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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ONLINE MERCHANTS GUILD, Plaintiff-Appellant, v. NICOLAS MADUROS, Director, California Dept. of Tax & Fee Administration, Defendant-Appellee.	No. 21-16911 D.C. No. 2:20-cv-01952-MCE-DB OPINION (Filed Nov. 9, 2022)
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Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., District Judge, Presiding

Argued and Submitted October 20, 2022
San Francisco, California

Before: S. R. THOMAS and M. SMITH, Circuit Judges,
and MCSHANE,* District Judge.

Opinion by Judge Sidney R. Thomas

* The Honorable Michael J. McShane, United States District
Judge for the District of Oregon, sitting by designation.

COUNSEL

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S. R. THOMAS, Circuit Judge:

In this appeal, we consider whether an association of e-commerce merchants may sue in federal court to enjoin California’s requirement that its members obtain seller’s permits from the state to facilitate sales tax collection. We conclude that the Tax Injunction Act (“TIA”), 28 U.S.C. § 1341, precludes the exercise of federal jurisdiction, and we affirm the district court.

I

The Online Merchants Guild (“Guild”) is a trade association for e-commerce merchants. Hundreds of Guild members sell products as third-party merchants through the e-commerce company Amazon’s “Fulfilled by Amazon” (“FBA”) program. When a customer purchases a product on Amazon provided by an FBA merchant, Amazon collects payment, and after charging a commission for the sale, credits the payment to the

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merchant's account. The goods are therefore ostensibly sold by the third-party merchant, but "fulfilled by" Amazon.

Appellee Maduros is the Director of the California Department of Tax and Fee Administration ("Department"), which, among other responsibilities, enforces California's sales and use taxes. Cal. Rev. & Tax. Code §§ 20, 6003, 6004, 7051. Before October 2019, California required FBA merchants to collect and pay sales tax on sales to California residents. California's Marketplace Facilitator Act, 2019 Cal. Stat. ch. 5, § 1 (A.B. 147), altered that requirement. Since October 2019, "marketplace facilitators" like Amazon have had the burden of collecting and remitting the sales and use taxes on sales facilitated through programs like FBA. Cal. Rev. & Tax Code §§ 6042, 6043. However, the Marketplace Facilitator Act is not retroactive and the Department continued to seek sales tax remittances from third-party FBA merchants for pre-October 2019 sales. *Id.* § 6049.5(a).

Anyone selling goods in California must pay sales tax. *Id.* §§ 6014, 6051, 6066. The taxpayer for the sales tax is the seller themselves, who may pass the tax along to the consumer if they wish.¹ *Id.* §§ 6051,

¹ The use tax, on the other hand, is an excise tax "imposed on the storage, use, or other consumption in [California] of tangible personal property purchased from any retailer." Cal. Rev. & Tax Code §§ 6015, 6201. The taxpayer for the use tax is the consumer, not the retailer, although retailers must collect and remit the use tax on behalf of the consumer. *Id.* §§ 6202(a), 6203(a).

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6901.5. The first step in remitting collected sales tax to the state is to apply for a “seller’s permit.” *Id.* § 6066. After a permit issues, sellers are assigned an account number, which is used to process the quarterly returns remitting the sales tax that sellers must file. *Id.* §§ 6066.4, 6051, 6452(b), 6454.

Failure to register for a required seller’s permit is a misdemeanor punishable by a fine of \$1,000-\$5,000 and up to a year in jail. *Id.* §§ 6071, 7153. More serious violations of the tax code result in felony punishment. *Id.* § 7153.5.

As part of its efforts to collect sales tax, the Department sent notices to Guild members informing them that they must obtain seller’s permits. The notices also inform the recipient of the criminal penalties for violating the tax code. *See id.* §§ 6071, 7153, 7153.5. These “registration demands” and “penalty threats,” as the Guild labels them, are the subject this appeal.

In September 2020, the Guild filed suit in the Eastern District of California claiming the Department’s tax collection efforts against Guild members violated the Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses of the United States Constitution, as well as the Internet Tax Freedom Act, 47 U.S.C. § 151. The complaint alleges injuries from both the registration demands and the Department’s broader policy of collecting taxes on FBA sales from Guild members rather than Amazon. The

Property for which sales tax is collected is exempted from the use tax. *Id.* § 6401.

Guild claims that Amazon should collect and pay all sales and use tax on products sold through the FBA program because of Amazon's extensive control over how the products are stored, marketed, sold, and shipped. The Guild seeks declarative and injunctive relief and requests damages, costs, and fees.

The Department moved to dismiss the complaint for lack of jurisdiction pursuant to the TIA, as well as the principles of comity and abstention.

The district court granted the motion to dismiss, holding the Guild's claims were "clearly barred" by the TIA because they did not "fall within the exception to the TIA for 'information gathering' activity." The district court also noted it "agrees that it should abstain" from addressing the Guild's claims under comity. The Guild timely appealed.

The Guild appeals only the dismissal of Counts 2, 4, and 7 of the complaint, which it construes as challenging the registration demands and penalty threats and not the taxes themselves.

II

The district court properly dismissed the action pursuant to the TIA. Under the TIA, "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The TIA "was designed expressly to restrict 'the jurisdiction of the

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district courts of the United States over suits relating to the collection of State taxes.’” *Hibbs v. Winn*, 542 U.S. 88, 104 (2004) (quoting S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937)). “[I]n enacting the TIA, Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority.” *Id.* at 104-105. However, the TIA does not preclude all challenges to state taxation.

We hold that the TIA bars federal jurisdiction over the Guild’s claims because the Guild seeks an injunction that would to some degree stop the assessment or collection of a state tax and an adequate state law remedy exists.

A

In order to determine whether the TIA bars the Guild’s claims, we must first characterize those claims. *Id.* at 99. In doing so, we must identify the “relief sought.” *Direct Marketing Association v. Brohl*, 575 U.S. 1, 7 (2015).

In its complaint, and on appeal, the Guild characterizes its claims as challenges to the Department’s registration demands and penalty threats—the imposing letters Guild members received informing them of their duty to obtain a seller’s permit. But the relief the Guild seeks is not so limited. The Guild seeks “injunctive and declaratory relief . . . to remedy the Department’s violations of law and to vindicate the constitutional rights of the Guild and its members and to

prevent irreparable injury to the interstate economy.” Placed in context with the registration requirements the Guild challenges, the relief sought here is injunctive and declaratory relief preventing the Department from enforcing the requirement that Guild members apply for a seller’s permit.

B

The TIA precludes suits in federal court where the requested relief would “to some degree stop” the assessment or collection of a state tax. *Direct Marketing*, 575 U.S. at 7. Relieving Guild members of the duty to obtain seller’s permits would prevent the remittance of sales tax. The Guild’s suit is therefore barred by the TIA.

No party disputes that applying for a seller’s permit is the first step in reporting and paying sales tax. After obtaining a permit, sellers are assigned an account number, which is used to process the quarterly returns remitting the sales tax that sellers must file. Cal. Rev. & Tax Code §§ 6066.4, 6051, 6452(b), 6454. In other words, Guild members cannot remit the sales tax they are required to collect under California law without obtaining a seller’s permit. The relief the Guild requests would therefore “to some degree stop” the assessment or collection of sales tax in California.

Direct Marketing is not to the contrary, and the reporting and information gathering requirements at issue in that case are distinguishable from the registration requirements here. In *Direct Marketing*, a trade

association of direct-to-consumer sellers sued the Director of Colorado’s Department of Revenue, seeking to enjoin Colorado’s imposition of sales and use tax-related “notice and reporting requirements” on out of state retailers. 575 U.S. at 5-6. More specifically, Colorado required retailers that did not collect Colorado sales and use tax to notify their Colorado customers of the *customer’s* duty to file a sales or use tax return and provide those customers with annual reports detailing their purchases. *Id.* at 6. Colorado also required the retailers to send an annual report to the state “listing the names of their Colorado customers, their known addresses, and the total amount each Colorado customer paid for Colorado purchases in the prior calendar year.” *Id.* The purpose of this requirement was to facilitate Colorado’s collection of sales and use tax from the customer. The Court held the TIA did not bar the trade association’s suit because although enjoining the laws would inhibit Colorado’s ability to collect taxes, it would not stop it from collecting those taxes. *Id.* at 14.²

² The Guild argues that under *Direct Marketing*, we cannot uphold the district court’s ruling unless we define one of the TIA’s listed tax enforcement phases—assessment, levy, or collection—to include the step in the taxation process that they “challenge,” which is the requirement that they register as sellers. But *Direct Marketing* is not so narrow. The Supreme Court went beyond the discussion of those tax enforcement phases and overturned the Tenth Circuit’s broad definition of “restrain,” holding that in the TIA, that word means “to some degree stop,” rather than “inhibit.” *Id.* at 12-14.

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In contrast, here, the Guild seeks to enjoin much more than “information gathering” that makes it easier for the state to collect taxes from a third party. Unlike the Association in *Direct Marketing*, the Guild’s members are the actual taxpayer. The relief the Guild requests would prevent the collection of taxes owed. Therefore, the requested relief would “to some degree stop” the assessment or collection of a state tax, and federal courts lack jurisdiction under the TIA.

C

The TIA precludes federal jurisdiction only if there is a “plain, speedy, and efficient” state remedy available. 28 U.S.C. § 1341. This “requires only that a state court remedy meet certain minimal procedural criteria. Specifically, a plain, speedy, and efficient remedy must provide a taxpayer with a full hearing and judicial determination at which he may raise any and all constitutional objections to the tax.” *Hyatt v. Yee*, 871 F.3d 1067, 1073 (9th Cir. 2017) (internal quotation marks and citations omitted).

Here, the Guild members have a state remedy: register, pay the taxes due, and then pursue a refund action. See *Loeffler v. Target Corp.*, 58 Cal. 4th 1081, 1101-02 (2014) (explaining scope of California’s constitutional prohibition on state court challenges to tax collection). Refund actions must first be brought in administrative proceedings. Cal. Rev. & Tax. Code § 6932. If the Department denies the claim or does not respond

within six months, the taxpayer can sue in state court for a refund. *Id.* §§ 6931-6937.

The Supreme Court has held California's tax refund procedures to be a "plain, speedy, and efficient" remedy for constitutional and statutory challenges to tax information and reporting requirements. *California v. Grace Brethren Church*, 457 U.S. 393, 398, 414-17 (1982). In *Grace Brethren*, California churches and religious schools brought constitutional claims seeking to enjoin, among other things, the collection of "both tax information and [a] state tax." 457 U.S. at 398. The district court held that a state tax refund suit would not provide a "plain, speedy and efficient" remedy, "because the plaintiffs claimed not only that their property had been taken unlawfully, but also that the 'very process of determining whether any tax is due at all results in a violation of their First Amendment rights.'" *Id.* at 401. The Supreme Court disagreed and held that California's tax refund system constituted a "plain, speedy and efficient remedy" both for the direct challenges to taxation, but also for the challenges against the pre-assessment recording and record-keeping requirements. *Id.* at 414-17. "Nothing in this scheme prevents the taxpayer from raising any and all constitutional objections to the tax in the state courts," and if those objections are successful, "there is every reason to believe that once a state appellate court has declared the tax unconstitutional the appropriate state agencies will respect that declaration." *Id.* at 414.

Under *Grace Brethren*, Guild members have a plain, speedy and efficient remedy in state court. They

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may pay the tax and seek an administrative refund on the grounds that the registration requirement is unconstitutional or unlawful as applied to them. If the administrative claim is denied or six months passes, they may sue in state court. If they are successful, “there is every reason to believe” the Department will “respect that declaration.” *Id.* at 415. This expectation is reasonable, contrary to the Guild’s assertions, even if Guild members may be subject to “civil and criminal penalties for nonpayment.” *Matthews v. Rodgers*, 284 U.S. 521, 526 (1932).

III

The district court also properly concluded that it should refrain from hearing the claims under the principles of comity. However, having concluded that federal jurisdiction is constrained by the TIA, there is no need for us to reach that issue.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ONLINE MERCHANTS
GUILD,

Plaintiff,

v.

NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,

Defendant.

No. 2:20-cv-01952-
MCE-DB

**MEMORANDUM
AND ORDER**

(Filed Oct. 13, 2021)

Through this action, Online Merchants Guild (“Plaintiff”) filed suit against Nicolas Maduros, Director of the California Department of Tax & Fee Administration (“Defendant”) for violation of the: (1) Due Process Clause; (2) Interstate Commerce Clause; (3) Due Process Clause; (4) Privileges and Immunities Clause; and Internet Tax Freedom Act. Presently before the Court are Defendant’s Motion to Dismiss (ECF No. 23) and Plaintiff’s Motion for Preliminary Injunction (ECF No. 22). For the following reasons, this Motion is GRANTED with leave to amend and Plaintiff’s Motion for Preliminary Injunction is DENIED.¹

¹ Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefs. E.D. Cal. Local Rule 230(g).

BACKGROUND²

Plaintiff is a guild comprised of online merchants who participate in interstate eCommerce, many of them through the use of Amazon. Amazon’s “Fulfilled by Amazon” (“FBA”) program provides for third-party merchants to source goods to be provided through Amazon’s own platform. The merchants convey goods to Amazon for warehousing. If those goods are purchased from its store, Amazon then ships the item(s) to the consumer. The FBA program makes up the majority of Amazon’s sales and has purportedly enabled Amazon to “offer artificially low prices by avoiding collecting sales tax.” ECF No. 1, ¶ 16.

This is because, despite Amazon’s involvement, before 2019, California required the individual retailers to collect sales tax from the consumer at the point of sale, which was then passed on to the state. The state of California also required out-of-state merchants to register as state tax collection agents.³

Given the foregoing, Plaintiff initiated this action challenging Defendant’s assessment and collection of taxes from out-of-state guild members and its registration requirements as unconstitutional. Defendant contends this action is improperly before the Court,

² Unless indicated otherwise, the following recitation of facts is taken, at times verbatim, from Plaintiff’s Complaint, ECF No. 1.

³ In 2019, California modified these rules when it passed the Marketplace Facilitators Act (“MFA”) that requires facilitators, such as Amazon, to collect and remit sales and use tax themselves. This suit concerns only pre-2019 conduct.

however, under the Tax Injunction Act (“TIA”). The Court agrees.

STANDARD

A. Motion to Dismiss

On a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Rule 8(a)(2) “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’ in order to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a Rule 12(b)(6) motion to dismiss does not require detailed factual allegations. However, “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Id. (internal citations and quotations omitted). A court is not required to accept as true a “legal conclusion couched as a factual allegation.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). “Factual allegations must be enough to raise a right to relief above the speculative level.” Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216 (3d ed. 2004))

(stating that the pleading must contain something more than “a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”).

Furthermore, “Rule 8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief.” Twombly, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, “[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” Id. (citing Wright & Miller, supra, at 94, 95). A pleading must contain “only enough facts to state a claim to relief that is plausible on its face.” Id. at 570. If the “plaintiffs . . . have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” Id. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be “freely given” where there is no “undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment. . . .” Foman v. Davis, 371 U.S. 178, 182 (1962); Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding

whether to grant leave to amend). Not all of these factors merit equal weight. Rather, “the consideration of prejudice to the opposing party . . . carries the greatest weight.” Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that “the complaint could not be saved by any amendment.” Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005); Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (“Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility. . . .”)).

B. Preliminary Injunction

In ruling on a request for injunctive relief, the trial court considers the irreparable injury to the moving party and the inadequacy of legal remedy for such injury. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). When seeking a preliminary injunction, a party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits combined with a balancing of hardships tipping sharply in favor of the moving party. Int’l Jensen, Inc. v. Metro-sound U.S.A., 4 F.3d 819, 822 (9th Cir. 1993). The standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits rather than a mere likelihood of success. See

Amoco Prod. Co. v. Village of Gambeel, 480 U.S. 531 (1987). When actual success on the merits is shown, however, the inquiry is over and a party is entitled to relief as a matter of law irrespective of the amount of irreparable injury which may be shown. Sierra Club v. Penfold, 857 F.2d 1307, 1318 n.16 (9th Cir. 1988).

ANALYSIS

A. Motion to Dismiss

Plaintiff claims that Defendant violates federal law by: (1) continuing assessment and collection of sales and use tax from the FBA merchants for pre-MFA transactions; (2) exercising jurisdiction over all FBA merchants with California sales; and (3) California's "pay-then-protest" tax refund process. See generally ECF No. 1. Defendant contends that the TIA bars the Court from hearing this matter because California state court remedies exist. Id. at 5-12.

Under the TIA "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy, and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (emphasis added); see also Rosewell v. La Salle Nat'l Bank, 450 U.S. 503 (1981); Dillon v. Montana, 634 F.2d 463, 466 (quotation and citation omitted). The TIA's primary purpose is to prevent federal courts from interfering with state tax assessment and collection, which is a power reserved for the states. Jerron West, Inc. v. State Cal. State Bd. of Equalization, 129 F.3d 1334, 1338 (9th Cir. 1997). As

pled, Plaintiff's claims are clearly barred here.⁴ Accordingly, because this Court lacks the jurisdiction to adjudicate these claims, Defendant's Motion to Dismiss is GRANTED with leave to amend.⁵

B. Preliminary Injunction

For the same reasons as Defendant's Motion to Dismiss, Plaintiff's Motion for Preliminary injunction fails because there is no likelihood of success on the merits. Accordingly, Plaintiff's Motion is DENIED.

CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss (ECF No. 23) is GRANTED with leave to amend and Plaintiff's Motion for Preliminary Injunction (ECF No. 22) is DENIED. Not later than twenty (20) days following the date this Memorandum

⁴ Plaintiff's claims do not fall within the exception to the TIA for "information gathering" activity, such as notice and reporting requirements, that precede assessment, levy, or collection are not jurisdictionally barred by the TIA. Direct Mktg. Ass'n v., 575 U.S. at 8, 11 (emphasis added). Nor does the Internet Tax Freedom Act create an exemption to the TIA. See California v. Grace Brethren Church, 4571 U.S. 393, 415 (1982); Hyatt v. Yee, 871 F.3d 1067, 1070 (9th Cir. 2017).

⁵ This Court also agrees that it should abstain from addressing this matter under the long-held doctrine of comity because adjudicating this case may disrupt administration of California's tax system. ECF No. 23 at 12-15; see Burford v. Sun Oil Co., 319 U.S. 315 (1943). However, because the federal court lacks jurisdiction to hear this suit under the TIA, this Court declines to discuss the doctrine further.

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and Order is electronically filed Plaintiff may, but is not required to, file an amended complaint. If no amended complaint is timely filed, the causes of action dismissed by virtue of this Order will be deemed dismissed with prejudice upon no further notice to the parties.

IT IS SO ORDERED.

Dated: October 13, 2021

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.
SENIOR UNITED STATES DISTRICT JUDGE

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONLINE MERCHANTS
GUILD,

Plaintiff-Appellant,

v.

NICOLAS MADUROS,
Director, California Dept. of
Tax & Fee Administration,

Defendant-Appellee.

No. 21-16911
D.C. No. 2:20-cv-01952-
MCE-DB
Eastern District of
California, Sacramento

ORDER
(Filed Jan. 3, 2023)

Before: S.R. THOMAS and M. SMITH, Circuit Judges,
and McSHANE,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges S.R. Thomas and M. Smith have voted to deny the petition for rehearing en banc, and Judge McShane so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

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21-16911

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONLINE MERCHANTS GUILD,

Plaintiff and Appellant,

v.

**NICOLAS MADUROS, DIRECTOR,
CALIFORNIA DEPARTMENT OF
TAX & FEE ADMINISTRATION,**

Defendant and Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:20-cv-01952-MCE-DB

The Honorable Morrison C. England, Jr., Judge

APPELLEE'S ANSWERING BRIEF

(Filed May 24, 2022)

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§ 6072..... 11, 15

§ 6201.....2, 3

§ 6203.....3

§ 6226..... 3, 11, 15

§ 6401.....3

§§ 6451-6459..... 12, 15

§ 6452.....11

§ 6454.....13

§§ 6901-6937.....27

§ 6901.5.....3

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§ 6934.....27
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§ 7051.....2
Cal. Stat. 2019, Chapter 5, § 1 et. seq.
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OTHER AUTHORITIES

Cal. Code Regs. Title 18
§ 1684.....3, 11
§ 1699.....11
§§ 35000-35067.....27

[1] INTRODUCTION

To prevent federal intrusion on the administration and collection of state tax, the Tax Injunction Act and the doctrine of comity generally bar challenges to state taxes filed in federal court, and bar this action. Online Merchants Guild sued the state, claiming that requiring individual merchants who sold goods on Amazon.com in California to collect and pay California sales and use tax violates federal law. This is the kind of claim that federal courts have consistently dismissed, holding that such disputes must be brought in state court.

In an effort to avoid these restrictions on federal jurisdiction, on appeal the Guild narrows its focus to challenging the state’s communications demanding

that individual merchants register with the state, and advising them of the statutory penalties for non-compliance, claiming that these challenges are not barred by the Tax Injunction Act or comity. However, these arguments do not transform what is fundamentally an ordinary state tax challenge into a different case that can avoid limitations on federal jurisdiction. The district court correctly held that it lacked subject-matter jurisdiction under the Tax Injunction Act, and that these claims must be adjudicated in state court. This Court should now affirm.

