstate marketplace" include the possibility that the marketplace itself could be affected by abandoning the physical-presence rule. The Court's focus on unfairness and injustice does not appear to embrace consideration of that current public policy concern.

The Court, for example, breezily disregards the costs that its decision will impose on retailers. Correctly calculating and remitting sales taxes on all e-commerce sales will likely prove baffling for many retailers. Over 10,000 jurisdictions levy sales taxes, each with "different tax rates, different rules governing tax-exempt goods and services, different product category definitions, and different standards for determining whether an out-of-state seller has a substantial presence" in the jurisdiction. Sales Taxes Report 3. A few examples: New Jersey knitters pay sales tax on yarn purchased for art projects, but not on yarn earmarked for sweaters. See Brief for eBay, Inc., et al. as *Amici Curiae* 8, n. 3 (eBay Brief). Texas taxes sales of plain deodorant at 6.25 percent but imposes ***2104** no tax on deodorant with antiperspirant. See *id.,* at 7. Illinois categorizes Twix and Snickers bars —chocolate-and-caramel confections usually displayed side-by-side in the candy aisle —as food and candy, respectively (Twix have flour; Snickers don't), and taxes them differently. See *id.,* at 8; Brief for Etsy, Inc., as *Amicus Curiae* 14–17 (Etsy Brief) (providing additional illustrations).

The burden will fall disproportionately on small businesses. One vitalizing effect of the Internet has been connecting small, even "micro" businesses to potential buyers across the Nation. People starting a business selling their embroidered pillowcases or carved decoys can offer their wares throughout the country —but probably not if they have to figure out the tax due on every sale. See Sales Taxes Report 22 (indicating that "costs will likely increase the most for businesses that do not have established legal teams, software systems, or outside counsel to assist with compliance related questions"). And the software said to facilitate compliance is still in its infancy,

and its capabilities and expense are subject to debate. See Etsy Brief 17–19 (describing the inadequacies of such software); eBay Brief 8–12 (same); Sales Taxes Report 16–20 (concluding that businesses will incur "high" compliance costs). The Court's decision today will surely have the effect of dampening opportunities for commerce in a broad range of new markets.

A good reason to leave these matters to Congress is that legislators may more directly consider the competing interests at stake. Unlike this Court, Congress has the flexibility to address these questions in a wide variety of ways. As we have said in other dormant Commerce Clause cases, Congress "has the capacity to investigate and analyze facts beyond anything the Judiciary could match." *General Motors Corp. v. Tracy,* 519 U.S. 278, 309, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997); see *Department of Revenue of Ky. v. Davis,* 553 U.S. 328, 356, 128 S.Ct. 1801, 170 L.Ed.2d 685 (2008).

Here, after investigation, Congress could reasonably decide that current trends might sufficiently expand tax revenues, obviating the need for an abrupt policy shift with potentially adverse consequences for e-commerce. Or Congress might decide that the benefits of allowing States to secure additional tax revenue outweigh any foreseeable harm to e-commerce. Or Congress might elect to accommodate these competing interests, by, for example, allowing States to tax Internet sales by remote retailers only if revenue from such sales exceeds some set amount per year. See Goodlatte Brief 12–14 (providing varied examples of how Congress could address sales tax collection). In any event, Congress can focus directly on current policy concerns rather than past legal mistakes. Congress can also provide a nuanced answer to the troubling question whether any change will have retroactive effect.

An erroneous decision from this Court may well have been an unintended factor contributing to the growth of e-commerce. See, *e.g.,* W. Taylor, Who's Writing the Book on Web Business? Fast Company (Oct. 31, 1996), https://www.fastcompany.com/27309/whos-writing-book-web-business. The Court is of course correct that the Nation's economy has changed dramatically since the time that *Bellas Hess* and *Quill* roamed the earth. I fear the Court today is compounding its past error by trying to fix it in a totally different era. The Constitution gives Congress the power "[t]o regulate Commerce ... among the several States." Art. I, § 8. I would let Congress decide whether to depart ***2105** from the physical-presence rule that has governed this area for half a century.

I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* C. Isidore, Amazon To Start Collecting State Sales Taxes Everywhere (Mar. 29, 2017), CNN Tech, http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html (all Internet materials as last visited June 19, 2018).