[2] STATEMENT OF THE ISSUES

1. Did the district court correctly hold that the Tax Injunction Act, 28 U.S.C. § 1341, bars the Guild from suing the state in federal court to challenge registration requirements for the collection of state sales and use tax?

2. Does abstention under the doctrine of comity provide an alternative ground for affirming the district court's judgment?

STATEMENT OF THE CASE

I. THE CALIFORNIA SALES AND USE TAX

Defendant-appellee Nicolas Maduros is the Director of the California Department of Tax and Fee Administration (“the Department” or “CDTFA”). ER-13. The Department administers California’s Sales and Use Tax Law, Cal. Rev. & Tax. Code § 6001 et. seq.,

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which includes the state's sales tax, *id.* §§ 6003, 6051 et. seq., and the state's use tax, §§ 6004, 6201 et. seq. Cal. Rev. & Tax. Code § 7051; Cal. Gov. Code § 15570.22 (reassigning responsibilities of the Board of Equalization to the Department).

The sales tax is assessed against retailers for the privilege of selling tangible personal property at retail in California. Cal. Rev. & Tax. Code § 6051. Retailers who sell goods in California must apply for and obtain a [3] seller's permit. Cal. Rev. & Tax. Code § 6066. Retailers must pay the sales tax, and they may, but are not required to, charge sales tax reimbursement to their customers to cover the cost of the sales tax. Cal. Civ. Code § 1656.1; Cal. Rev. & Tax. Code § 6901.5.

The use tax, on the other hand, is an excise tax imposed on the storage, use, or other consumption of tangible personal property that is sold for use in California. Cal. Rev. & Tax. Code § 6201. Although the taxpayer is the consumer, retailers engaged in business in California must collect and remit the use tax on their customers' behalf. *Id.* §§ 6202 and 6203. Retailers who sell goods for use in California must register for a Certificate of Registration – Use Tax. *Id.* § 6226; Cal. Code Regs. tit. 18 § 1684(e).

The two taxes are complementary. *Wallace Berrie & Co. v. State Bd. of Equalization*, 40 Cal. 3d 60, 66-67 (1985). Sales and use taxes are assessed at the same rate and are mutually exclusive: any property to which the sales tax applies is exempted from the use tax. *Id.*; Cal. Rev. & Tax. Code § 6401.

II. THE APPLICATION OF THE SALES AND USE TAX TO AMAZON'S FULFILLMENT BY AMAZON PROGRAM

Amazon contracts with millions of retailers to sell goods on Amazon.com via the Fulfillment By Amazon (FBA) program. ER-13-14 [4] (Complaint) ¶¶ 15, 16. Hundreds of those FBA merchants are members of appellant Online Merchants Guild (Guild). *Id.* FBA merchants ship their goods to Amazon warehouses, and Amazon may relocate those goods to other Amazon warehouses across the country for rapid delivery. ER-14-15 ¶¶ 16-18. When a customer buys an FBA merchant's product on Amazon.com, Amazon receives the customer's payment, ships the product to the customer, and then delivers the funds (minus Amazon's fees and costs) to the FBA merchant. ER-15 ¶ 19.

California required individual FBA merchants to collect and pay state sales and use tax on sales to California residents until October 2019, when a new state law made Amazon responsible for collecting and paying taxes on FBA sales. ER-19-20 ¶ 35, ER-23 ¶¶ 47-48; ER-53-64. In 2019, California enacted the Marketplace Facilitator Act in response to *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018). Cal. Stat. 2019, ch. 5, § 1 (A.B. 147) (declarations of the California Legislature). The Marketplace Facilitator Act requires marketplace facilitators like Amazon to pay the sales and use tax on sales they facilitate. Cal. Rev. & Tax. Code §§ 6042 and 6043, added by Cal. Stat. 2019, ch. 5, § 2. Amazon has been paying sales and use tax on FBA sales occurring on and after the October 1, 2019

effective date of the Marketplace Facilitator Act. ER-20 ¶ 35. But the Marketplace Facilitator [5] Act is not retroactive. Cal. Stat. 2019, ch. 5, § 1 et. seq. The Department continues to assess and collect sales and use tax from FBA merchants for transactions prior to October 1, 2019. ER-19-20 ¶¶ 35-36.

III. PROCEDURAL HISTORY

The Guild filed a complaint, ER-9-41, and a motion for preliminary injunction, docket no. 22,¹ alleging that California's policy of requiring individual FBA merchants to collect and remit sales and use tax instead of Amazon violated federal law, including the Due Process Clause, the dormant Commerce Clause, the Equal Protection Clause, the Privileges and Immunities Clause, and the Internet Tax Freedom Act, 47 U.S.C. § 151 note. ER-31-40. The Guild asked the district court to enjoin California from requiring out-of-state retailers who sell goods to California residents through the FBA program to register, report, and remit sales and use tax and requested declaratory relief and damages. ER-40-41; docket no. 22.

¹ On December 18, 2020, the Guild filed a motion for preliminary injunction, docket no. 14, and the Department filed a motion to dismiss, docket no. 16. In response to a joint scheduling request by the parties, docket no. 20, the district court issued a scheduling order dismissing all pending motions with leave to re-file, docket no. 21. On March 1, 2021, the Guild filed a renewed motion for preliminary injunction, docket no. 22, and the Department filed a renewed motion to dismiss, docket no. 23. The renewed motions were the subject of the district court's October 13, 2021, final decision. ER-3-8.

[6] The Department moved to dismiss for lack of jurisdiction under Rule 12 of the Federal Rules of Civil Procedure. SER-143. The parties' briefing on the motion to dismiss addressed both the Tax Injunction Act and abstention under the doctrine of comity. SER-143-208.

The district court granted the motion to dismiss on both grounds, holding that the Tax Injunction Act deprived it of jurisdiction over the Guild's complaint, and that abstention would be appropriate under the doctrine of comity because the relief requested could disrupt administration of California's tax system. ER-7 & fn. 5. The court denied the motion for a preliminary injunction "[f]or the same reasons." ER-8.

The district court ordered that the Guild "may, but is not required to, file an amended complaint" within 20 days. ER-8. It further specified that "[i]f no amended complaint is timely filed, the causes of action dismissed by virtue of this order will be deemed dismissed with prejudice upon no further notice to the parties." *Id.* The Guild did not file an amended complaint, the order became final, and the Guild timely appealed. ER-127-129.

SUMMARY OF ARGUMENT

The district court correctly dismissed this case because it is barred by the Tax Injunction Act, and in the alternative, subject to abstention based on [7] the doctrine of comity. Because the relief the Guild requested

would interfere with the “assessment, levy, or collection” of a state tax, it is barred.

The Guild acknowledges that the complaint seeks to stop California from collecting taxes from FBA merchants, and that the complaint therefore falls, at least in part, within the scope of the Tax Injunction Act. AOB at 1920. On appeal, however, the Guild prefers to focus specifically on its challenges to Department correspondence requiring individual FBA merchants to register. The Guild argues these challenges are governed by *Direct Marketing Association v. Brohl*, 575 U.S. 1 (2015), and are outside the scope of the Tax Injunction Act. But because the assessment, collection, and payment of state tax was not at issue in that case it is inapposite here. In *Brohl*, the Court held that the Tax Injunction Act did not bar a case challenging a state’s demand for sales information from non-taxpayer third parties. Here, the Guild seeks to stop California from assessing and collecting tax from retailers who are responsible for collecting and paying the tax under state law. The Guild cannot avoid the bar of the Tax Injunction Act by focusing its attention narrowly on registration requirements because these requirements are essential and integral to the collection and payment of sales and use tax in California. The Guild’s requested relief – a determination that the retailer is not required to [8] register – would also mean that the retailer is not required to pay the tax. Because the relief the Guild seeks in these counts would enable the FBA merchants to avoid reporting and paying the tax, the Tax Injunction Act bars their claims.

The Guild's appeal of abstention under the doctrine of comity also fails. Again, the Guild does not dispute that the relief it requests – enjoining the Department from directing FBA merchants to register – would disrupt California's administration of the sales and use tax. Rather, the Guild contends that California's tax refund remedy is inadequate because merchants cannot challenge the registration demands without paying the tax first. AOB at 24-28. Because the Supreme Court has held that post-payment refund suits are an adequate remedy, this argument is foreclosed by controlling precedent.

ARGUMENT

I. STANDARD OF REVIEW

The Department agrees that this appeal presents issues of law that are reviewed *de novo*. *Jerron West, Inc. v. State of Cal. State Bd. of Equalization*, F.3d 1334, 1337 (9th Cir. 1997).

II. THE TAX INJUNCTION ACT DIVESTS FEDERAL COURTS OF JURISDICTION OVER THE GUILD'S CLAIMS

The Tax Injunction Act divests federal district courts of subject-matter jurisdiction over any action that seeks relief that would enjoin, suspend, or restrain the assessment, levy or collection of state taxes, unless the plaintiffs are without a plain, speedy, and efficient remedy in state court:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

This “broad jurisdictional barrier” “drastically” limits federal jurisdiction over state tax disputes. *Lowe v. Washoe County*, 627 F.3d 1151, 1155 (9th Cir. 2010) (quoting *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 825 (1997), and *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1982)) (internal quotations omitted). It “restrain[s] state taxpayers from instituting federal actions to contest their liability for state taxes.” *Hibbs v. Winn*, 542 U.S. 88, 108 (2004). The principal motivating force for the act was the recognition of the imperative need of a State to administer its own fiscal operations. *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 522 (1981). “Its primary purpose is to prevent federal court [10] intrusion into state tax collection, an area which deserves the utmost comity to state law and procedure.” *Jerron West*, 129 F.3d at 1338.

The Tax Injunction Act bars challenges, like this one, based on federal law. *Hyatt v. Yee*, 871 F.3d 1067, 1076 (9th Cir. 2017) (holding federal claims barred because California courts offer a remedy for federal constitutional claims). The bar is not limited to actions seeking injunctive relief; the Tax Injunction Act also bars claims for declaratory relief, damages, or refunds because those forms of relief may also interfere with

the collection of state taxes. *Jerron West*, 129 F.3d at 1338.

On appeal, the Guild limits its arguments on the Tax Injunction Act to Counts 2, 4, and 7 of the complaint. AOB at 10 (“we are only proceeding as to the registration demands and penalty threats (via Counts 2, 4, and 7)”; 19-20 (acknowledging that other counts challenge collection activities). The Department will likewise focus on Counts 2, 4, and 7. These counts, like the others, challenge the assessment, levy, and collection of taxes and are thus barred.

A. Registration is integral to filing tax returns and paying taxes, which are acts of assessment and collection

The Department’s registration requirement is part of the process of assessment and collection of sales and use tax. By seeking to enjoin [11] registration, the Guild seeks to suspend or restrain tax assessment and collection. The Guild’s claims are therefore barred by the Tax Injunction Act.

Under California law, registration is the requisite first step to reporting and paying sales and use tax. The registration statutes apply only to retailers that are required to collect and remit sales and use tax. Cal. Rev. & Tax. Code §§ 6066 (retailers responsible for sales tax or both sales and use tax must obtain a seller’s permit), 6071.1 (retailers that have stopped making taxable sales must surrender their seller’s permits), 6072 (same), Cal. Code Regs. tit. 18 § 1699(a)

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(only a person actively engaged in making retail sales in California must have a seller's permit); Cal. Rev. & Tax. Code § 6226 (retailers responsible for only use tax must obtain a Certificate of Registration – Use Tax), Cal. Code Regs. tit. 18 § 1684 (same). The legal standard governing whether a retailer must register is the same as the standard governing whether a retailer must file sales and use tax returns. Cal. Rev. & Tax. Code §§ 6452(b).

Registration facilitates the assessment and collection of taxes by, among other things, allowing the state to assign account numbers that retailers must include on their sales and use tax returns and that are used for other tax administration purposes. *E.g.*, Cal. Rev. & Tax. Code § 6066.4 [12] (cities and counties may require retailers doing business in their jurisdiction to provide their seller's permit account numbers). Without registration, the state cannot assign a tax account number, and without a tax account number, a retailer cannot file a return.

An order enjoining California from registering a set of retailers would effectively stop those retailers from reporting and paying California taxes. The California sales and use tax is self-assessed, with the filing of tax returns constituting the act of assessment. *Maganini v. Quinn*, 99 Cal.App.2d 1, 3 (1950). The California sales and use tax therefore differs from the federal income tax, where assessment is “a step in the taxation process that occur[s] after, and [is] distinct from, the step of reporting information pertaining to tax liability.” *Brohl*, 575 U.S. at 9. This aspect of California law

also distinguishes this case from *Online Merchants Guild v. Hassell*, No. 1:21-CV-369, 2021 U.S. Dist. LEXIS 101240, *1344 (M.D. Pa. May 28, 2021), which concluded that registration demands were not a “formal act of taxation” under Pennsylvania law. Under California law, reporting and assessment are a single step, so any court order that interferes with the filing of tax returns also interferes with tax assessment. Cal. Rev. & Tax. Code §§ 6451-6459. Because the tax must be paid at the time the tax return is submitted, the reporting requirement also triggers a collection [13] requirement. *Id.* § 6454. Federal courts cannot issue orders that would inhibit the state’s authority to assess and collect taxes. *Brohl*, 575 U.S. at 14 (Tax Injunction Act prohibits federal courts from granting relief that “to some degree stops ‘assessment, levy or collection’”).

B. *Brohl* and *CIC Services* are inapposite here because the relief sought in those cases would not have enjoined, suspended, or restrained the assessment or collection of tax

The Guild relies on *Brohl* and *CIC Services, LLC v. Internal Revenue Serv.*, 141 S. Ct. 1582 (2021), arguing that the Department’s registration demands constitute “information gathering” that does not fall within the scope of the Tax Injunction Act. But *Brohl* and *CIC Services* do not govern here. Both are distinguishable because they addressed duties placed on parties who were not themselves obligated to collect

or pay the tax. *Brohl* and *CIC Services* do not limit the application of the Tax Injunction Act, where, as here, plaintiffs seek to avoid paying a tax.

The plaintiff in *Brohl* challenged a Colorado policy requiring retailers who were *not* required to collect or remit sales and use tax to submit information about their Colorado sales. *Brohl*, 575 U.S. at 4-6. Colorado did not use this information to assess or collect tax from the third-party retailers. *Id.* Instead, the information was used to assess taxes against the [14] Colorado residents who had purchased the goods and owed the tax. *Id.* In that context, the Court held the state's information demands were outside the scope of the Tax Injunction Act. *Id.* at 8-12. In contrast here, the Guild directly challenges the registration requirements placed on retailers who owe or are required to collect and remit tax.

In *CIC Services*, the plaintiff – a tax advisor, not a taxpayer – challenged an IRS information reporting requirement that had an attenuated relationship to a potential tax penalty.² 141 S.Ct. at 1586-1588, 1590-1592. There, the Supreme Court rejected the argument that the attack on the reporting requirement was the same as an attack on the tax, based on “[t]hree aspects of the regulatory scheme, taken in combination.” *Id.* at

² *CIC Services* interpreted the Anti-Injunction Act, 26 U.S.C. § 7421, which bars suits to restrain the IRS from assessing or collecting a federal tax. The Tax Injunction Act was modeled after the Anti-Injunction Act, and courts assume that words used in both acts, such as “assessment” and “collection,” are generally used in the same way. *CIC Services*, 141 S. Ct. at 1589 n.1.

1591. First, the reporting obligations inflicted significant costs apart from the tax penalty: “this suit attempts to get out from under the (non-tax) burdens of a (non-tax) reporting obligation.” *Id.* Second, there was a “threefold contingency” between the reporting requirement and the tax liability, and the government conceded that when there is a too attenuated connection [15] between a duty and tax, the challenge to the duty should not be viewed as restraining the collection of the tax. *Id.* Finally, violation of the reporting requirement resulted not just in a tax penalty for the taxpayer, but potential criminal penalties for both taxpayers and their advisors, including up to a year in prison. *Id.* at 1591-92

In contrast here, the Guild cannot show similar factors exempt its challenge from the scope of the Tax Injunction Act: The registration requirement itself inflicts no significant costs on the taxpayer; there are no contingencies between the registration requirement and the tax liability (as the registration and reporting requirements apply only to those retailers who make California sales), Cal. Rev. & Tax. Code §§ 6066, 6071, 6071.1, 6072, 6226, 6451-6459; and though the violation of the registration requirement may trigger misdemeanor penalties where the retailer is making sales taxable in California, Cal. Rev. & Tax. Code § 6071, it does not subject non-taxpayers to criminal penalties. The Guild’s suit attempts to get FBA merchants out from under the tax burdens of a tax reporting obligation and is therefore barred.

In *Brohl* and *CIC Services*, the Supreme Court took pains to distinguish the typical tax challenge, where a taxpayer can challenge the tax “only after he pays it, by suing for a refund.” *CIC Services*, 141 S.Ct. at 1586; see [16] *Brohl*, 575 U.S. at 7 (noting that the Court of Appeal identified the case as “‘different from the prototypical [Tax Injunction Act] case.’”). Both decisions referred to a suit brought on behalf of someone potentially liable for the tax as the “run-of-the-mine” tax case, 141 S.Ct. at 1593; 575 U.S. at 14, fn. 2. Unlike the situations in *Brohl* and *CIC Services*, those typical tax challenges, brought by or on behalf of someone who may owe the tax, are barred. “[T]his suit falls outside the Anti-Injunction Act because the injunction it requests does not run against a tax at all . . . If the dispute is about a tax rule . . . the sole recourse is to pay the tax and seek a refund.” *CIC Services* at 1593.

Various justices have, in concurring opinions, emphasized the importance of the identity of the party that stands to benefit from the requested relief. Justice Sotomayor in *CIC Services* and Justice Ginsburg in *Brohl* explained that the results of those cases might have been different if the plaintiff were challenging a tax that they were obliged to pay. *CIC Services*, 141 S.Ct. at 1594-1595 (Sotomayor, J., concurring) (“the answer might be different if *CIC Services* were a taxpayer instead of a tax advisor”); *Brohl*, 575 U.S. at 19 (Ginsburg, J., concurring) (“A different question would be posed . . . by a suit to enjoin reporting obligations imposed on a tax payer or tax collector, e.g., an employer or an in-state retailer”). And Justice

[17] Thomas, who wrote the majority opinion in *Brohl*, made a similar point in a concurrence in *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). There, he stated that the Court should have applied the Tax Injunction Act rather than turning to the doctrine of comity because the parties challenging the tax “object to their own liability” and “are in no sense ‘outsiders’ to the revenue-raising state-tax regime they ask the federal courts to restrain.” *Id.* at 435 (Thomas, J. concurring).

This case is a typical, “run-of-the-mine” tax challenge brought on behalf of those who owe state tax. The Guild seeks to prevent the state from assessing and collecting taxes from FBA merchants. “[I]n enacting the [Tax Injunction Act], Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority.” *Hibbs*, 542 U.S. at 104-105. The Guild’s goal in asking federal courts to stop the Department from directing FBA merchants to register is to stop the Department from receiving tax returns (assessments) and payments (collections) from those FBA merchants. The Tax Injunction Act bars federal courts from granting such relief. *Brohl*, 575 U.S. at 14.

C. The Guild's complaint and its exhibits establish the direct connection between registration and the assessment and collection of sales and use tax

[18] The Guild's suggestion that the registration requirement can be divorced from the reporting and payment of taxes to avoid application of the Tax Injunction Act is unconvincing. The purpose of the registration correspondence the Guild challenges was to inform retailers that they owe sales and use tax and to facilitate the reporting and payment of the tax.³ It informed FBA merchants that they were liable for sales and use tax, ER-72, ER-73, ER-80, and encouraged or directed them to register with the Department, ER-66, ER-68, ER-70, ER-72, ER-74, ER-76, ER-79, ER-84, and submit tax returns, ER-75, ER-76, ER-82, ER-86, ER-88. The challenged correspondence also identified potential consequences for failure to comply with the obligations to register and file tax returns, including audits and involuntary deficiency assessments with monetary penalties and interest, ER-72-80, ER-86-87, as well as misdemeanor penalties for violating tax statutes and felony penalties for intentional tax evasion, ER-66, ER-68, ER-70-72, ER-74, ER-79, ER-84-85.

The challenged correspondence identifies the steps the recipients should take to report and pay sales and use tax. Recipients were advised that [19] the first step

³ Examples of challenged correspondence were attached as exhibits 610 of the complaint, ER-66-89, and discussed in paragraphs 45-47 of the complaint, ER-23.

is to register online at www.cdtfa.gov. ER-66, ER-68, ER-70, ER-72, ER-74, ER-76, ER-79, ER-84.

Electronic filing is the [Department's] method for filing your sales and use tax returns and making payments. Log into our website at www.cdtfa.gov to utilize our online services and become a registered user.

ER-76. FBA merchants who did register were directed to file their tax returns using the Department's online system. ER-73, ER-75, ER-76, ER-80, ER-82, ER-86-89. They were advised to pay the tax and warned about the consequences of failing to pay. ER-72-80, ER-86-87.

The Guild's complaint acknowledges the direct connection between requiring retailers to register with the Department and the assessment and collection of taxes. It alleges that California requires FBA merchants to "register as tax collection agents for the state," ER-10 ¶ 3, and repeatedly associates registration with the reporting, collection, and payment of sales and use tax, e.g. ER-20 ¶ 37 and ¶ 39, ER-23 ¶ 47, ER-25 ¶ 53.

Claims 2, 4, and 7 – which the Guild contends are directed exclusively to the registration demands – also acknowledge the close connection between registration and collection. ER-33 ¶ 79 ("California lacks personal jurisdiction over the guild members at issue and [the Department] cannot require them to register *as tax collection agents for the state*," emphasis [20] added); ER-35-36 ¶ 91 (alleging that the Department's "demand that nonresident small businesses register with

the agency (*and become tax collectors for the agency*) imposes a substantial burden on interstate commerce,” emphasis added); ER-38 ¶ 108 (“By imposing *the tax and* registration requirements challenged herein on the out-of-state Guild members . . . but not on [Amazon] . . . the Department is discriminating against eCommerce in violation of the Internet Tax Freedom Act, emphasis added).

To rule in the Guild’s favor on any of these causes of action, a court would have to conclude that California violated the U.S. Constitution or the Internet Tax Freedom Act by requiring FBA merchants to register and remit sales and use tax. Claims 2, 4, and 7 therefore fall within the scope of, and are barred by, the Tax Injunction Act.

D. The Guild waived its arguments for treating its challenge to the Department’s registration demands differently by failing to raise them in the district court

Even if there were merit to the argument that Claims 2, 4, and 7 should be treated differently than its other causes of action, the Guild waived it by failing to raise it in the district court. The Guild’s opposition to the motion to dismiss addressed the Department’s registration demands generally and stated that the court should conduct a claim-specific analysis, but it did not allege that Counts 2, 4, or 7 call for different relief than any of the other [21] causes of action.

SER-174. As a “general rule,” this Court does not entertain arguments on appeal that were not presented or developed before the district court. *Villanueva v. California*, 986 F.3d 1158, 1164 n.4 (2021). There is no reason for this Court to depart from that general practice in this case.

III. THE DOCTRINE OF COMITY REQUIRES ABSTENTION

A. Governing law

The Court should affirm for the alternative reason that abstention is required by the doctrine of comity. The doctrine of comity is older and broader than the Tax Injunction Act. *Levin*, 560 U.S. at 417, 425-26. “[T]he comity doctrine applicable in state taxation cases restrains federal courts from entertaining claims for relief that risk disrupting state tax administration.” *Id.* at 417. Congress passed the Tax Injunction Act “to plug two large loopholes courts had opened in applying the comity doctrine,” *id.* at 432, that had led federal courts in tax cases to “become free and easy with injunctions,” *id.* at 423, citation omitted. But the Tax Injunction Act is “only a partial codification of the federal reluctance to interfere with state taxation.” *Id.* at 424. Where the doctrine applies, a federal court must abstain from actions seeking injunctive relief, declaratory [22] relief, or damages. *Fredrickson v. Starbucks Corp.*, 840 F.3d 1119, 1124 (9th Cir. 2016).

The comity doctrine has two requirements: it applies where a federal court is asked to grant relief that

would “intrude upon and disrupt a state’s enforcement of its tax system,” *Jerron West*, 129 F.3d at 1338, and the state provides a “plain, adequate, and complete” remedy, *Levin*, 560 U.S. at 424. These requirements mirror those of the Tax Injunction Act to a certain degree, but the first requirement is “more embracing” than that of the Tax Injunction Act because it is not limited to the assessment, levy, or collection of taxes – it applies to federal intrusion of any kind on state tax enforcement. *Id.* at 417, 425-25, 429. As for the second requirement, “plain, adequate, and complete” has essentially the same meaning as “plain, speedy, and efficient” in the Tax Injunction Act. *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 116 n.8 (1981).

Where its requirements are met, comity “precludes the exercise of original federal-court jurisdiction.” *Levin*, 560 U.S. at 426. It is a “prudential doctrine” in the sense that a state could waive it by voluntarily choosing to submit to a federal forum, unlike the Tax Injunction Act which includes no such exception. *Id.* at 432. But where a state has not voluntarily submitted adjudication of its taxes to the federal courts, abstention is not a [23] matter of discretion – federal courts must abstain. *Id.*; *Fredrickson*, 840 F.3d at 1124.

B. The Guild seeks relief that would disrupt enforcement of California’s sales and use tax

The doctrine of comity applies here because the Guild seeks relief that would intrude upon and disrupt the Department’s administration of California’s sales and use tax law. The Guild does not argue otherwise, AOB at 22-33 (arguing only that California lacks an adequate remedy and that three considerations identified in *Levin* weigh against abstention), for good reason. The complaint, including Counts 2, 4, and 7, calls for the district court to (i) assess the legality of the Department’s determination that the individual FBA merchants were responsible for collecting and paying sales and use tax instead of Amazon, and (ii) enjoin the Department from directing FBA merchants to register, report, and pay the tax. ER-33-41; AOB at 2, 10, 19, 29-30. Even if one focused solely on the registration demands, such relief would be “the very interference in state taxation the comity doctrine aims to avoid.” *Levin*, 560 U.S. at 429.

C. California courts offer a plain, adequate, and complete remedy

[24] The Guild challenges abstention based on the doctrine of comity on the grounds that California does not provide a plain, adequate, and complete remedy. This argument is foreclosed by precedent.

The plain, adequate, and complete standard for the comity doctrine is essentially identical to the plain,

speedy, and efficient standard for the Tax Injunction Act. *McNary*, 454 U.S. at 116 n.8. The Supreme Court and this Court have held that California's tax refund remedy is plain, speedy, and efficient. *Grace Brethren Church*, 457 U.S. at 414-16 & n.31 (discussing state unemployment insurance tax refund procedures); *Jerron West*, 129 F.3d at 1339-40 (discussing sales tax refund procedures). Anyone required to pay or collect and remit sales and use tax may pay or remit the tax and sue the Department for a refund in the superior courts of California, where they can raise objections to the tax based on federal law. *Hyatt*, 871 F.3d at 1067; *Jerron West* at 1336-1338. California's tax refund remedy is plain, adequate, and complete for the same reasons that it is plain, speedy, and efficient.

The Guild does not contest the adequacy of California's tax refund remedy for any FBA merchant who has paid sales and use tax. Instead, the Guild contends that California law "deprive[s] the [Guild] and its members of any means to prospectively challenge registration demands and associated [25] threats" without first paying the tax. AOB at 25. But the lack of a prepayment remedy does not make state court procedures inadequate for purposes of the Tax Injunction Act, *Grace Brethren Church*, 457 U.S. at 415-417; *Rosewell*, 450 U.S. at 522-523, and it therefore does not make them inadequate for purposes of the doctrine of comity.

Grace Brethren Church addressed registration and reporting requirements like those raised by the Guild here. The *Grace Brethren Church* plaintiffs argued that they lacked a plain, speedy, and efficient

remedy in state court because before filing a refund suit they would have to comply with the state's record-keeping, registration, and reporting requirements and their constitutional rights might therefore be violated before they had the opportunity to challenge the state tax at issue. 457 U.S. at 415. The Court found that argument "unpersuasive," *id.*, pointing out that the plaintiffs could pay the tax and bring their challenge fairly quickly as a refund action in the courts of California, *id.* at 415-416; they would be subject to the same state recordkeeping and reporting requirements while the case progressed in federal court, so "there are no apparent advantages to federal-court relief," *id.* at 416; and when Congress passed the Tax Injunction Act it was well aware that refund actions were the sole remedy in many states for unlawfully collected taxes, *id.*

[26] The Guild's legal theory in this case is that the Department's registration demands were sent to the wrong retailers – that FBA merchants should never have been directed to register because they should never have been required to collect and remit sales and use tax. It is true that claims like these cannot be brought in California courts prospectively, before the taxes are paid. But a post-payment refund suit is "plain, speedy, and efficient" under the Tax Injunction Act, in which "Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections." *Hibbs*, 542 U.S. at 104. A refund suit is therefore "plain, adequate, and complete" for the purposes of the doctrine of comity.

It is also true that California sales and use tax refund suits may only be initiated by the person or entity that paid the tax, so the Guild cannot file claims like these in a California court on its members' behalf. Cal. Rev. & Tax. Code § 6937. That does not make California's remedy inadequate. For example, in *Franchise Tax Bd. v. Akan Aluminum*, 493 U.S. 331 (1989), the Supreme Court concluded that California's tax refund remedy was adequate even though a corporate parent had no legal right to sue on behalf of a subsidiary that had actually paid the tax. 493 U.S. at 338-39. Since the subsidiary that had paid the tax had an adequate state court remedy, the Tax Injunction Act barred the claims. *Id.*

[27] The Guild likens its claims to cases where there was a lack of certainty that the aggrieved party could file a challenge in state court, and they would have had to risk significant tax penalties or criminal sanctions before filing suit. *CIC Services*, 141 S.Ct. at 1586-87; *Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1273-74 (9th Cir. 1990). This case is entirely different. Here, taxes have already been assessed against many FBA merchants. ER-23 ¶ 49, ER-25-26 ¶¶ 52, 54. Any aggrieved FBA merchant has a statutory right to pay the tax and sue for a refund, without risking any criminal penalties. Cal. Rev. & Tax. Code §§ 6901-6937; Cal. Code Regs. tit. 18, §§ 35000-35067. They must first submit an administrative claim for refund, and then they may file as soon as the Department denies the administrative claim for refund, or after six months if the Department has not

yet acted. Cal. Rev. & Tax. Code § 6934. Apart from having to wait six months to give the Department an opportunity to respond to the claims in the first instance, the retailer challenging the tax has control over when to file suit. *Id.* California's refund remedy is therefore plain, adequate, and complete.

D. *Levin* weighs in favor of abstention

[28] The Guild contends that three considerations that weighed in favor of abstention in *Levin*, 560 U.S. at 431-432, weigh against abstention here. AOB at 28-33. The Guild is mistaken.

The first consideration in *Levin* was that the plaintiff-respondents sought “federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny.” 560 U.S. at 431. The Guild contends that the Department “enjoys none of the latitude Ohio did in *Levin*” because this case involves allegations of discrimination against interstate electronic commerce and the imposition of taxes on retailers over whom California lacks personal jurisdiction. AOB at 29-30. These constitutional and statutory arguments are like the constitutional arguments that were precluded by the doctrine of comity in *Levin*. 560 U.S. at 419 (alleging discriminatory taxation in violation of the Commerce Clause and Equal Protection Clause).

The second consideration in *Levin* was that “while respondents portray themselves as third-party

challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position.” 560 U.S. at 431. The Guild argues: “unlike in *Levin*, the [Guild’s] members are hardly in competition with Amazon.” [29] AOB at 30-31. The Guild has missed the point. The second *Levin* consideration was that the plaintiffs were taxpayers, not disinterested third-party outsiders. 560 U.S. at 431. Similarly here, the Guild’s FBA merchant members have an interest in not paying a state tax they believe to be unlawful.

The third consideration in *Levin* was that “the Ohio courts are better positioned than their federal counterparts to correct any violation because they are more familiar with state legislative preferences and because the [Tax Injunction Act] does not constrain their remedial options.” 460 U.S. at 431-32. The Guild acknowledges that when a state law conflicts with federal law, “the Supreme Court’s typical practice is to remand such cases to state courts for correction – which the lower federal courts cannot do,” this “leaves state courts better, if not exclusively, equipped to fashion a remedy.” AOB 31. The Guild’s only rationales for arguing that this consideration might not apply are that “when state courts cannot even hear the claim, abstention makes little sense,” *id.* at 31, and that its members should not be required to expose themselves to criminal penalties to be allowed to challenge a statute, *id.* at 33. But as discussed above in section III.C, any FBA merchant who is required to pay or collect and remit sales and use tax has a legal right to challenge their

assessment through a tax refund action in [30] the superior courts of California, after completing the preliminary steps, without risking any penalties.

CONCLUSION

For the forgoing reasons, the judgment should be affirmed.

Dated: May 24, 2022 Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ONLINE MERCHANTS GUILD,
Plaintiff,

v.

**NICOLAS MADUROS, DIRECTOR,
CALIFORNIA DEPARTMENT OF
TAX & FEE ADMINISTRATION,**
Defendant.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no other related cases pending in this Court.

Dated: May 24, 2022 Respectfully submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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9th Cir. Case Number(s)

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v. Maduros _____

I hereby certify that on May 24, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on May 24, 2022, at Sacramento, California.

B. Supinger
Declarant

/s/ B. Supinger
Signature

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Counsel for Online Merchants Guild

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant.

Case No.: _____

COMPLAINT

(Filed Sep. 29, 2020)

42 U.S.C. § 1983

**INTERNET TAX
FREEDOM ACT**

Introductory Statement

1. This is an action to challenge government conduct that is crushing thousands of small business owners. California's Treasurer, Fiona Ma, has publicly criticized the California Department of Tax & Fee Administration's actions as "unlawful, unconstitutional, and impractical," and pleaded with Governor Newsom to stop CDTFA from arbitrarily destroying peoples'

livelihoods.¹ But CDTFA continues to exceed its lawful authority—all to preserve an economic subsidy to Amazon and political subsidy to some California politicians. The Online Merchants Guild, a trade association for the affected small businesses, brings this action to challenge CDTFA’s violations of the rule of law.

2. This case arises from California’s massive subsidization of Amazon, which CDTFA laundered through the state sales tax system for years. The basic context is as follows. California requires businesses to collect taxes on retail sales, through a scheme administered by CDTFA. Amazon is such a business—Amazon operates the dominant online store in the United States, with over \$280 billion in sales in 2019 alone.² But for nearly all of the last decade, Amazon refused to collect California sales taxes on the vast majority of sales in its store. And, because Amazon offered political benefits to CDTFA and its elected overseers, CDTFA wrongly gave Amazon a pass. The result was billions in foregone tax revenue.

3. CDTFA recently began looking to make *someone* pay the missing sales taxes. No Amazon, but the hundreds of thousands of U.S.-based third-party merchants outside of California who supply Amazon’s store. Unlike Amazon, these merchants are small,

¹ March 8, 2019 Letter from Treasurer Fiona Ma, CPA, to Governor Gavin Newsom, Exhibit 1.

² Daniel Sparks, “Amazon’s Record 2019 in 7 Metrics,” *The Motley Fool* (February 6, 2020), <https://www.fool.com/investing/2020/02/06/amazons-record-2019-in-7-metrics.aspx>.

and have neither economic nor political power in California. Amazon has been feeding CDTFA names of merchants, whom CDTFA has been targeting for supposed tax obligations stretching back to 2012—often in amounts that seem fictional and designed to create *in terrorem* negotiating leverage. Further, CDTFA is demanding that non-resident merchants register as tax collection agents for the State. CDTFA has been threatening those who do not give in and pay up with felony convictions, years in jail, and crushing fines. CDTFA continues to discriminate against them in favor of the political and economic “benefits” Amazon offers the state government.

4. CDTFA’s conduct is causing marketplace havoc and threatening thousands of small business owners with financial ruin. Amazon did not collect taxes on the Amazon sales at issue, dating back nearly a decade, so the Guild’s members do not have tax revenue from those sales. Any payment now would have to come out of the small businesses themselves. The Guild’s members generally lack such funds. CDTFA’s policy could bankrupt them. CDTFA’s conduct is also perversely deterring growth and diversification away from Amazon, in effect locking Guild members into Amazon’s ecosystem.

5. CDTFA’s actions are unlawful for a variety of reasons. At the most basic level, the agency does not have the power to impose registration or sales tax requirements on the Guild members in question. CDTFA’s position is that because *Amazon* unilaterally decided to store items in *Amazon’s* California

warehouses for sale in *Amazon's* store—after Guild members surrendered custody of those items to *Amazon*—*Guild* members are subject to personal jurisdiction in California. That is not the law: Guild members did not deliberately affiliate with the state via *Amazon's* unilateral choices.³ Accordingly, CDTFA cannot lawfully demand nonresident Guild members register with the state, pay back taxes, and collect taxes prospectively. Further, CDTFA's decision to pursue those small businesses—instead of Amazon—unlawfully discriminates against non-residents and interstate commerce. And that is just the tip of the iceberg.

6. CDTFA surely knows that its actions exceed the agency's lawful authority. The dispositive constitutional principles have been settled for decades. But the agency is undeterred because of the economic reality that most affected small business owners cannot vindicate their rights in California's byzantine and oppressive system for challenging unlawful assessments. This case is necessary to protect the Guild members' constitutional rights.

Jurisdiction and Venue

7. This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this case arises

³ *See, e.g., Walden v. Fiore*, 571 U.S. 277, 284 (2014) (“The unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.”) (cleaned up).

under the Constitution and laws of the United states, including the Due Process Clause, the Commerce Clause, the Equal Protection Clause, the Privileges and Immunities Clause, the Internet Tax Freedom Act, and 42 U.S.C. § 1983.

8. The Court has personal jurisdiction over defendant Maduros and the agency he leads, CDTFA, which is headquartered in Sacramento, California. The Online Merchants Guild submits to the personal jurisdiction of this Court for purposes of this action.

9. Venue is proper in the Court's Sacramento Division under 28 U.S.C. § 1391 because defendant Maduros and his agency reside in Sacramento and a "substantial part of the events or omissions giving rise to the claim occurred" within the Sacramento Division.

10. The Tax Injunction Act does not preclude this Court's exercise of jurisdiction because, *inter alia*, the Guild and its members lacks any meaningful state court remedy and the Guild challenges provisions and conduct outside the scope of the TIA's putative jurisdiction-stripping provisions. Comity is no basis for declining jurisdiction, either.

Parties and Standing

11. The Online Merchants Guild is a trade association for online merchants. The Guild's purpose is to advocate for a free and fairly regulated online marketplace, and for the interests of online merchants. The Guild provides a common voice for the diverse group of

merchants who supply Amazon's store and other online stores. The Guild's membership, which numbers in the hundreds, is almost entirely comprised of small and micro-businesses that members have built from scratch. Many of the Guild's members are true kitchen-table enterprises. Often, eCommerce provides the Guild's members a means of earning self-sufficiency despite disadvantages and setbacks. The Online Merchants Guild is a resident of Wyoming.

12. The Online Merchants Guild has standing in its own right because the organization has been forced to divert its resources to address the impacts of the challenged CDTFA conduct, as set forth in greater detail in the declaration of Paul S. Rafelson, the Guild's Executive Director.⁴

13. The Online Merchants Guild also has standing on behalf of its members, who are or may be affected by the CDTFA conduct challenged herein. The Guild's members would have standing in their own right because they have been or may be subject to CDTFA's challenged conduct. The interests the Guild seeks to represent are germane to the organization's purpose set forth above. This lawsuit will not necessarily require the participation of the Guild's members as plaintiffs.

14. Defendant Maduros is the Director of CDTFA, which is the California state agency responsible for collection of sales tax. Defendant Maduros and

⁴ Declaration of Paul S. Rafelson, Exhibit 2.

CDTFA are residents of California. Prior to 2017, the state Board of Equalization implemented the scheme addressed herein. But after a series of scandals and state and federal criminal investigations, those responsibilities were transitioned to the newly-created CDTFA⁵. For simplicity, we generally refer to the agency by its current name.

Factual Allegations

Amazon's FBA Program

15. The Guild's members include hundreds of online merchants who participate in the interstate eCommerce market. For many of the Guild's members, Amazon's store is the dominant, if not exclusive, means by which they participate in interstate eCommerce. Amazon's importance to eCommerce, and small business eCommerce in particular, cannot be overstated. According to some reports, Amazon has nearly half of

⁵ See, e.g., Patrick McGreevy, "In Massive Shake-Up, Gov. Jerry Brown Breaks Up California's Scandal-Plagued Tax Collection Agency," *L.A. Times* (June 27, 2017), <https://www.latimes.com/politics/la-pol-ca-tax-boardoverhaul-20170627-story.html> (describing how the BOE was "the target of an investigation by the Department of Justice, and its members and employees have been accused by auditors of mismanagement that included putting \$350 million in sales taxes in the wrong accounts, and improperly interfering with decisions to open field offices an. transfer staff," and how an audit "discovered board members were undermining the executive director and transferring tax collections staff to direct parking and crowd control at conferences that boosted the members' standing in the community").

the entire eCommerce market in the U.S.⁶ Amazon’s closest “competitor,” the behemoth Walmart, has less than 10% of that market.⁷

16. This case involves the regulatory environment around Amazon’s Fulfilled by Amazon or FBA program. The gist of FBA is that Amazon relies on millions of “third-party merchants” to source goods for Amazon’s store. Those merchants identify and source items that Amazon might choose to carry in its store. The merchants convey the goods to Amazon to warehouse and, if purchased in Amazon’s store, to ship to the consumer. That is, Amazon fulfills the order, hence the name, Fulfilled by Amazon. (By contrast, a smaller fraction of sales on Amazon are what Amazon considers “first-party” sales, in which Amazon itself sources the goods.) FBA has contributed to Amazon’s wild success by allowing the company to externalize various supply chain costs—and by allowing Amazon to offer artificially low prices by avoiding collecting sales tax.

17. FBA generally works as follows. Third-party merchants, such as OMG members, source products for possible sale on Amazon. Merchants propose a sale

⁶ See, e.g., Wayne Duggan, “Latest E-Commerce Market Share Numbers Highlight Amazon’s Dominance,” *Yahoo! Finance* (Feb. 4, 2020), <https://finance.yahoo.com/news/latest-e-commerce-market-share-185120510.html> (“Bank of America estimates Amazon currently has about 44% of U.S. e-commerce market share, up from 40% in 2018. Walmart is a distant second at just 7%, followed by eBay at 5% and Target at just 2%.”).

⁷ *Id.*

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price to Amazon.⁸ Amazon has full discretion to approve the products for sale, and to approve or reject the price, using an internal algorithm whose precise features are unknown to merchants. Amazon also retains editorial control over product listings. Amazon also controls where and how products are listed on the site—i.e., the results consumers see when they search.

18. After Amazon approves a merchant's proposed listing, Amazon will direct the merchant to ship the products to a warehouse of Amazon's choosing. From there, Amazon may keep the goods in that warehouse, or ship them anywhere for positioning, including after breaking up the lot.

19. After a consumer purchases a product in Amazon's store, Amazon is responsible for selecting the warehouse from which to draw the product, packing the product, and shipping it to the consumer. Amazon also collects payment, and—after holding onto the funds for several weeks—credits the merchant's account. On FBA sales, Amazon charges merchants a commission that can reach 45%.

20. Amazon is in privity with consumers, whom Amazon deems the company's "customers." By contrast, under the terms of merchants' agreement with Amazon, merchants are not in privity with consumers. Amazon generally forbids merchant contact with consumers.

⁸ See Amazon, "Business Solutions Agreement," https://sellercentral.amazon.com/gp/help/external/G1791?language=en_US.

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21. For most Guild members, FBA is critical to survival on Amazon, despite the high commission. FBA can account for over 90% of sales for many members.

22. To implement FBA, Amazon has a network of more than 180 fulfillment and sortation centers around North America.⁹ Amazon no doubt has a sophisticated algorithm for where it stores items, but that algorithm is unknown to the Guild's members and beyond their control. Amazon has several FBA facilities in California, where it unilaterally chooses to store Guild members' goods.

23. Once Guild members transfer custody of their goods to Amazon, they have no say in where Amazon moves the goods. Guild members have no control over which warehouse or warehouses Amazon chooses to use for storage. Guild members cannot instruct Amazon to use or not use warehouses in certain states. Nor can they order Amazon to pull goods out of certain states. When a consumer makes a purchase, Guild members cannot tell Amazon which warehouse to ship the item from. Nor can Guild members realistically "cancel" sales from particular warehouses or to particular locations.

24. The following FBA fact pattern is representative. Guild member X in Washington, DC sources a pallet of ink pens, and proposes a listing to Amazon. After Amazon approves the listing, Amazon directs the Guild member to ship the product to the nearest warehouse,

⁹ Seller Essentials, "Amazon Warehouse Locations," <https://selleressentials.com/amazon/amazon-fulfillment-centerlocations/>.

in Baltimore. The merchant's role in the process is essentially over. Amazon unilaterally decides to break up the pallet, keeping some of the inventory in the mid-Atlantic, and positioning the rest around the country—e.g., Houston, Stockton, and Reno. Months later, an Amazon customer in Sacramento searches for pens. Amazon decides which results to display. Assume that the consumer unknowingly chooses the pen that happens to be stored in California, perhaps because Amazon chose to display that result first. The consumer places an order; Amazon accepts, and Amazon chooses to fulfill that order from the Stockton warehouse rather than the Reno location or facilities further east.

25. In the foregoing example, Amazon, not the Guild members, unilaterally decided to store goods in California and fulfill orders from those warehouses to Amazon's California customers. Amazon is subject to CDTF's taxing authority for the sale, but the Guild's members are not. Yet CDTF disregards the law and purports to claim personal jurisdiction over the Guild's members, as explained below.

California's FBA Sales Tax Regime

26. First some background on California's sales tax regime.¹⁰ The basic framework of California sales tax, which has existed for decades, is that retailers collect sales tax from the consumer at the point of sale, and then pass those collected amounts on to the state.

¹⁰ We use the familiar term sales tax to refer to sales and use taxes.

So, in the pen example, one would expect Amazon to collect and remit the sales tax: it's Amazon's store; Amazon has physical custody of the pen; Amazon chose to store the pen in California; Amazon approves the listing, processes the sale, transfers the pen to the customer, and collects payment.¹¹ Until very recently, however, Amazon successfully defied its collection obligations, costing California billions in uncollected sales tax.

27. To understand why there is a massive amount of uncollected tax, we need to go back in time. As *The Philadelphia Inquirer* reported, “[w]hen Amazon opened its first warehouse in California in 2013, it escaped the obligation to collect the taxes on sales by third-party merchants on the company’s site, apparently by convincing state officials that it was not the retailer obligated to collect sales tax in those cases—a distinction that has since been undermined by court decisions in South Carolina, Pennsylvania, and elsewhere.”¹²

¹¹ See, e.g., Cal Rev. & Tax Code § 6014-15 (providing statutory definitions of those obligated to collect sales taxes that match Amazon’s conduct); Cal. Reg. 1569 (“A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale.”).

¹² Harold Brubaker, “California Hits Philly-Area Amazon Seller with \$1.6 Million Sales-Tax Bill,” *The Philadelphia Inquirer* (November 5, 2019), <https://www.inquirer.com/business/california-sales-tax-amazon-sellerphiladelphia-business-20191105.html>; see also

28. Around that time, when Amazon was building up the FBA program, states like California were seeking to tax online sales and correct the advantage that Amazon had over brick-and-mortar retailers. Amazon fought collecting taxes, until “cut[ting] a deal” to abandon the company’s ballot initiative to change California tax law in exchange for an additional tax-free year.¹³

29. As Amazon’s tax-free year was ending, CDTFA was apparently planning to treat Amazon like any other store and require the company to collect sales tax on all of its sales. In September 2012, CDTFA told reporters that Amazon would have to collect taxes on FBA orders it fulfills: “Since Amazon is handling the merchandise and all aspects of the sale, the [CDTFA] would consider them the retailer, and Amazon would have to collect tax on the transaction.”¹⁴

30. Here is the email from CDTFA’s Deputy Director—second in command—to the media¹⁵:

Amazon Services, LLC v. S.C. Dep’t of Rev., No. 17-ALJ-17-0238-CC (S.C. Admin. Law Ct. Sept. 10, 2019), <https://src.bna.com/Leb>.

¹³ Jay Greene, “Amazon and California Lawmakers Cut Sales Tax Deal,” *CNET.com* (September 8, 2011), <https://www.cnet.com/news/amazon-and-california-lawmakers-cut-sales-tax-deal/>.

¹⁴ Declan McCullagh, “Amazon Shoppers Will Squeeze Through California Tax Loophole,” *CNET.com* (September 11, 2012), <https://www.cnet.com/news/amazon-shoppers-will-squeeze-through-calif-tax-loophole/>.

¹⁵ September 10, 2012 Email from Venus Stromberg on behalf of Deputy Director Garza (CDTFA) to Declan McCullagh (CNET.com), Exhibit 3.

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> On 9/10/12 4:35 PM, Stromberg, Venus wrote:
> > Hi Declan,
>>
>> Deputy Director Garza asked me to respond to
your inquiry.
>>
>> The following should be attributed to the Cali-
fornia State Board of
> > Equalization. If you need a quote or interview,
I will put you in >
> contact with a spokesperson.
>>
>> Based on our understanding of how FBAs func-
tion in regards to > Amazon, > Amazon has posses-
sion of the property and the power to > transfer
title to > the consumer. Since Amazon is handling
the > merchandise and all aspects > of the sale, the
Board of Equalization > would consider them the
retailer, > and Amazon would have to collect tax
on the transaction.
>>
>> I hope this information is helpful.
>>
>> Contact the office if you have any further ques-
tions.
>>
>> Venus Stromberg
>>
>> Office of Public Affairs
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31. But hours after the reporter asked Amazon for a quote in response, CDTFA issued a late-night “updated” position: Amazon would retain its tax advantage by refusing to collect tax on FBA sales.¹⁶

32. The very next day, a CDTFA staffer gave Amazon’s accountants a tax opinion letter based on Amazon’s characterization of how it operates FBA.¹⁷ Although the letter offered several caveats and contained basic legal errors, Amazon apparently used it to justify the company’s refusal to collect sales taxes.

33. Amazon’s artificially lower prices gave the company a significant pricing advantage over brick-and-mortar stores and online competitors who did collect sales tax. Consumers, predictably, shopped in the store with lower prices, which helped contribute to the downfall of various retailers. Amazon’s artificially low prices also helped lure consumers to enroll in Amazon Prime, which was key to Amazon’s growth strategy. Essentially, Amazon profited by creating a giant tax-free store. As *Capital & Main* observed, “It’s highly likely that Amazon clears more profit than marketplace sellers on their transactions. So Amazon, by proxy, benefits financially from third-party tax avoidance, and the pricing advantage it provides. And, by not collecting tax, Amazon even avoids liability for mistakes made by third-party sellers that could trigger

¹⁶ *Id.*

¹⁷ Cary C. Huxsoll (BOE) Letter to Reed Schreiter (PricewaterhouseCoopers LLP) (September 11, 2012), Exhibit 4.

audits.”¹⁸ That is part of Amazon’s overall strategy: “Amazon’s continuous resistance to collecting sales taxes made it the first major American company to build its business based on tax avoidance. Contrary to popular belief, the company is still resisting today.”¹⁹

34. Why would California let Amazon escape paying billions of dollars in sales taxes? According to Treasurer Ma, the “[n]umber one” reason the state refused to make Amazon collect sales taxes was that “the governor’s office has been trying to woo Amazon into putting a headquarters here. I’ve been pushing and they haven’t wanted to do anything up front.”²⁰ That regulatory favoritism is of a piece with other giveaways to Amazon. For example, California offered Amazon hundreds of millions in “incentives” and bespoke regulation to locate HQ2 in the state.²¹

35. The sales tax piece of the giveaway scheme ended in late 2019, when Amazon agreed to begin collecting taxes pursuant to California’s new “marketplace

¹⁸ David Dayen, “The ‘Amazon Tax’ Ruling: Disrupting the Disruptors?,” *Capital & Main* (July 10, 2018), <https://capitalandmain.com/the-amazon-tax-ruling-disrupting-the-disruptors-0710>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Jeff Collins, “Gov. Brown Pledges Hundreds of Millions in Incentives for Amazon HQ2 in California,” *The Orange County Register* (October 18, 2017), <https://www.ocregister.com/2017/10/18/brown-pledges-hundreds-ofmillions-in-tax-incentives-for-amazon-hq2/> (documenting hundreds of millions in tax credits, “employment training funds,” property tax abatement, a ‘strike team’ to expedite all permits and approvals,” promised legislation to “streamlin[e]” the CEQA approval process, etc.).

facilitator” law. But what about the taxes Amazon refused to collect for the prior decade? That’s where CDTFA’s challenged conduct comes in.

CDTFA’s Registration and Collection Position

36. CDTFA is now apparently trying to clean up for Amazon’s decade of tax avoidance. But rather than looking to Amazon, CDTFA has actually partnered with Amazon to go after non-resident small businesses that lack Amazon’s political and economic power in the state.

37. The challenged CDTFA policy works as follows. According to CDTFA, nonresident Guild members are “*required* to collect and pay sales and/or use tax” if, *inter alia*, they “use, *directly or indirectly*, or through a subsidiary or agent, a . . . place of distribution, . . . warehouse or storage place, or other physical place of business in California.”²² CDTFA publications elaborate: “If you use a California fulfillment center to store your inventory, you are required to register with the CDTFA and file sales and use tax returns.”²³ Similarly, “[i]f you are an out-of-state seller that uses a California fulfillment center to store your inventory for delivery to consumers in California, you are also required to register with the CDTFA and file sales and

²² CDTFA, “Do You Need to Register with California?,” <https://www.cdtfa.ca.gov/industry/out-of-stateretailers.htm#Registration> (first emphasis in original; second added).

²³ CDTFA, “Publication 77, Out-of-State Sellers: Do You Need to Register with California?, Examples,” <https://www.cdtfa.ca.gov/formspubs/pub77/#examples>.

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use tax returns. You are responsible for reporting and paying the tax to the CDTFA on your retail sales to California consumers. You may also be responsible for other fees; your online application will determine what licenses or permits with the CDTFA may be required.”²⁴

38. CDTFA’s definition of “fulfillment center” tracks and is modeled on Amazon’s FBA program: “A fulfillment center is a location, generally a warehouse facility, where orders for tangible merchandise are received, packaged, and picked up by a common carrier for shipment to the customer.”²⁵

39. As applied to Amazon’s FBA program, then, CDTFA purports to require foreign citizens whose goods Amazon unilaterally chooses to store in California to register with the agency and collect state and district sales tax on Amazon’s sales of those goods. The Due Process Clause commands otherwise,²⁶ but that has not deterred CDTFA.

²⁴ CDTFA, “Fulfillment Centers,” <https://www.cdtfa.ca.gov/industry/fulfillment-centers.htm>; see also CDTFA, “Form 38-A (7-19),” <https://cdtfa.ca.gov/formspubs/forms.htm> (claiming nexus over non-residents who “were engaged in business in this state solely because you used a marketplace facilitator . . . to facilitate sales for delivery in this state and the marketplace facilitator stored your inventory in this state”).

²⁵ CDTFA, “Publication 109, Internet Sales, Online Marketplaces and Fulfillment Centers,” <https://www.cdtfa.ca.gov/formspubs/pub109/#online>.

²⁶ See, e.g., *Holland Am. Line, Inc. v. Wartsila N. Am., Inc.*, 485 F.3d 450 (9th Cir. 2007) (“The placement of a product into the stream of commerce, without more, is not an act purposefully

40. CDTFA’s claims to jurisdiction go even further. Amazon uses a process called “commingling,” in which the company fulfills orders from a different merchant’s goods if it saves Amazon money.²⁷ In a typical fact pattern, a customer places an order from merchant 1’s listing. But if merchant 2’s identical item is located closer to the customer, Amazon will fulfill the order from merchant 2’s supply and credit the sale to merchant 1. In that event, merchant 1’s item would never even enter the state in question—yet CDTFA will still claim personal jurisdiction over merchant 1 for the sale (and then CDTFA will claim jurisdiction over merchant 1’s business in general).

41. CDTFA goes even further still. According to CDTFA, a single item stored by Amazon in California gives the agency personal jurisdiction over the rest of the non-resident merchant’s business. Not only does that violate the Due Process Clause,²⁸ it deprives Guild members of the benefit of California’s supposed online tax threshold and violates the Internet Tax Freedom Act.

directed toward a forum state. Even a defendant’s awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream of commerce into an act purposefully directed toward the forum state.” (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987)); accord *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011).

²⁷ Rafelson Dec. ¶ 11, Exhibit 2; Freifelder Dec. ¶ 8, Exhibit 11.

²⁸ See, e.g., *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017).

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42. In addition to demanding taxes, CDTFA insists on registration.²⁹ Registration triggers more registration. For example, “[i]f you are required to register in California for a Seller’s Permit or a Certificate of Registration—Use Tax, you may have other registration and fee requirements” such as those relating to “covered electronic devices,” certain batteries, tires, lumber, and building products containing at least 10% wood.³⁰ California also imposes recordkeeping requirements: “When you hold a California seller’s permit or other CDTFA license or permit, you are required to maintain your business records to verify that you have properly paid the fee.”³¹ Such “[r]ecords must be kept for at least four years,” and longer in the case of an audit (which can stretch for years).³²

43. And on top of that, after ensnaring non-residents California may seek income tax or other revenue streams.³³

²⁹ *E.g.*, CDTFA, “Publication 77, Out-of-State Sellers: Do You Need to Register with California?, Examples,” <https://www.cdtfa.ca.gov/formspubs/pub77/#examples>;

³⁰ CDTFA, “Publication 77, Out-of-State Sellers: Do You Need to Register with California?, Additional Accounts, Licenses and Permits,” <https://www.cdtfa.ca.gov/formspubs/pub77/#additionalAccounts>.

³¹ CDTFA, “Doing Daily Business,” <https://www.cdtfa.ca.gov/industry/out-of-stateretailers.htm#DoingDailyBusiness>.

³² CDTFA, “Tax Guide for Out-of-State Retailers, Doing Daily Business,” <https://www.cdtfa.ca.gov/industry/out-of-state-retailers.htm#DoingDailyBusiness>.

³³ See Multistate Tax Commission, *Nexus FAQs*, <http://www.mtc.gov/Nexus-Program/Online-Marketplace-Seller-Initiative/FAO>.

CDTFA's Injuries to the Guild and its Members

44. CDTFA is seeking to enforce the above registration and collection policies against hundreds of Guild members and thousands of similarly-situated businesses. Using names and email addresses supplied by Amazon, CDTFA has targeted the online merchants who supply goods to Amazon for Amazon's store.³⁴ CDTFA's tactics go beyond what even the most brazen private debt collector, mindful of the Fair Debt Collection Practices Act, would attempt.

45. CDTFA agents have been demanding that non-residents register with the state to collect sales tax on pain of jail time. For example, CDTFA personnel have unilaterally conclude s that Guild members must register with the state, and then warned Guild members that if they "choose not to voluntarily [*sic*] comply to obtain a sellers permit," they could be "**guilty of a felony,**" fined thousands of dollars, and "**imprison[ed] for 16 months, two years, or three years.**"³⁵

³⁴ See, e.g., Amazon Email to Sellers, Exhibit 5 (Amazon mass-emailing suppliers regarding disclosure of their contact information and federal taxpayer identification numbers to CDTFA); Gail Cole, "Not All States Want Marketplace Facilitators to Collect Tax. Some Just Want Information.," *Alvara* (Dec. 7, 2018), <https://www.avalara.com/us/en/blog/2018/12/not-all-states-want-marketplace-facilitators-to-collect-tax-some-just-want-information.html> (describing how Amazon shared supplier information with California and other states).

³⁵ March 2018 Email from CDTFA to Guild member (emphasis added), Exhibit 6; see also various correspondence from CDTFA to Guild members, Exhibit 7.

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46. Similarly, CDTFA agents have written to Guild members to “set up an appointment with you for registration,” while simultaneously warning that that if the member declines, “**you can be prosecuted** and billed, [and] become unable to receive penalty relief.”³⁶

47. When merchants register, CDTFA then goes after the merchants for retrospective taxes **back to 2012**.³⁷

48. Because Amazon did not collect sales tax on its sales during that period, Amazon’s merchants do not have the tax receipts to turn over to CDTFA. Payments would have to come out of revenue or other sources—money that Guild members in general do not have.

49. CDTFA has also been unilaterally deciding how much non-resident merchants “owe” and sending demand letters for payment. Guild members have received seven-figure “assessments” backed up by threats of criminal prosecution. One target was Guild member Brian Freifelder from Pennsylvania, who was the subject of widespread media coverage.³⁸ Brian

³⁶ March 2018 Email from CDTFA to Guild member, Exhibit 8 (emphasis in original).

³⁷ February 2018 Email from CDTFA to Guild member (“Your company is required to file Sales and Use Tax returns on a Quarterly basis with a start date of 9/5/2012. All sales of tangible personal property are retail sales and subject to tax, unless supported by documentation as being exempt”), Exhibit 9; *see also, e.g.*, January 24, 2019 Email from CDTFA to Guild member (demanding tax returns “from 2Q14 through 2Q17”), Exhibit 10.

³⁸ Declaration of Brian Freifelder, Exhibit 11.

received a CDTFA demand for \$1.6 million for just a six-month period in California, which exceeded the plausible taxes on “every sale [he has] ever done.”³⁹ After Brian pointed out the obvious error, CDTFA cut the assessment to approximately \$30,000—raising serious questions about the good-faith basis for the original demand. The Guild has observed a similar pattern in which CDTFA will make large demands on other merchants, untied to the sales at issue, apparently to gain negotiating leverage through fear.

50. Brian was only one of many CDTFA targets. According to the *Philadelphia Inquirer*, there are “**hundreds of thousands** of third-party merchants on Amazon who were informed by [CDTFA] that they should have been collecting taxes on sales to California residents as far back as 2012.”⁴⁰

51. Guild member Denise Rasbid is another target whom CDTFA has driven nearly to the end of her business. Denise started her Illinois-based eCommerce clothing boutique after auto-immune disease and small children took her out of the corporate world. Her business is successful by third-party merchant standards, but still modest: for 2019, she paid herself “just under \$11,000 for 40-60 hours per week” of work.⁴¹

³⁹ “Harold Brubaker, “California Hits Philly-Area Amazon Seller with \$1.6 Million Sales-Tax Bill,” *The Philadelphia Inquirer* (November 5, 2019), <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html>.

⁴⁰ *Id.*

⁴¹ Declaration of Denise Rasbid, Exhibit 12.

Denise’s world was turned upside down when, in 2019, CDTFA emailed her demanding that—because of her FBA participation—she must register with the agency, pay years of back taxes, and collect California sales tax prospectively. CDTFA also threatened her with penalties and interest. CDTFA’s demands have contributed to the looming bankruptcy of Denise’s business, because she cannot pay the allegedly due past amounts and the compliance burdens of prospective tax collection are significant for a small enterprise like hers. CDTFA’s conduct has also made it essentially prohibitive for Denise to diversify her business away from Amazon.

52. Another example is Alice Kim, Guild member and founder of Hanalei Beauty Company in Hawaii.⁴² Hanalei is female- and minority-owned, and employs 25 people. In 2019, CDTFA called Alice and demanded more than \$10,000 in taxes on prior Amazon sales. After Alice’s attempt to explain that Amazon, not she, controlled whether her products were stored in California “fell on deaf ears” and led to “threat[s]” from CDTFA, Alice simply paid the taxes. Giving in to CDTFA’s demands was economically rational—it would have cost far more than \$10,000 to litigate for years against the agency. Alice’s is a classic example of a negative value claim, and there are thousands more merchants in her shoes.

53. Yet another example is Guild member Mindy Wright, who owns and operates a small eCommerce

⁴² Declaration of Alice Kim, Exhibit 13.

business based in Washington.⁴³ In late 2018, CDTFA demanded that Mindy register to collect taxes for California; after she began doing so and collecting sales tax prospectively, CDTFA then pursued her for up to 8 years of supposedly-due retrospective taxes. Mindy faces tens of thousands of dollars in back taxes, penalties, and interest, which is beyond her means. She may be forced to close her business and seek bankruptcy protection.

54. Arnold Norman is another Guild member.⁴⁴ After he and his wife were laid off in their mid-50s during the Great Recession, they founded an eCommerce business focused on products for people suffering from Alzheimer's, dementia, and similar maladies—conditions Arnold and his wife had seen loved ones suffer and die from. Being New Yorkers, they set up to collect New York taxes and file quarterly sales taxes with that state. But in late 2018, CDTFA demanded that they register with California. Fearful, they did—then the agency demanded California sales taxes back to at least 2015. Arnold and his wife have spent thousands in professional fees dealing with those demands, and paid thousands in back taxes out of pocket. Now CDTFA is demanding tens of thousands more—money Arnold and his wife do not have. But, as he explains, “we cannot afford to challenge CDTFA in California state court”; it would “make more sense for us just to

⁴³ Declaration of Mindy Wright, Exhibit 14.

⁴⁴ Declaration of Arnold Norman, Exhibit 15.

‘give in,’” because “we just cannot afford to fight CDTFA.”⁴⁵

55. Tax collectors like CDTFA don’t just threaten jail time. They seize funds from Amazon accounts. They seize funds from accounts in national banks. They may seize funds from IRS refund accounts. They are relentless.

56. Guild members face serious financial hardship, ranging from bankruptcy to job cuts, to say nothing of loss of expansion, as a result of CDTFA’s demands for money that Guild members do not have. Further, CDTFA’s aggressive practices are chilling participation in the interstate marketplace and investment in American jobs. The registration and reporting requirements impose substantial costs on non-resident small businesses. For many members, the cost of multi-state or nationwide compliance alone could exceed their profit margin.

57. As referenced above, California’s elected Treasurer, Fiona Ma, has publicly criticized CDTFA’s actions as “unlawful, unconstitutional, and impractical.”⁴⁶ Treasurer Ma, a former Chair of the State Board of Equalization (which housed what became CDTFA), urged Governor Newsom to intervene and stop CDTFA’s injurious conduct. As Treasurer Ma explained to Governor Newsom, “the real travesty is that these actions

⁴⁵ *Id.* at ¶ 10.

⁴⁶ March 8, 2019 Letter from Treasurer Fiona Ma, CPA, to Governor Gavin Newsom, Exhibit 1; *see also* March 3, 2020 Written Testimony of Fiona Ma to Congress, Exhibit 16.

by CDTFA . . . are also causing many of the third-party sellers to go out of business and into bankruptcy.”⁴⁷

58. CDTFA is the most aggressive state revenue agency but is not alone among them in pursuing FBA merchants for Amazon’s sales, giving these issues an additional interstate element. As an illustration of what other states are doing to Guild members, Wisconsin’s tax agency has been posting individuals names online and threatening to seize IRS tax refunds before they are distributed to the taxpayer.⁴⁸ Washington State tax collectors have demanded nearly \$200,000 from Guild member Jennifer Jenson, who runs a Native American-owned eCommerce business from Utah.⁴⁹ Washington claims to be able to tax her entire business back to 2010 because a single customer returned a single book to Amazon—at Amazon’s direction—to an Amazon warehouse in Washington state. Jenson is facing three or four more years of administrative process while making payments on an installment plan due to financial hardship. He cannot get into Washington state court and challenge the assessment until after the administrative process concludes. And now CDTFA is after her as well. As she explains, her business cannot withstand the administrative costs—to say nothing of the surprise penalties—and her business is “probably one tax judgment away from

⁴⁷ *Id.* at 4.

⁴⁸ Wisconsin Department of Revenue Correspondence to Guild Member, Exhibit 17.

⁴⁹ Declaration of Jennifer Jenson, Exhibit 18.

collapsing.”⁵⁰ Because it “doesn’t really make economic sense for us to fight,” they may just ‘give in’ and start over with a different business.”⁵¹ Multiply these problems by 50 states, and the result is chaos in the marketplace. The combined effect of these demands on Guild members is chilling their participation in the interstate marketplace, while illustrating why challenging individual assessments in individual state actions is not viable.

59. Many affected merchants have contacted the Guild for help and guidance.⁵² The Guild has spent thousands of hours assisting its membership and working on their behalf with respect to CDTFA’s challenged conduct. In addition to educating members and assisting affected and concerned individuals, the Guild has engaged in public advocacy work, including organizing and submitting information to regulators and legislators. The Guild now turns to the courts for protection of the Guild’s members’ constitutional rights.

**This Court is a Proper Forum
for This Controversy**

60. Although CDTFA will likely try to hide behind the Tax Injunction Act, 28 U.S.C. § 1341, the TIA does not strip this Court of jurisdiction for a variety of reasons. In the first instance, the Guild has no “plain, speedy and efficient remedy” for vindicating its

⁵⁰ *Id.* at ¶ 8.

⁵¹ *Id.*

⁵² Rafelson Dec. ¶ 28, Exhibit 2.

interests or its members' interests in state court.⁵³ As a matter of California law, only the taxpayer who pays the tax has standing to challenge an assessment, which limits the Guild's standing on behalf of its members in state court, since the Guild is not the taxpayer.⁵⁴ Further, California law places severe limits on the availability of injunctive relief in tax matters.⁵⁵

61. The Guild also challenges various provisions and policies that are not acts of "assessment, levy or collection" and are therefore outside the scope of the TIA.⁵⁶

62. For their part, the Guild's members also lack an effective means of vindicating their federal constitutional rights in California state court. The state procedural framework precludes meaningful scrutiny of CDTFAs' compliance with basic constitutional guarantees, and effectively immunizes constitutional violations at mass scale.

63. California is a pay-to-play state: litigants first have to pay a tax before challenging whether the

⁵³ 28 U.S.C. § 1341.

⁵⁴ See Cal Rev. & Tax Code § 6391; *IBM Personal Pension Plan v. San Francisco*, 131 Cal. App. 4th 1291 (2005) (non-taxpayers lack standing to challenge assessed taxes under California law).

⁵⁵ See Cal. Const., Art. XIII § 32 ("No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax.").

⁵⁶ *Direct Mktg. Ass'n v. Brohl*, 575 U.S. 1, 8 (2015).

tax is lawful in the first place.⁵⁷ That process is lengthy and expensive. When CDTFA issues a tax assessment against a Guild member, the matter is first handled in a layered administrative scheme. Guild members cannot raise constitutional issues in that process. Instead, Guild members who want to raise even threshold questions like personal jurisdiction must wait out the administrative process, pay any amount the administrators demand, and then file a refund action in California state court. The “price” of entering the courtroom is years of administrative delay, thousands (or more) in surrendered assets, and thousands in legal fees. Very few of the Guild’s members have the financial resources to vindicate their rights in that manner. Instead, the economically rational response for a small business—and the response CDTFA counts on—is to surrender. CDTFA is thus able to capitalize on the negative value element of the claims at issue here. That is what happened to Guild member Alice Kim. As another example, Guild member Denise Rasbid is unable to reasonably afford challenging the basic lawfulness of CDTFA’s demand. She is already stretched to the end financially, and cannot afford to pay to access California’s state court system.

64. Individual litigation is also completely inefficient at the judicial system level because CDTFA has targeted thousands of businesses, leading to the possibility of thousands of individual challenges. California law also imposes the same economically irrational

⁵⁷ Cal. Const., Art. XIII § 32; Cal Rev. & Tax Code § 6931.

barrier on class actions as it does on individual actions: “there is no bar to certification of a class action for refund of unconstitutional taxes *so long as all class members have filed their own individual claims and thereby exhausted their remedies.*”⁵⁸ In other words, the state court limits on taxpayer class actions enforce the very negative-value problem class actions are otherwise intended to remedy.

65. Guild members who are not yet in CDTFA’s sights, but fear becoming so, appear to have no *ex ante* means of challenging the assessment regime in state court, since paying an assessment is the price of access to the state court system. As for Guild members whose products Amazon stored in California, they face uncertainty about whether and when and in what amount CDTFA will assess them, and further uncertainty and delay regarding any challenge to the lawfulness of that assessment. This includes Guild members referenced herein, because it is unclear whether CDTFA has completed targeting their prior FBA sales.

66. There are also multi-state aspects to the problems at issue here, which further remove this case from the TIA. California is the most aggressive, but not the only, state to pursue non-residents in the manner described herein. Dozens of states have attempted to use the Multistate Tax Commission to

⁵⁸ *Franchise Tax Bd. Limited Liab. Corp. Tax Refund Cases*, 25 Cal. App. 5th 369, 386 (2018) (emphasis added).

pressure third-party merchants to pay sales tax revenues Amazon should have but did not collect.⁵⁹

67. Further removing this case from the TIA, the remedies sought herein will not deprive California of revenue, much less of revenue to which the state is lawfully entitled. As Treasurer Ma has explained (writing then as a Member of the Board of Equalization), it is “inefficient, if not impossible for [CDTFA] to properly audit thousands of FBA retailers around the U.S. who are having orders fulfilled through Amazon fulfillment centers in the State of California”; but by collecting taxes from Amazon, “CDTFA would only have to audit one company and compliance would significantly improve. The State of California would also see billions of dollars of additional revenue that could fund vital programs and services.”⁶⁰ CDTFA’s targeting of thousands of Amazon’s suppliers rather than Amazon itself is even more impractical and suspect when one considers the problem of overseas suppliers. Hundreds of thousands of Amazon’s suppliers are

⁵⁹ See Eugene Kim, “Some Amazon Sellers Can Avoid Paying Back Sales Taxes through a Temporary Amnesty Program,” *CNBC* (August 3, 2017), <https://www.cnn.com/2017/08/03/some-amazon-sellers-can-avoid-paying-back-sales-taxes-through-a-temporary-amnesty-program.html> (describing the multi-state nature of the issue); Matt Day, “Amazon Pulled Into Another Sales-Tax Fight as States Go After Third-Party Sellers on Its Marketplace,” *The Seattle Times* (November 8, 2017), <https://www.seattletimes.com/business/amazon/amazon-pulled-into-another-sales-tax-fight-as-states-go-after-third-party-sellers/> (similar).

⁶⁰ August 31, 2017 Letter from Fiona Ma, CPA to Keely Martin Bosler, Cabinet Secretary, Office of Governor Edmund G. Brown Jr., Exhibit 19.

based in China, where they are practically if not legally beyond CDTFA's reach.

68. Moreover, CDTFA's conduct is effectively a tax credit or subsidy to Amazon, challenges to which are generally outside the scope of the TIA.

69. Additionally, the Internet Tax Freedom Act reflects Congressional intent to limit jurisdiction-stripping where the TIA might otherwise be applicable.

70. CDTFA cannot invoke the comity doctrine (to the extent it remains a basis for declining jurisdiction⁶¹) for various reasons. For one thing, "comity is a two-way street, requiring a delicate balancing of sometimes-competing state and federal concerns."⁶² CDTFA cannot violate multiple federal interests (*e.g.*, constitutional rights, the interstate economy) and the interests of other states (*e.g.*, the due process rights of their own citizens⁶³) and then invoke comity as a shield. Further,

⁶¹ *See, e.g., Sprint Comms. v. Jacobs*, 571 U.S. 69, 77 (2013) ("Jurisdiction existing, this Court has cautioned, a federal court's obligation to hear and decide a case is virtually unflagging.") (cleaned up).

⁶² *Trump v. Vance*, 941 F.3d 631, 638 (2d Cir. 2019), *aff'd*, 140 S. Ct. 2412 (2020).

⁶³ *See, e.g., Bristol Myers-Squibb*, 137 S. Ct. at 1780 ("restrictions on personal jurisdiction . . . are a consequence of territorial limitations on the power of the respective States. . . . The sovereignty of each State implies a limitation on the sovereignty of all its sister States.") (cleaned up).

the *Levin* “considerations” do not apply.⁶⁴ Comity is no basis for declining jurisdiction.

Causes of Action

Count 1

CDTFA’s demand for and seizure of money belonging to non-resident Guild members violates the Due Process Clause.

71. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

72. By demanding and seizing under threat of criminal and civil punishment money from Guild members over whom CDTFA lacks personal jurisdiction, CDTFA is violating the Fourteenth Amendment’s Due Process Clause in multiple ways.

73. CDTFA lacks personal jurisdiction over the affected Guild members for purposes of tax assessment. In the tax context, a state must have “nexus” to exercise power over a nonresident. The Supreme Court has long recognized two independent aspects of “nexus” that a state must satisfy to regulate a non-resident. One aspect arises from the Due Process Clause; the other from the Commerce Clause. Although they are “closely related,” the Due Process Clause and the Commerce Clause “pose distinct limits on the taxing powers of the States. Accordingly, while a State may, consistent with the Due Process Clause, have the

⁶⁴ See *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 431-32 (2010).

authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause”—or vice versa.⁶⁵ The two clauses “reflect different constitutional concerns” and are “analytically distinct.”⁶⁶ And “while Congress has plenary power to regulate commerce among the States and thus may authorize state actions that burden interstate commerce, it does not similarly have the power to authorize violations of the Due Process Clause.”⁶⁷

74. Among other aspects, the Due Process Clause imposes personal jurisdiction-base a limits on state authority to regulate non-residents. The familiar personal jurisdiction rules from the litigation context have long applied in the tax context.⁶⁸

75. CDTFAs is purporting to regulate Guild members over whom California lacks personal jurisdiction. The Guild members at issue are non-Californians, over whom CDTFAs purports to base jurisdiction not on the members’ actions, but on Amazon’s unilateral decision to store items in Amazon’s possession in Amazon’s California warehouses and ship orders to Amazon’s California customers from those warehouses. The Guild

⁶⁵ *Quill Corp. v. ND*, 504 U.S. 298, 305 (1992) (quoting *Bella Hess v. Dep’t of Rev. of Ill.*, 386 U.S. 743, 756 (1967); citing *Tyler Pipe Indus., v. Wash. State Dep’t of Rev.*, 483 U.S. 232 (1987)). *Wayfair* overruled a discrete and different aspect of *Quill* and *Bella Hess*. See *Wayfair*, 138 S. Ct. at 2099.

⁶⁶ *Quill Corp.*, 504 U.S. at 305.

⁶⁷ *Id.*

⁶⁸ See, e.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2091 (2018) (tracing the “minimum contacts” requirement).

members at issue did not thereby deliberately affiliate with California, lack sufficient contacts with the state, and are not subject to personal jurisdiction in the state.

76. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

77. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 2

CDTFA's registration demands violate the Due Process Clause.

78. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

79. For reasons similar to those in Count 1, California lacks personal jurisdiction over the Guild members at issue and CDTFA cannot require them to register as tax collection agents for the state. Yet CDTFA has threatened Guild members with felony jail time if they refuse to register.

80. CDTFA's conduct has caused and will continue to cause irreparable injury to the Online Merchants Guild and its members.

81. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate

the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 3

CDTFA is violating the Commerce Clause by imposing discriminatory and burdensome restrictions on interstate commerce.

82. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

83. By pursuing the Guild's members instead of Amazon for the sales taxes at issue, CDTFA is discriminating against out-of-state merchants in favor of Amazon because Amazon offers state politicians substantial in-state "benefits" that Guild members cannot offer. That discrimination is *a per se* violation of the dormant Commerce Clause.⁶⁹

84. CDTFA's demand for back taxes also fails the *Complete Auto* test because the demand does not apply to an activity through which Guild members create a substantial nexus to California; the demand is not fairly apportioned as between Amazon and the Guild's members; the demand discriminates against interstate commerce, particularly by favoring Amazon's in-state conduct over the interests of non-resident small businesses and by interfering with Guild members'

⁶⁹ *Granholm v. Heald*, 544 U.S. 460, 476 (2005) ("State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity.")

participation in the interstate eCommerce market; and the demand is not fairly related to the services California provides, since the Guild’s members did not seek out any such services.⁷⁰

85. CDTFA’s demand for taxes stretching back nearly a decade imposes an undue burden on the Guild’s members, contrary to *Wayfair* and other precedents.⁷¹

86. CDTFA’s conduct also fails the *Pike* standard because the regulation imposes burdens on interstate commerce that clearly exceed any legitimate local interest.⁷² Among other things, CDTFA’s conduct severely burdens the ability of Guild members to participate in the interstate economy (and in some cases even to exist as going concerns). By contrast, the main local “benefit” is the continuation of an illegitimate subsidy to Amazon. CDTFA’s conduct cannot provide a material local benefit in the sense of increased tax revenue, because CDTFA is unlikely to obtain significant revenue by pursuing thousands of low-income businesses, in comparison to the revenue CDTFA could

⁷⁰ *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977).

⁷¹ *Wayfair, Inc.*, 138 S. Ct. at 2098 (“In this case, however, South Dakota affords merchants a reasonable degree of protection. . . . [T]he law is not retroactive.”); *United States v. Carlton*, 512 U.S. 26, 38 (1994) (O’Connor, J., concurring) (explaining that periods of retroactivity longer than a year are rarely attempted, have not been sustained, and would likely raise “serious constitutional questions”).

⁷² *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

obtain by pursuing Amazon. And CDTFA's conduct, if and when replicated by other states, poses additional harms to the interstate marketplace.

87. CDTFA's application of the small-business threshold imposes an undue burden on interstate commerce. The *Wayfair* Court pointed to dollar thresholds designed to limit the tax burden on non-resident small businesses as a means of limiting Commerce Clause problems.⁷³ Dollar thresholds operate such that only companies who do significant business in a state, and are thus presumably large enough to shoulder the compliance burdens, can be made responsible for collecting sales tax. California's new Marketplace Facilitator Act contains a threshold: nonresidents who sell less than \$500,000 are supposed to be exempt from sales tax collection obligations.⁷⁴ But CDTFA disregards that threshold. According to the agency, any merchant whose goods Amazon stores in a California warehouse is not really a non-resident merchant at all; instead, the presence of "inventory" in California means they are resident and are ineligible for the threshold.⁷⁵ Essentially, according to CDTFA, one dollar of

⁷³ *Wayfair*, 138 S. Ct. at 2099.

⁷⁴ Cal. RTC § 6203(c)(4) (excluding from the definition of retailers obligated to collect tax those who have sales for delivery in California that do not exceed \$500,000 per year); CDTFA, Use Tax Collection Requirements Based on Sales into California Due to the *Wayfair* Decision, Overview, <https://www.cdtfa.ca.gov/industry/wayfair.htm> (explaining that "remote sellers" who sell more than \$500,000 are responsible for collecting sales tax).

⁷⁵ CDTFA, "Tax Guide for Marketplace Facilitator Act, FAQs," <https://cdtfa.ca.gov/industry/MPFAct.htm#note3>.

merchandise stored and sold—by Amazon—in California will grant CDTFA taxing authority over the rest of the merchant’s business. Not only is that unlawful, it deters merchants from using the threshold to grow a business line outside Amazon. CDTFA’s policy has the intent and effect of precluding merchants from diversifying away from Amazon.

88. CDTFA’s conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

89. Injunctive and declaratory relief is necessary to remedy CDTFA’s violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 4

CDTFA’s registration requirements violate the Commerce Clause.

90. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

91. CDTFA’s demand that non-resident small businesses register with the agency (and become tax collectors for the agency) imposes a substantial burden on interstate commerce. The compliance costs are significant, and given CDTFA’s practices challenged herein, understandably lead Guild members to fear that they will become subject to additional burdens

by the agency. That has the effect of chilling Guild members' participation in the interstate marketplace.

92. There is no lawful local benefit that outweighs those injuries, because CDTFA cannot lawfully regulate the Guild's non-resident members, and any information the agency needs for a lawful local purpose can be derived directly and more efficiently from Amazon.

93. Insofar as CDTFA places the burden on non-resident merchants, while refusing to place the burden on Amazon (despite Amazon's in-state presence and benefits to the state), CDTFA is directly discriminating against foreign residents in *per se* violation of the Commerce Clause.

94. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

95. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 5

CDTFA is violating the Equal Protection Clause by preferentially benefiting Amazon and burdening the Guild's members.

96. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

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97. There is one sale—in Amazon’s store—to tax. As between Amazon or the Guild’s members, CDTFA chose to impose burdens on the politically weak Guild members instead of the politically powerful Amazon. CDTFA made that decision on the basis of political favoritism, regulatory capture, economic protectionism, and bureaucratic self-interest, which violates the Equal Protection Clause.⁷⁶

98. CDTFA’s conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

99. Injunctive and declaratory relief is necessary to remedy CDTFA’s violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 6

CDTFA is violating the Privileges and Immunities Clause by treating non-resident Guild members differently than Amazon.

100. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

101. The Privileges and Immunities Clause prohibits CDTFA from treating nonresident Guild

⁷⁶ See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978, 991-92 (9th Cir. 2008) (regulation “designed to favor economically certain constituents at the expense of others similarly situated” is unconstitutional).

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members substantially differently than Amazon (which has a large in-state presence) absent a substantial and legitimate justification.

102. As to the same alleged tax collection obligation, CDTFA pursues non-resident Guild members while continuing Amazon's subsidies, in the hopes that Amazon will increase its in-state presence and in-state political benefits, which does not further any substantial and legitimate justification.

103. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

104. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the equal protection rights of the Guild and its members.

Count 7

**CDTFA's discrimination violates
the Internet Tax Freedom Act.**

105. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

106. The Internet Tax Freedom Act (ITFA) prohibits California from, *inter alia*, imposing "discriminatory taxes on electronic commerce," which are defined as taxes that are "not generally imposed and legally collectible . . . on transactions involving similar property, goods, services or information accomplished

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through other means.”⁷⁷ The ITFA further prohibits California from imposing on electronic commerce “an obligation to collect or pay the tax on a different person or entity than in the case of transactions involving similar property, goods, services, or information accomplished through other means.”⁷⁸

107. Congress intended for the ITFA to provide a private right of enforcement for damages and other appropriate relief.

108. For purposes of the ITFA, Amazon has a brick-and-mortar component to its business in California, including multiple FBA warehouses and other physical sites (existing and hoped-for) that provide political benefits to the state. By imposing the tax and registration requirements challenged herein on the out-of-state Guild members who participate in protected eCommerce, but not on Amazon’s de facto brick-and-mortar operations, CDTFA is discriminating against eCommerce in violation of the ITFA.

109. CDTFA further discriminates against eCommerce by imposing the tax and registration requirements challenged herein on Guild members who supply Amazon’s eCommerce store, while CDTFA would not impose the same requirements on out-of-state suppliers who supply goods housed for sale by

⁷⁷ Internet Tax Freedom Act Section 1101(a); Section 1105(2), codified at 47 U.S.C. § 151, Note.

⁷⁸ *Id.*

traditional brick-and-mortar retailers in their warehouses.

110. CDTFA's past, present, and future violations of the ITFA have caused the Guild and its members damages and irreparable injury.

111. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 8

CDTFA is violating the Due Process Clause by imposing retroactive taxes far in excess of those that might be constitutionally permissible.

112. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

113. CDTFA is attempting to impose massive retroactive taxes without adequate contemporaneous notice. Many merchants have received demands for taxes stretching back nearly a decade.

114. Those massive retroactive liabilities violate the limits on retroactive legislation in general and retroactive tax regulation in particular.

115. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

116. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Count 9

**California's pay-to-play system for
vindicating constitutional rights violates
the Due Process Clause.**

117. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

118. The operative California process for challenging the constitutionality of state tax assessments fails to provide due process before Guild members are deprived of their property and before they can challenge the lawfulness of other regulatory requirements. As set forth herein, at least as applied, CDTFA is able to capitalize on the nature and negative-value aspects of the sums at issue to effectively preclude constitutional scrutiny of how the agency seizes money belonging to private citizens.

119. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

120. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its

members and to prevent further irreparable injury to the interstate economy.

Count 10

CDTFA is violating the Due Process Clause by imposing tax and registration obligations of the basis of unconstitutionally vague language and policies.

121. The Online Merchants Guild incorporates the foregoing paragraphs as if set forth herein.

122. CDTFA is attempting to impose taxation and registration requirements on the basis of statutory and regulatory language and policies that did not and do not give sufficient notice to the Guild's members of what was necessary to comply with the law.

123. Yet, despite the impermissibly vague language, CDTFA continues to seek to enforce those provisions against the Guild's members.

124. CDTFA's conduct has caused and will continue to cause damages and irreparable injury to the Online Merchants Guild and its members.

125. Injunctive and declaratory relief is necessary to remedy CDTFA's violations of law and to vindicate the constitutional rights of the Guild and its members and to prevent further irreparable injury to the interstate economy.

Prayer for Relief

126. The Online Merchants Guild respectfully requests, on behalf of itself and its members, the following relief:

a. A declaration pursuant to 28 U.S.C. § 2201 that CDTFA's conduct and application of California law to the Online Merchants Guild's members as set forth herein is unconstitutional;

b. An order and judgment enjoining CDTFA from further such constitutional violations;

c. Costs and attorney's fees pursuant to 42 U.S.C. § 1988;

d. Damages for CDTFA's violation of the U.S. Constitution and the Internet Tax Freedom Act;

e. A jury trial on all issues so triable; and

f. All other appropriate relief.

Dated this 29th day of September, 2020.

s/ Candice L. Fields

Candice L. Fields
CANDICE FIELDS LAW
Counsel for Online Merchants Guild

COMPLAINT EXHIBITS

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Counsel for the Online Merchants Guild

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX
& FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION OF
PAUL S. RAFELSON**

1. My name is Paul S. Rafelson. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony. I make this declaration on

personal knowledge of the matters discussed herein.

The Online Merchants Guild

2. I am the Executive Director of the Online Merchants Guild, in which capacity I offer this declaration. I am also an attorney in private practice who represents online merchants. I also have experience as an online merchant myself. I have accumulated thousands of hours of experience in the eCommerce marketplace, particularly Amazon's store, and the associated regulatory environment.
3. The Online Merchants Guild is a trade association for online merchants. The association's purpose is to advocate for a free and fairly regulated online marketplace, and for the interests of online merchants. Our advocacy work primarily consists of raising public awareness, educating our members on key issues and their rights, meeting with legislators and regulators, and similar traditional trade association work. We provide a "common voice" for hundreds of small business owners who have built new enterprises from scratch.

Guild Members' Use of Amazon's FBA Program

4. Guild members depend on Amazon, which operates by far the most important eCommerce store in the interstate marketplace. Amazon has dominant legal and practical control over

sales made through its online retail storefront as a result of Amazon's market power and its contractual terms.¹ Amazon also takes a commission on the sale of goods sourced by its merchants, in addition to a recurring fee for the right to supply Amazon's store. In all likelihood, Amazon makes more per sale than Guild members do.

5. For the most part, our members supply goods to Amazon's store via Amazon's Fulfilled by Amazon ("FBA") program.² The majority of all goods sold on Amazon.com are FBA goods supplied by "third-party merchants" like Guild members. When goods are offered via FBA, Amazon features those goods as "Prime Eligible," meaning that members of Amazon's Prime program are more likely to purchase the products, as it will be delivered in two days, a key benefit of being a Prime Member. Amazon's percentage is high for FBA sales: 45% of the sale price (30% plus the 15% commission). Amazon likely makes more on sales than Guild members do.
6. FBA works as follows. Merchants, like Guild members, source items they think Amazon

¹ The Amazon Services Business Solutions Agreement ("BSA"), through which Amazon sets the contractual terms for selling on Amazon, is available here: https://sellercentral.amazon.com/Whelp/external/G1791?language=en_US. The agreement and related contractual documents are incorporated herein by reference.

² See BSA at Fulfillment Services. Amazon's FBA program operated consistently with the below throughout the period in question.

might choose to carry in its store. Merchants will propose to Amazon a listing, including a proposed sale price, which Amazon will approve or reject in its full discretion, using an algorithm whose features are unknown to our members.

7. After Amazon approves a listing, Amazon then directs merchants where to ship the goods for Amazon's custody, which is usually the warehouse nearest to them. Typically Amazon provides merchants the UPS label with shipping information. Amazon's precise algorithm for how it selects the initial warehouse destination is unknown to our Members. From there, Amazon will redistribute the goods across its network of warehouses and distribution centers throughout the country.
8. FBA operates in a similar fashion to a consignment store model whereby physical custody and control of the inventory is surrendered to Amazon, Amazon features the products in their store, the customer deals directly with Amazon as the consignee, and if a sale is made, Amazon will transfer the sales proceeds (net of Amazon's share) to the merchant. This model, while factually indistinguishable from any other retail model from the customer's perspective, enables Amazon to be the everything store, offering a vast catalogue of items without undertaking the traditional inventory risk that a traditional, non-consignment-based retailer typically would.

9. Guild members have no control over which warehouse or warehouses Amazon chooses to utilize. They cannot tell Amazon to store, or not store, goods in particular states.
10. When Amazon's customers purchase FBA products, Amazon packs and ships the goods in their fulfillment centers and ships it to their customer. Amazon determines which warehouse to ship goods from. Merchants cannot tell Amazon which warehouses to fulfill orders from.
11. Amazon often engages in "commingling" fungible goods, in which an FBA order is not actually fulfilled from the items a merchant supplied, but the merchant receives credit for the sale, which allows Amazon to save on shipping and logistical costs.³ This is probably easier to illustrate with an example. Say Guild Member 1 supplies 10 DVDs to Amazon; Amazon stores those on the East Coast. Guild Member 2 supplies 10 of the same DVDs to Amazon, which Amazon stores on the West Coast. Then say a customer in California buys the DVD from Guild Member 1's listing. Rather than shipping the DVD across the country, Amazon will – in its discretion – supply the order from Guild Member 2's items, but credit Guild Member 1's account for the sale. In that example, even though Guild Member 1's item was never in California, CDTFAs

³ See Amazon BSA at F-4, Storage.

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enforcement policy would still purport to seek sales taxes from Guild Member 1 on the sale.

12. In addition to the logistical aspects, Amazon controls the rest of its store.
13. Online merchants are not in privity of contract with Amazon's customers; Amazon is. Amazon makes clear that customers are "Amazon's customers," not online merchants' customers.
14. At all times, Amazon controls pricing in its store, knows what a product in its store is priced at, what the product sold for, and whether sales taxes were collected on the sale.
15. Amazon has ultimate control over prices in its store. Online merchants cannot unilaterally determine the listing price; instead, they can estimate a price Amazon is likely to approve, based on historical sales data Amazon provides, and propose that to Amazon. Amazon retains final control over the price it will accept for listing a good on the Amazon site. Amazon commonly rejects prices for being too high (or too low) in Amazon's view. Of course, the merchant's proposed price will need to account for the merchant's acquisition and other costs, including Amazon's fees, and may reflect a demand premium, but ultimately the price the consumer sees does not happen without Amazon's approval. Amazon also has an Application Programming Interface ("API"), which allows third-party applications to interact with Amazon's store, including applications that automatically adjust the price,

in response to changing market conditions, which are determined by a data feed via Amazon's API of prior retail sales of similar products in Amazon's store.

16. Amazon also processes customer payments; merchants have no direct financial exchange with Amazon's customers. After extracting its commissions (and sometimes other charges), and typically after waiting several weeks, Amazon will remit a portion of the sale price to the merchant's Amazon account.
17. Amazon controls how and where items are listed on Amazon's store and in search results. Amazon maintains "the right to determine the design, content, functionality, availability and appropriateness of its websites, selection, and any product or listing in the Amazon Stores, and all aspects of each Service, including [online merchants'] use of the same."⁴ Online merchants cannot control whether customers in a state like California see the merchant's products in their search results. Our members cannot prohibit items from appearing in certain states. Only Amazon can control where and how search results are displayed.
18. It is not possible for online merchants using Amazon's store to engage in California-specific sales; nor can they realistically avoid making sales in California. The same is true for every state – from the perspective of

⁴ BSA at S-6.

our members, Amazon is a single national marketplace. Merchants cannot prospectively limit such sales because Amazon controls the search results and listings on Amazon. It is impractical for online merchants to “watch” for sales into particular states and reactively cancel them. Further, Amazon limits the number of sales that an online merchant can cancel, and will shut down the accounts of merchants that Amazon perceives cancel too many orders.

19. Amazon controls communications with customers, barring online merchants from sending “unsolicited” communications, requiring use of Amazon’s messaging platform to communicate with customers, and limiting the scope of communications to those “necessary for fulfilling the order or providing customer services.”⁵ Amazon also forbids online merchants from directing Amazon’s customers to the merchants’ own websites, or to any sales channel other than Amazon.
20. Amazon has a policy of demanding that online merchants validate listings, such as by requiring receipts to prove that name-brand merchandise was lawfully obtained. Amazon will terminate listings, or accounts, if it is not satisfied with sellers’ responses. That reflects Amazon’s control over its store, and its ability

⁵ Amazon Selling Policies and Seller Code of Conduct, https://sellercentral.amazon.com/gp/help/external/help.html?itemID=G1801&language=en_US&ref=%20ag_G1801_cont_521.

to establish rules that ensure Amazon's sales are in compliance with the law.

21. In my experience, many foreign sellers on Amazon (not Guild members) are beyond CDTFA's practical reach, if not the agency's legal reach. For example, approximately half of sellers on Amazon are based in China. In my experience, it is extremely unlikely that CDTFA will be able to actually find, much less coerce into payment, third-party merchants based in China. There is a widely known problem of foreign suppliers flooding Amazon with defective and counterfeit goods, and then evading identification and liability.⁶ There is little reason to suspect the behavior would be any different for tax issues.

Impacts of CDTFA's Conduct on the Guild and its Members

22. CDTFA began pursuing Guild members and other online merchants for supposed back taxes and registration requirements in 2017, although the agency's efforts seemed to increase in 2018. That was immediately a source of concern for Guild members, who were stunned that the agency was claiming tax authority over them despite their nonresident status, and even though Amazon failed to collect any sales taxes that were owed, with

⁶ See, e.g., Jon Emont, "Amazon's Heavy Recruitment of Chinese Sellers Puts Consumers at Risk," *The Wall Street Journal* (Nov. 11, 2019), <https://www.wsj.com/articles/amazons-heavy-recruitment-of-chinese-sellers-putsconsumers-at-risk-11573489075>.

California demanding reimbursement for uncollected taxes going as far back as 2012. The ripple effects were felt throughout the online merchant community. Even those who did not receive demands from CDTFA were concerned they might receive demands in the future. CDTFA's demands for back taxes and registration with the agency, and threats to imprison or fine merchants, has caused significant disruption to Guild members' businesses and frankly their personal wellbeing.

23. Guild members and other merchants, even those advised by accountants, were unaware that they were expected to be collecting taxes in Amazon's store. They do not have the funds to pay those taxes now, as the tax was never collected from Amazon's customers, and they do not have the funds to protect their interests through California's pay-to-play system.
24. While Amazon is now collecting tax in California, based on the company's interpretation of a change in the tax law that Amazon argues only established an obligation to collect in 2019, known as marketplace facilitator law, Members are also concerned about ongoing compliance costs with respect to their other eCommerce businesses, which can be thousands of dollars per state – a significant sum for small businesses with thin margins. This is due to the fact that CDTFA has taken a position that once a seller uses FBA they are no longer entitled to the protection of California's "Wayfair" law which requires \$500,000 in sales before a business is required to collect.

It is the CDTFAs position that FBA constitutes a traditional physical presence, pursuant to the *Quill* decision therefore any presence of inventory negates such protection.

25. I am aware of many Guild members and other online merchants who fear CDTFAs enforcement, and who have refrained from business activity due to the chilling effects of CDTFAs enforcement policy.
26. The problem is even more confounded because other states are following California's lead and imposing ambiguous retroactive tax liability on non-resident sellers. California is generally known to be a "thought-leader" and a source of influence in developing state tax policies that other states will follow. Therefore, as California proves its unlawful persecution of small businesses to be successful, more states may follow, and many already have in various ways.
27. For example, the issue of "FBA Nexus" removing the *Wayfair* protections is not unique to California. Many other states tax agencies take a similar position that the mere presence of inventory placed in an Amazon facility negates the protections of *Wayfair*. This means that a small-business merchant with just 30 items, could find themselves with a 30-state tax compliance obligation if Amazon were to place one of those items in each state, meaning the small-business would have to register with 30 states, collect sales tax, pay income or other taxes or otherwise be subjected to each

state's other unique registration and compliance burdens before the company makes a single sale, let alone the typical 200 transactions or \$100,000 in sales that is typically required in most states.

28. The Guild has devoted significant resources and thousands of hours to addressing CDTFA's enforcement policies, including meeting with officials, educating and advising members, and educating the broader public through podcasts and online media. That has diverted resources from other Guild functions.
29. Preliminary injunctive relief against the challenged CDTFA policies and laws is necessary to protect the interests of the Online Merchants Guild and its members. Absent such an injunction, members will remain chilled in their interstate marketplace activity, their businesses will suffer, and many of them will be forced to surrender their constitutional rights to CDTFA under duress.
30. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/Paul S. Rafelson

Paul S. Rafelson

> On 9/10/12 4:35 PM, Stromberg, Venus wrote:
> > Hi Declan,
> >

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> > Deputy Director Garza asked me to respond to your inquiry.

> >

> > The following should be attributed to the California State Board of

> > Equalization. If you need a quote or interview, I will put you in >

> contact with a spokesperson.

> >

> > Based on our understanding of how FBAs function in regards to > Amazon, > Amazon has possession of the property and the power to > transfer title to > the consumer. Since Amazon is handling the > merchandise and all aspects > of the sale, the Board of Equalization > would consider them the retailer, > and Amazon would have to collect tax on the transaction.

> >

> > I hope this information is helpful.

> >

> > Contact the office if you have any further questions.

> >

> > Venus Stromberg

> >

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> > (916) 327-8988

> >

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STATE OF CALIFORNIA [SEAL]

STATE BOARD OF EQUALIZATION **BETTY T. YEE**
First District, San Francisco
450 N STREET, SACRAMENTO, CALIFORNIA **SEN GEORGE RUNNER**
(RET.)
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082 Second District, Lancaster
916.323.3092 • MICHELLE STEEL
Third District, Orange County
FAX 916.323.3387 **JEROME E HORTON**
First District, Los Angeles
www.boe.ca.gov **JOHN CHIANG**
State Controller

CYNTHIA BRIDGES
Executive Director

September 11, 2012

Mr. Reed Schreiter, Director
State and Local Tax
PricewaterhouseCoopers LLP
400 Capitol Mall, Suite 600
Sacramento, CA 95814

Re: Tax Opinion Request 12-361
Amazon Fulfillment Services, Inc.
Amazon Services LLC

Dear Mr. Schreiter:

This is in response to your August 7, 2012, letter in which you request information as to the application

of the Sales and Use Tax Law to certain transactions involving the above-captioned taxpayer's business. You previously requested a legal opinion on February 24, 2012, on the application of tax to certain transactions involving an unnamed Taxpayer's business. We have had follow-up conversations relating to that opinion request and, with your August 7, 2012, letter, you "disclose the identity of the requestor, [provide] additional facts, and [renew your] request for a written tax opinion from the [State Board of Equalization] discussing the proper application of California sales and use tax to the transactions described in more detail in [your August 7, 2012] letter."

In your August 7, 2012 letter, you state, in relevant part:

I. Factual Background

Amazon.com, Inc. ("Parent"), conducts multi-state business operations through separate legal entities, including Amazon Fulfillment Services, Inc. ("AFS"), Amazon Services LLC ("Service Company"), and Amazon.com LLC ("LLC") (individually "Company" or collectively "Companies" or "Amazon"). [See Exhibit 1 - Structure Chart.] Each Company is wholly owned (directly or indirectly) by Parent.¹

In summary, this request focuses on the service offering "Fulfillment by Amazon" ("FBA"),

¹ In the prior letter dated February 24, 2012, AFS was referred to as a "Company A (Warehouse Company)," Service Company was referred to as "Company B (Website Operator)," and LLC was referred to as "Company C (Related Retailer)."

but also touches on various other service offerings.

A. Description of services provided to Third Party Retailers:

Service Company offers three services to unrelated third party retailers (“Third Party Retailers”) as described in the Amazon Services Business Solutions Agreement (“Business Solutions Agreement” or “BSA”) [See Exhibit 2 - Business Solutions Agreement]. The services described in the BSA exist independently of each other, and Third Party Retailers must separately register for each service. The services provided under the BSA are: 1) Selling on Amazon, 2) Webstore by Amazon (“Webstore”), and 3) FBA.² Service Company contracts directly with the Third Party Retailers. However, other Amazon entities supply to Service Company some of the components of the services that Service Company provides to the Third Party Retailers. The other Amazon entities are compensated by Service Company

² In addition to listing products of Third Party Retailers, Service Company also lists products sold by Amazon-related retailers, such as LLC (“related Retailers”). The Related Retailers are the sellers of record and enter into intercompany agreements with Service Company for the listing services. AFS also provides fulfillment services directly to Related Retailers and so Service Company is not an intermediary in those arrangements. In a typical transaction, AFS sources, purchases, holds title to, and manages inventory for Related Retailers. When a Related Retailer sells a product, AFS prepares the product for shipment and title passes to Related Retailer and then to the customer when the product is put on the loading dock for pick-up by a carrier (e.g., UPS) for delivery to the customer.

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for the work performed for the Third Party Retailers.

Service Company also offers tax calculation services to Third Party Retailers under a separate agreement.

Following is a brief description of the services:

1. Selling on Amazon

Pursuant to the BSA, Selling on Amazon is a service that allows the Third Party Retailers to list products for sale directly on the website operated by Service Company, www.amazon.com (“Amazon.com”), essentially granting Third Party Retailers a space on Amazon.com, which functions like a virtual “shopping mall” on the Internet. Third Party Retailers upload offers to the selling platform and determine the price of the offering. Amazon.com clearly lists the Third Party Retailer as the seller of record on the detail order listing page that customers must view prior to placing orders. [See Exhibit 3 - Screen Shots of Seller of Record from Amazon.com.]³

When a customer places an order for Third Party Retailer’s product, a message is sent to the Third Party Retailer who must accept the order. The Third Party Retailer accepts the order, and an order confirmation is sent to the customer, which, in part, confirms the Third Party Retailer as the seller of record. With the

³ The disclosure of the seller of record on Amazon.com prior to sale completion makes it possible for the SSE to determine the Third Party Retailers that are engaged in selling on Amazon.com.

order confirmation, Service Company also collects the payment for the purchase. Specifically, Service Company collects the sales price and shipping costs from the customer, deducts a referral fee ranging from 6 to 25 percent of the sales price, a variable closing fee, and a per-item fee of \$0.99. Service Company then remits the net amount to the Third Party Retailer.

Absent an agreement for FBA, Third Party Retailer is responsible for shipping the merchandise to the customer, as well as handling returns and customer service. Third Party Retailers are in no way obligated to use only Amazon.com to sell their products, and in fact commonly utilize various other sales channels aside from Amazon.com.

2. Webstore by Amazon

Webstore provides access to, and use of, an e-commerce website, Webstore Site, through which Third Party Retailers can offer and sell their products.⁴ Third Party Retailers retain full control of the Webstore Site and determine which items are for sale on their Site. Amazon operates Webstore Site, processes payments, and makes available online marketing data. Third Party Retailer maintains title to inventory sold on the Webstore Site

⁴ One high-profile example of this type of service is that in the past, Amazon ran the Target.com website for the well known retailer Target. While Amazon no longer runs the Target site, through its Webstore service Amazon does run websites for many Third Party Retailers.

and retains responsibility to source, sell, fulfill, ship, and deliver products.

3. FBA

Third Party Retailers can also register for FBA. This option becomes particularly attractive for Third Party Retailers that do not have warehouse space in certain parts of the country because it allows them to store inventory in an Amazon-owned warehouse. Although Third Party Retailers contract directly with Service Company for FBA, AFS (through AFS's various [Fulfillment Center (hereafter FC)] subsidiaries owns and operates the warehouse, and fulfillment services provided to Service Company, which in turn Service Company furnishes to the Third Party Retailers. The cost for these services is billed to the Third Party Retailer by Service Company rather than AFS, because the contract for FBA is executed with Service Company. To that end, Service Company maintains an inter-company contract with AFS to provide FBA to Service Company. Service Company charges the FBA fee to Third Party Retailers. The FBA fee consists of a Pick and Pack fee, a weight based Handling fee, and a monthly Storage fee. Service Company pays the FC entities on a per-unit basis at an arm's length price for the FBA services.

Third Party Retailers send their products to an FC designated by Service Company where the FC stores the products and fulfills orders on behalf of the Third Party Retailer. Third

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Party Retailers continue to hold title to their products stored in an FC. Title to the products passes from Third Party Retailers to their customers upon receipt of the products by a third party common carrier for shipment to customers. [See Exhibit 4 - FBA Overview and FAQs.]

Sales of goods stored with AFS can be consummated through (1) Amazon.com via Selling on Amazon or (2) outside Amazon.com (the later known as a “Multi-Channel Sale”).

a. FBA in combination with Selling on Amazon

Third Party Retailers may contract for Selling on Amazon, Webstore, or FBA as a separate service, or contract for the services in combination. For example, a Third Party Retailer may often contract for both Selling on Amazon and FBA. If a Third Party Retailer purchases Selling on Amazon along with FBA, then when a customer purchases Third Party Retailer’s goods advertised on Amazon.com, Service Company is authorized to process the transaction on behalf of Third Party Retailer and can automatically forward the order to AFS. Pursuant to its contract with Third Party Retailers, Service Company is authorized to accept the order on behalf of Third Party Retailer and collects the payment for the purchase. After deducting its fees (including both Selling on Amazon and FBA fees), Service Company remits the remainder of the purchase price collected to the Third Party Retailer. Service Company pays AFS for the

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services it performs on behalf of Third Party Retailer.

b. Multi-Channel sales

As mentioned above, Multi-Channel Sales are sales consummated independently by Third Party Retailers outside of Amazon.com. Since the Third Party Retailer's goods are being stored in an AFS warehouse, Third Party Retailer must advise Service Company that it sold goods in the event of a Multi Channel Sale. Service Company, in turn, advises AFS to release the goods to the shipper for delivery to the customer. Upon receipt of an order from Third Party Retailer, AFS labels, picks, packs, and ships the products to customers from Third Party Retailer's stock of goods according to specification provided by Third Party Retailer.

Third Party Retailer is the seller of record and holds title to the stock of tangible personal property. Title to the products passes from Third Party Retailer to their customers upon receipt of the products by a shipper for shipment to customers, F.O.B., shipping point. Pursuant to its agreement with Service Company, AFS ships the items directly to Third Party Retailers' customers.

c. Customer Service and Returns

Pursuant to the terms of the BSA, AFS receives and processes returns of any units fulfilled using the FBA service option that are

sold through Amazon.com. Only one of AFS's legal entities is eligible to receive returns under the BSA. That entity is AFS's subsidiary "Amazon.com kydc LLC," which has an FC in Kentucky.

By contrast, Third Party Retailer is responsible for returns and refunds of any units generated from a Multi-Channel sale. As it relates to customer service, Amazon is responsible for issues relating to packaging, handling and shipment, and customer returns, refunds, and adjustments related to FBA products that are sold on Amazon.com.

d. "Seller Central" Management Reports

"Seller Central" is a separate portal dedicated to apprising Third Party Retailers of information about their activities on Amazon.com or their Webstore Site. Amazon maintains electronic records, which can be accessed through "Seller Central" Management Reports, which track the inventory of units by identifying the number of units stored in any FC location. Third Party Retailers can generate this report of inventory from Seller Central at any time. The BSA, section F-14, states that ownership of inventory within a state may create nexus for Third Party Retailers:

You understand and acknowledge that storing Units at our [FC's] may create tax nexus for you in any country, state, province, or other localities in which your Units are stored, and

you will be solely responsible for any taxes owed as a result of such storage

4. Tax Calculation Services

Service Company also offers, under a separate agreement and for a separate fee, Tax Calculation Services, whereby it will calculate and collect tax from Third Party Retailers' customers and forward amounts collected to Third Party Retailers. Third Party Retailers are responsible for both product taxability determinations and reporting and remitting the correct tax to the various taxing authorities.

Moreover, as part of the terms of the BSA, the Company disclaims any responsibility for the collection and payment of Third Party Retailers' taxes. Specifically, Third Party Retailers must agree to the following provision in order to participate in any of the services described in the BSA:

As between the parties, you will be responsible for the collection and payment of any and all of Your Taxes. Any and all fees payable by you pursuant to this Agreement are exclusive of all sales, use and similar taxes, and you will pay any taxes that are imposed and payable on such amounts. Except as otherwise provided in this Agreement, you agree that Amazon is not obligated to determine whether taxes apply, and Amazon is not responsible to collect,

report or remit any taxes arising from any transaction.

B. Relationship of the Parties

The Wholesale Distribution and Fulfillment Agreement between Service Company and AFS (“Distribution Agreement”) specifies that the parties act independently of each other and are not “agents” of one another. The Distribution Agreement states the following:

Relationship Between Parties. Unless otherwise set forth in Exhibit A or Exhibit B or as otherwise authorized in writing, no Party has any authority of any kind to enter into agreements or licenses in the name of or binding on any other Party, or offer or create any warranty or other obligation, express or implied, on behalf of any other Party. Any services performed by a Party pursuant to this Agreement are performed by such Party as an independent contractor on a non-exclusive basis, and nothing in this Agreement creates a partnership, joint venture, franchise or agency relationship between the Parties as a result of this Agreement. [AFS] has exclusive control over its employees, representatives, agents, contractors and subcontractors (collectively “Personnel”), and over its employee relations and its policies relating to wages, hours, working

conditions and other employment conditions. [AFS] has the exclusive right to hire, transfer, suspend, dismiss, recall, promote, discipline, discharge and adjust grievances with its Personnel. [AFS] is solely responsible for all salaries and other compensation of its Personnel who provide Services and for making all deductions and withholdings from its employees' salaries and other compensation and paying all contributions, taxes and assessments.

(Italics added.)

[¶] [¶]

V. Advice Requested

In light of the above discussion, I ask the SBE to confirm . . . that neither Service Company nor AFS would be considered to be a retailer of tangible personal property owned by Third Party Retailers, based on the provisions of Regulation 1569.

You clarified certain information in your letter and provided additional information regarding the FBA service in telephone calls between August 20, 2012, and August 23, 2012, and an email on August 21, 2012.

In your letter, you state that, "Third Party retailers send their products to an FC designated by Service Company where the FC stores the products and fulfills orders on behalf of the Third Party Retailer." In a telephone conversation, you stated that AFS determines

the location(s) where the property will be stored initially and provides this information to Service Company who then informs the Third Party Retailer which FC or FC's to ship its product(s) to.

In a separate telephone conversation, you stated that once the Third Party Retailer's products are shipped to an FC facility, AFS may move the products between its FC facilities without approval of Service Company or the Third Party Retailer. Furthermore, Service Company has no authority to direct AFS as to where to store the Third Party Retailer's products.

Amazon does offer a program to Third Party Retailers whereby it offers to limit the FC's in which it stores a Third Party Retailer's products. In order to provide this service, an addendum to the standard contract between Service Company and the Third Party Retailer is executed. You described this program in an email on August 21, 2012, in which you state, in relevant part:

In the contract between Services and AFS, AFS agrees to provide fulfillment services. The manner in which these fulfillment services are provided is controlled by AFS. As such, there is not any specific terms in the contract between Services and AFS that control the issue of limited inventory placement. By way of background, Services received requests from its FBA customers to limit their inventory footprint. Services took action on these requests by discussing them with their fulfillment provider, AFS. For these cases,

AFS dictates the locations that are best for their operations and those locations appear in the contract terms between Services and the FBA customer. This is similar to the inventory staging services provided by shippers such as UPS when large and highly anticipated products are being released after a pre-order period.

As an attachment to this email, you also provided a copy of the addendum to the contract between Service Company and the Third Party Retailer. The addendum states, in relevant part:

In connection with the standard FBA Service, Amazon may require that Units be sent to any Amazon [FC] located within Your Elected Country, and we may transfer Units between any Amazon [FC] located within Your Elected Country. However, as part of a beta program (the “Tri State Beta Program”), Amazon is offering to limit the location of the Amazon [FC’s] in which Units are shipped to and stored in connection with the FBA Service, subject to the following terms and conditions.

A1. General Terms

A1.1 Existing Units. For any Units in Amazon [FC’s]s as of the Addendum Effective Date, Amazon will transfer such Units as necessary to Amazon [FC’s]s located within the Beta Program States, and will at all times thereafter limit the storage of Units within Amazon [FC’s]s located within certain of the United States (the “**Beta Program States**”).

A1.2 New Units. You will ship Units to the Amazon [FC's]s we specify in accordance with applicable Program Policies. Amazon will direct you to ship Units to, and will at all times limit the storage of such Units within, Amazon [FC's]s located within the Beta Program States.

A1.3 Beta Program States. The list of Beta Program States will initially include the Commonwealth of Kentucky, the State of Nevada and the State of Indiana. Amazon may remove a state from the list of Beta Program States at any time. Should Amazon add a state to the list of Beta Program States, Amazon will provide you sixty (60) days prior notice before transferring or storing any Units to or within Amazon [FC's]s located within such additional state.

A1.4 Returns and Disposal. You may, at any time, request that Units be returned to you or disposed of pursuant to Section F-7 (Returns to You and Disposal) of the Agreement.

A1.5 Additional Fees. For each Unit fulfilled through the FBA Service in connection with the Tri State Beta Program, the Order Handling fee you pay Amazon pursuant to Section F-9 (Compensation) of the Agreement may be increased \$[0.75] per Unit. For the avoidance of doubt, where Amazon charges the Order Handling fee as provided in the previous sentence and no Order Handling fee would otherwise be charged if a given Unit

was fulfilled through the FBA Service outside of the Tri State Beta Program, you will pay Amazon an Order Handling fee of S[0.75] for such Unit when it is fulfilled in connection with the Tri State Beta Program. Amazon may modify the additional fees set forth in this Section A1.5 at any time upon sixty (60) days prior notice.

A1.6 Tri State Beta Program Termination. Amazon may terminate the Tri State Beta Program (or your participation in it) upon sixty (60) days prior notice. You may terminate your participation in the Tri State Beta Program at any time upon sixty (60) days notice to Amazon. Any Units remaining in Amazon [FC's]s upon the termination of the Tri State Beta Program (or your participation in it) will continue to be managed and fulfilled through the standard FBA Service in accordance with the Agreement.

In a telephone conversation, you stated that a Third Party Retailer who participates in the TriState Beta Program cannot limit its footprints to just one of the states in the program. In other words, AFS may decide where to store Third Party Retailer's property amongst FC's within the three Beta Program States. You stated that when a Third Party Retailer participates in this program, AFS may move its products between the Beta Program States without receiving approval from the Third Party Retailer or Service Company. Furthermore, Service Company has no authority to direct AFS as to where to store the Third

Party Retailer's products amongst the Beta Program State FC's.

DISCUSSION

Your question involves application of the Sales and Use Tax Law. I will provide a description of that law and then discuss portions of the law relevant to your inquiry. I will then address your inquiry.

California imposes a sales tax measured by a retailer's gross receipts from the retail sale of tangible personal property inside this state, unless the sale is specifically exempted from taxation by statute. (Rev. & Tax. Code, §§ 6051, 6091.) The sales tax is imposed on the retailer who may collect reimbursement from its customer if the contract of sale so provides. (Civ. Code, § 1656.1; Cal. Code Regs., tit. 18, § (Regulation or Reg.) 1700.) When sales tax does not apply, use tax is imposed, measured by the sales price of tangible personal property purchased from a retailer for storage, use, or other consumption in California, unless specifically exempted or excluded from taxation by statute. (Rev. & Tax. Code, §§ 6201, 6401.) The use tax is imposed on the person actually storing, using, or otherwise consuming the tangible personal property. (Rev. & Tax. Code, § 6202.) However, every retailer "engaged in business" in this state that makes sales subject to California use tax is required to collect use tax from its customers and remit it to the Board. (Rev. & Tax. Code, §§ 6202, 6203; Reg. 1684.) Taxable gross receipts or sales price includes all amounts received with respect

to the sale, with no deduction for the cost of the materials, service, or expense of the retailer passed on to the purchaser, unless there is a specific statutory exclusion. (Rev. & Tax. Code, §§ 6011, 6012.)

The term “sale” includes “any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration.” (Rev. & Tax. Code, § 6006, subd. (a).) The term “seller” includes “every person engaged in the business of selling tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax,” and, as relevant here, the term “retailer” includes: “(1) Every seller who makes any retail sale or sales of tangible personal property, and every person engaged in the business of making retail sales at auction of tangible personal property owned by the person or others; and (2) Every person engaged in the business of making sales for storage, use, or other consumption or in the business of making sales at auction of tangible personal property owned by the person or others for storage, use, or other consumption.” (Rev. & Tax Code, §§ 6014, 6015.)

Relevant to your inquiry, Regulation 1569 discusses the application of tax to sales made by consignees and lienors of tangible personal property. It states, in relevant part that:

A person who has possession of property owned by another, and also the power to cause title to that property to be transferred to a

third person without any further action on the part of its owner, and who exercises such power, is a retailer when the party to whom title is transferred is a consumer. Tax applies to his gross receipts from such a sale.

A “person” includes any individual, firm, partnership, joint venture, limited liability company, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, assignee for the benefit of creditors, trustee, trustee in bankruptcy, syndicate, the United States, this state, any county, city and county, municipality, district, or other political subdivision of the state, or any other group or combination acting as a unit. (Rev. & Tax. Code, § 6005.) Black’s Law Dictionary (6th ed. 1990) provides that the term “possession” refers to the situation where a person has “actual possession,” meaning “direct physical control over a thing,” and “constructive possession,” meaning that a person “has both the power and intention . . . to exercise dominion or control over a thing, either directly or through another person or persons.”

Service Company and AFS are separate persons under Revenue and Taxation Code section 6005. Thus, in order for either entity to be considered the retailer on sales of a Third Party Retailer’s merchandise under Regulation 1569, it would have to have both possession of the Third Party Retailer’s property and the power to cause title to that property to be transferred without any further action on behalf of the Third Party Retailer.

Selling on Amazon

When sales of Third Party Retailers are made under the Selling on Amazon program, you state that “[w]hen a customer places an order for Third Party Retailer’s product, a message is sent to the Third Party Retailer who must accept the order.” In this case, neither AFS nor Service Company has the power to cause title to the Third Party Retailer’s property to be transferred without action on the part of the Third Party Retailer. Thus, neither AFS nor Service Company is a retailer under Regulation 1569 for sales made by Third Party Retailers using Selling on Amazon.

Webstore

You state that Webstore provides Third Party Retailers use of an e-commerce website, Webstore site, through which Third Party Retailers offer and sell products. You state further that Third Party Retailers retain full control of the Webstore Site and determine which items are for sale. The Third Party Retailer maintains title to the inventory sold on the Webstore Site and retains responsibility to source, sell, fulfill, ship, and deliver products. It is our understanding that when an order is placed through the Webstore site, the Third Party Retailer must accept the order. Furthermore, we assume, based on your statement that the Third Party retailer is responsible for shipping and delivering the products, that it maintains possession of the goods prior to shipment. Neither AFS nor Service Company has the possession of the Third Party

Retailer's property or the power to cause title to the property to be transferred without action on the part of the Third Party Retailer. Thus, neither AFS nor Service Company is a retailer under Regulation 1569 for sales made by Third Party Retailers using Webstore.

FBA in combination with Selling on Amazon

You state in your letter that when a customer purchases Third Party Retailer's goods advertised on Amazon.com, Service Company is authorized to process the transaction on behalf of the Third Party Retailer and can automatically forward the order to AFS. Furthermore, Service Company is authorized to accept the order on behalf of the Third Party Retailer. Service Company has the power to cause title to the Third Party Retailer's property to be transferred to a third person without any further action on the part of the Third Party Retailer. AFS does not have this power. As such, AFS is not a retailer under Regulation 1569 when a Third Party Retailer participates in FBA in combination with Selling on Amazon.

While Service Company has the power to cause title to the Third Party Retailer's property to be transferred to a third person without further action on the part of the Third Party Retailer, Service Company can be a retailer under Regulation 1569 only if it also has possession of the Third Party Retailer's property. As discussed below, we conclude that Service Company does not have possession of the Third Party Retailer's property and is therefore not a retailer under Regulation

1569 for sales of a Third Party Retailer's property when the Third Party Retailer participates in FBA in combination with Selling on Amazon, including instances where the Third Party Retailer participates in the TriState Beta Program.

When a Third Party Retailer participates in FBA, it is AFS and not Service Company that determines to which FC or PC's the Third Party Retailer's will ship its property. Additionally, once the Third Party Retailer's property is shipped to the FC's, AFS has the power to ship the property between various FC locations without receiving approval of the Service Company. Service Company does not have the power or authority to direct AFS to hold the Third Party Retailer's property in a specific FC.

When a Third Party Retailer participates in the TriState Beta Program, AFS again makes the determination as to where the Third Party Retailer's property will be initially sent by the Third Party Retailer. If Third Party Retailers enter into this program after their property has been shipped to various FC's not located within the Beta Program States, then AFS decides how to transfer property amongst FC's located within the Beta Program States. AFS has the power to ship the property between various FC locations within the Beta Program States without receiving approval of the Service Company. Furthermore, Service Company does not have the power or authority to direct AFS to hold the Third Party Retailer's property in a specific FC.

Service Company does not have direct physical control over the Third Party Retailer's property nor does it have the power and intention to exercise dominion and control over the Third Party Retailer's property while it is in the FC location. Accordingly, Service Company does not have possession of the Third Party Retailer's property and thus is not a retailer of the Third Party Retailer's property under Regulation 1569.

Multi-Channel sales

You state that Multi-Channel Sales are sales consummated independently by Third Party Retailers outside of Amazon.com, and that the Third Party Retailer must advise Service Company that it sold the goods. Service Company then advises AFS to release these goods to the shipper for delivery. Neither AFS nor Service Company has the power to cause title to the Third Party Retailer's property to be transferred without action on the part of the Third Party Retailer. Neither AFS nor Service Company is a retailer under Regulation 1569 for sales made by Third Party Retailers in Multi-Channel sales.

Conclusion

As stated above, neither AFS nor Service Company is a retailer, under Regulation 1569 or otherwise, when sales of Third Party Retailers' property are made using Selling on Amazon, Webstore, FBA in combination with Selling on Amazon, or Multi-Channel sales.

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This conclusion is based on the information you have provided in your letter, your email and telephone calls, as discussed above. If the actual facts differ from the facts summarized in this letter, the opinions expressed in this letter may not be reliable. I note further that we have not been provided a copy of the contract or contracts between AFS and Service Company. Finally, the ultimate determination of whether or how tax applies to these transactions will be based on the actual facts and circumstances, as verified by audit.

I trust this response suffices to answer your question. If you have further questions, please write again.

Sincerely,

/s/ Cary C. Huxsoll
Cary C. Huxsoll
Tax Counsel III (Specialist)

CCH/MCB

J:/Bus/Use/Finals/Huxsol1/1569/12-361.docx

cc: Sacramento District Administrator (KH)
Riverside District Administrator (EH)

From: **Amazon Services** <seller-info@amazon.com>
Date: Tue, Oct 23, 2018 at 9: [REDACTED] PM
Subject: Disclosure to the California Department of
Tax and Fee Administration
To: [REDACTED]

Amazon has received a valid and binding legal demand from the California Department of Tax and Fee

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Administration (CDTFA) requiring that Amazon disclose the following information about your business in 2017:

- Contact information (name, address, and email)
- US Taxpayer Identification Number

To comply with our obligations under the law, we plan to provide this information to the CDTFA by November 6, 2018. In many cases, sellers who register and file taxes in California already provide information on their Amazon business as part of their tax filings. Because each seller's business and tax needs are unique, we encourage you to consult with a tax advisor to answer any questions you may have.

You also may refer to the following resources in Seller Central:

- Solution Provider Network, a directory with information about several tax advisors:
<https://sellercentral.amazon.com/gp/help/external/G201687890>.
- Tax calculation services, optional services for calculating U.S. sales and use taxes:
<https://sellercentral.amazon.com/gp/help/G200787660>.

Thank you for selling on Amazon,

Amazon Services

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From: Fowler, Lelania <Lelania.Fowler@cdtfa.ca.gov>
Sent: Thursday, March [REDACTED], 2018 [REDACTED]
Subject: RE: [REDACTED]

[REDACTED]

The Registration Requirement is based on my investigation and our telephone conversations.

I am doing my due diligence in order to provide you with your options and maintain a record for a potential Audit Referral if you choose not to register.

If you choose not to voluntarily comply to obtain a sellers permit these are outcomes some of the possible:

- Law codes
<https://www.boe.ca.gov/lawguides/business/archive/2010/vol1/sutl/sales-and-use-tax-law-chapter10-all.html>
- **6071. Unlawful acts.** A person who engages in business as a seller in this state without a permit or permits or after a permit has been suspended or revoked, and each officer of any corporation which so engages in business, is guilty of a misdemeanor punishable as provided in Section 7153.
- **7153. Same.** Any violation of this part by any person, except as otherwise provided, is a misdemeanor. Each offense shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), or imprisonment not exceeding one year in the

county jail, or both the fine and imprisonment in the discretion of the court.

- 7153.5. **Same.** Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars (\$25,000) or more in any 12-consecutive-month period. Each offense shall be punished by a fine of not less than five thousand dollars (\$5,000) and not more than twenty thousand dollars (\$20,000), or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court.

Business Taxes Law Guide - SALES AND USE
TAX LAW

www.boe.ca.gov

The mission of the State Board of Equalization is to serve the public through fair, effective, and efficient tax administration

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Thank You,

Lelania Fowler
Tax Technician III
California Department of Tax and Fees Administration
3321 Power Inn Rd., Ste. 210
Sacramento, CA 95826-3889
Phone: 916-227-6636 | Fax: 916-227-6641
E: Lelania.Fowler@cdtfa.ca.gov | www.cdtfa.ca.gov

From: Fowler, Lelania <Lelania.Fowler@cdtfa.ca.gov>
Sent: Thursday, March [REDACTED], 2018 [REDACTED]
Subject: RE: [REDACTED]

The Registration Requirement is based on my investigation and our telephone conversations.

I am doing my due diligence in order to provide you with your options and maintain a record for a potential Audit Referral if you choose not to register.

If you choose not to voluntarily comply to obtain a sellers permit these are outcomes some of the possible:

- Law codes
<https://www.boe.ca.gov/lawguides/business/archive/2010/vol1/sutl/sales-and-use-tax-law-chapter10-all.html>
- 6071. **Unlawful acts.** A person who engages in business as a seller in this state without a permit or permits or after a permit has been suspended or revoked, and each officer of any corporation which so

engages in business, is guilty of a misdemeanor punishable as provided in Section 7153.

- 7153. **Same.** Any violation of this part by any person, except as otherwise provided, is a misdemeanor. Each offense shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), or imprisonment not exceeding one year in the county jail, or both the fine and imprisonment in the discretion of the court.
- 7153.5. **Same.** Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars (\$25,000) or more in any 12-consecutive-month period. Each offense shall be punished by a fine of not less than five thousand dollars (\$5,000) and not more than twenty thousand dollars (\$20,000), or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court.

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www.boe.ca.gov

The mission of the State Board of Equalization is to serve the public through fair, effective, and efficient tax administration

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Thank You,

Lelania Fowler
Tax Technician III
California Department of Tax and Fees Administration
3321 Power Inn Rd., Ste. 210
Sacramento, CA 95826-3889
Phone: 916-227-6636 | Fax: 916-227-6641
E: Lelania.Fowler@cdtfa.ca.gov | www.cdtfa.ca.gov

From: Fowler, Lelania <Lelania.Fowler@cdtfa.ca.gov>
Sent: Wednesday, March [REDACTED], 2018 [REDACTED]
To: [REDACTED]
Subject: [REDACTED]

Good morning,

I am writing to set up an appointment with you for registration.

It takes about 15-20 minutes.

I am available from 7:00 a.m. to 3:00 P.M. Pacific Standard Time, Monday through Friday.

Please let me know when you would like me to call you to complete registration.

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I also wanted to advise you that operating unlawfully you can be prosecuted and billed, become unable to receive penalty relief per:

Law codes

<https://www.boe.ca.gov/lawguides/business/archive/2010/vol1/sutl/sales-and-use-tax-law-chapter10-all.html>

Business Taxes Law Guide - SALES AND USE TAX LAW

www.boe.ca.gov

The mission of the State Board of Equalization is to serve the public through fair, effective, and efficient tax administration

- **6071. Unlawful acts.** A person who engages in business as a seller in this state without a permit or permits or after a permit has been suspended or revoked, and each officer of any corporation which so engages in business, is guilty of a misdemeanor punishable as provided in Section 7153.
- **7153. Same.** Any violation of this part by any person, except as otherwise provided, is a misdemeanor. Each offense shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), or imprisonment not exceeding one year in the county jail, or both the fine and imprisonment in the discretion of the court.

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- 7153.5. **Same.** Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars (\$25,000) or more in any 12-consecutive-month period. Each offense shall be punished by a fine of not less than five thousand dollars (\$5,000) and not more than twenty thousand dollars (\$20,000), or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court.

Thank You,

Lelania Fowler
Tax Technician III
California Department of Tax and Fees Administration
3321 Power Inn Rd., Ste. 210
Sacramento, CA 95826-3889
Phone: 916-227-6636 | Fax: 916-227-6641
E: Lelania.Fowler@cdtfa.ca.gov | www.cdtfa.ca.gov

STATE OF CALIFORNIA	[SEAL]
CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION	EDMUND G. BROWN JR. Governor
OUT-OF-STATE OFFICE	MARYBELL BATJER Secretary, Government Operations Agency
3321 POWER INN ROAD, SUITE 130, SACRAMENTO CA 95826-3803	NICOLAS MADUROS Director
1-916-227-6600	
fax 1-916-227-6641	
<i>www.cdtfa.ca.gov</i>	



Letter Date: September [REDACTED], 2018
Case ID: [REDACTED]

Dear [REDACTED]

As a result of our review of the questionnaire regarding your sales activities in California as well as an independent investigation, your company is required to register with the California Department of Tax and Fee Administration (CDTFA) pursuant to Revenue and Taxation Code (R&TC) section 6203

We provide the convenience of online registration at *www.cdtfa.ca.gov*. From the homepage, select Register and follow the prompts. Your start date is the date your firm was first engaged in business in California (see R&TC section 6203). Please note, pursuant to R&TC section 6071, a person who is engaged in business as a seller in this state without a permit is in violation of the law and each officer of a corporation may be guilty of a misdemeanor. Failure to comply by October 1,

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2018, may result in a Notice of Determination (billing) being issued, as authorized under R&TC section 6487.

If you have further questions regarding this matter or need assistance with the requirements of this letter, please feel free to contact me at the telephone number listed above.

Sincerely,

Nicole Campbell
Business Taxes Representative
Out-of-State Office

From: **Fong, Liane** <Liane.Fong@cdtfa.ca.gov>
Date: Thu, Jan 24, 2019 at [REDACTED]
Subject: California Department of Tax and Fee Administration/ Case ID #693561
To: [REDACTED]

In the process of applying for your California Sellers Permit, you have provided a start date of 02/15/19 for your sales and use tax account.

Under current law, you are considered the retailer of the inventory you sell through a fulfillment center and other marketplaces and you are required to provide the CDTFA with an accurate start date that reflects when your nexus in California first commenced. In accordance with the Revenue and Taxation Code 6487, failure to comply may result in the necessary enforcement action including an audit and issuance of deficiency determinations, the CDTFA can issue

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determinations for up to eight years when issuing a Notice of Determination(billing) for an unreported period.

If you need to change your start to reflect when you first commence California nexus, please contact me or our office at (916) 227-6600.

Enclosure: Regulation 1684

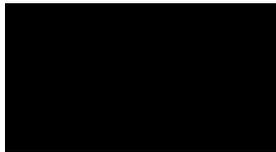
LIANE FONG

California Department of Tax and Fee Administration
Out of State District Office

Phone: 916-227-66621 | Fax: 916-227-6641

E: lfong@cdtfa.ca.gov | www.cdtfa.ca.gov

STATE OF CALIFORNIA	[SEAL]
CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION	EDMUND G. BROWN JR. Governor
OUT-OF-STATE OFFICE	MARYBELL BATJER
3321 POWER INN ROAD, SUITE 130, SACRAMENTO CA 86826-3803	Secretary, Government Operations Agency
1-916-227-6600 fax 1-916-227-6641 <i>www.cdtfa.ca.gov</i>	NICOLAS MADUROS Director



Letter Date: February [REDACTED], 2019
Case ID: [REDACTED]

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Dear [REDACTED] (Or To Whom It May Concern)

In the August 15, 2018 letter, the California Department of Tax and Fee Administration (CDTFA) informed you of your firm's requirements to register with us as mandated by the State of California under the Sales and Use Tax Law. As of the date of this letter, we have not received your response.

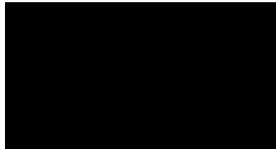
We provide the convenience of online registration at www.cdtfa.ca.gov. From the homepage, select Register and follow the prompts. Your start date is the date your firm was first engaged in business in California (see R&TC section 6203). Please note, pursuant to R&TC section 6071, a person who is engaged in business as a seller in this state without a permit is in violation of the law and each officer of a corporation may be guilty of a misdemeanor. Failure to comply by March 7, 2019, may result in a Notice of Determination (billing) being issued, as authorized under R&TC section 6487.

If you have further questions regarding this matter or need assistance with the requirements of this letter, please feel free to contact me at the telephone number listed above.

Sincerely,

Becky Smith
Tax Technician
Phone 916-227-6663
rebecca.smith@cdtfa.ca.gov
Out-of-State Office

STATE OF CALIFORNIA	[SEAL]
CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION	EDMUND G. BROWN JR. Governor
OUT-OF-STATE OFFICE	MARYBELL BATJER Secretary, Government Operations Agency
3321 POWER INN ROAD, SUITE 130, SACRAMENTO CA 95826-3803	NICOLAS MADUROS Director
1-916-227-6600	
fax 1-916-227-6641	
<i>www.cdtfa.ca.gov</i>	



Letter Date: May [REDACTED], 2019
 Letter ID: [REDACTED]
 Account Type: Sales and Use Tax
 Account Number: [REDACTED]
 Limited Access Code: [REDACTED]
 Collection ID: [REDACTED]

**IMMEDIATE ACTION REQUIRED
 FIE YOUR RETURN OR YOUR SELLER'S
 PERMIT MAY BE CANCELLED**

Dear Taxpayer:

Our records indicate that we have not received your sales and use tax return for the period listed below.

Account	filing Period
[REDACTED]	December 31, 2015
	Period Begin Period End
	October 1, 2015 December 31, 2015

If your seller's permit is cancelled, it is illegal for you to make sales of taxable items in California.

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What should I do now?

File your return immediately by logging in at www.cdtfa.ca.gov and click on "File a Return." You must file a return even if you have no sales or use tax to report or you cannot pay. If you cannot pay in full, please file your return immediately, pay as much as you can to avoid additional interest, and then contact your local office to discuss your account.

Or

If you need help with filing your return, please contact the office at the telephone number above.

If your return is not filed by July 31, 2018, you may be billed for estimated amounts due, pursuant to Revenue and Taxation Code section 6511.

If you believe you have received this letter in error or your business has closed, please contact your local office at the phone number listed above.

For additional information, read publication 54, Collection Procedures, or publication 74, Closing Out Your Account at www.cdtfa.ca.gov.

California Department of Tax and Fee Administration

From: **Khan, Saman** <Saman.Khan@cdtfa.ca.gov>
Date: Wed, Feb [REDACTED], 2018 at [REDACTED]
Subject: California Department of Tax and Fee Administration
To: "[REDACTED]"

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Hello Mr. [REDACTED],

A follow up email was sent to you on 12/26/17 regarding filing of your past period liabilities, and to see if you had any questions. Your account is delinquent for period(s): **3Q14-2Q17**.

Electronic filing is the California Department of Tax and Fee Administration method for filing your sales and use tax returns and making payments. Log into our website

at www.cdtfa.ca.gov to utilize our online services and become a registered user. The express login code for your account is provided below. Please be aware

that interest continues to accrue on any unpaid tax due.

As an advisory, any delinquent tax amount is subject to penalty and interest. Relief from penalty is possible if your failure to register and file timely

was due to reasonable cause. You may request relief from penalties.

Please file your returns online by February 08, 2018. Failure to file the required returns will result in your account

being referred to our audit section for issuance of an estimated determination.

If you wish to go on a payment plan here is a link to apply for one:

<https://www.cdtfa.ca.gov/services/#Overview>

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Please feel free to call or email me with your questions at any time. Your case has been assigned to me now.

Past Period Liability for Account

Permit: SC OHB 103107481

Express Login Code: t922445j

Sincerely,

Saman khan

BTCS 1

California Department of Tax and Fee Administration

Out of State Office MIC: OH

3321 Power Inn Rd STE 130

Sacramento CA 95826

Phone: 916-227-6653

Fax: 916-227-6641

Email: saman.khan@cdtfa.ca.gov

www.cdtfa.ca.gov

[SEAL] **California Department of
Tax and Fee Administration**

The information contained in this e-mail is private, confidential, or legally privileged. It is intended only for the use of the person(s) name herein as sender and recipients of the communication. Any retention, display, dissemination, distribution, disclosure, publication or copying of the contents of the attached message by individuals other than the sender or recipient of the said

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communication is strictly prohibited. If you have received this e-mail message in error, please immediately notify the sender (the California Department of Tax and Fee Administration) by e-mail or at the sender's telephone number, then immediately delete this e-mail. Persons who copy or disclose such confidential information are subject to applicable legal penalties.

Any written advice is intended to provide general information regarding the application of the tax and will not serve as a basis for relief of liability under Revenue and Taxation Code section 6596.

STATE OF CALIFORNIA

[SEAL]

CALIFORNIA DEPARTMENT
OF TAX AND FEE
ADMINISTRATION

EDMUND G. BROWN JR.
Governor

OUT-OF-STATE OFFICE
3321 POWER INN ROAD, SUITE 130,
SACRAMENTO CA 95826-3803
1-916-227-6600
fax 1-916-227-6641
www.cdtfa.ca.gov

MARYBELL BATJER
Secretary,
Government
Operations Agency

NICOLAS MADUROS
Director

Letter Date: February [REDACTED], 2019

Case ID: [REDACTED]

Dear [REDACTED] (Or To Whom It May Concern)

In the August 15, 2018 letter, the California Department of Tax and Fee Administration (CDTFA)

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informed you of your firm's requirements to register with us as mandated by the State of California under the Sales and Use Tax Law. As of the date of this letter, we have not received your response.

We provide the convenience of online registration at *www.cdtf.ca.gov*. From the homepage, select Register and follow the prompts. Your start date is the date your firm was first engaged in business in California (see R&TC section 6203). Please note, pursuant to R&TC section 6071, a person who is engaged in business as a seller in this state without a permit is in violation of the law and each officer of a corporation may be guilty of a misdemeanor. Failure to comply by March 7, 2019, may result in a Notice of Determination (billing) being issued, as authorized under R&TC section 6487.

If you have further questions regarding this matter or need assistance with the requirements of this letter, please feel free to contact me at the telephone number listed above.

Sincerely,

Becky Smith
Tax Technician
Phone 916-227-6663
rebecca.smith@cdtfa.ca.gov
Out-of-State Office



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From: **Fong, Liane** <Liane.Fong@cdtfa.ca.gov>
Date: Thu, Jan 24, 2019 at [REDACTED]
Subject: California Department of Tax and Fee
Administration/ Case ID #693561
To: [REDACTED]

In the process of applying for your California Sellers Permit, you have provided a start date of 02/15/19 for your sales and use tax account.

Under current law, you are considered the retailer of the inventory you sell through a fulfillment center and other marketplaces and you are required to provide the CDTFA with an accurate start date that reflects when your nexus in California first commenced. In accordance with the Revenue and Taxation Code 6487, failure to comply may result in the necessary enforcement action including an audit and issuance of deficiency determinations, the CDTFA can issue determinations for up to eight years when issuing a Notice of Determination(billing) for an unreported period.

If you need to change your start to reflect when you first commence California nexus, please contact me or our office at (916) 227-6600.

Enclosure: Regulation 1684

LIANE FONG

California Department of Tax and Fee Administration
Out of State District Office

Phone: 916-227-66621 Fax: 916-227-6641

E: lfong@cdtfa.ca.gov | www.cdtfa.ca.gov

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From: "Campbell, Nicole" <Nicole.Campbell@cdtfa.ca.gov>

Subject: California Department of Tax and Fee Administration

Date: Jul 13, 2018 [REDACTED]

To: [REDACTED]

Dear Controller,

A instate audit was conducted showing [REDACTED] making sales to California customers. Please complete the attached California Nexus Questionnaire by Monday July 16, 2018. If you have any questions please contact me.

Thank you

*Nicole Campbell
Business Taxes Representative
California Department of Tax and Fee Administration
3321 Power Inn Rd, Suite 130,
Sacramento, CA 95826-3893
Ph: 916-227-2907 Fax: 916-227-6641
E-mail Nicole.Campbell@cdtfa.ca.gov / www.cdtfa.ca.gov*

Any answer given is intended to provide general information regarding the application of tax based on the information you have provided and will not serve for relief of liability under section 6596.

[LOGO] please consider the environment before printing this e-mail

Notice: The information contained in this e-mail message is private, confidential, or legally privileged. It is intended ONLY for the use of the person(s) specifically named herein as sender and recipient(s) of the

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communication. Any retention, display, dissemination, distribution, disclosure, publication or copying of the contents of this message by individuals OTHER than the sender or recipient of the said communication is strictly prohibited. If you have received this e-mail message in error, please immediately notify the SENDER at sender's e-mail address, then immediately delete the entire e-mail message, without copying the message, and without disclosing its contents to any person other than the sender or recipient. Persons who copy or disclose such confidential information are subject to applicable legal penalties.

Date: Thu, Jan 24, 2019 [REDACTED]
Subject: California Department of Tax and Fee Administration - [REDACTED]
To: [REDACTED]

Hello

This is a follow up email regarding delinquent returns for [REDACTED]. You have delinquent periods from 2Q14 through 2Q17. Please file returns as soon as possible and let me know once they are completed.

Here is a link to log into your account:

<https://onlineservices.cdtfa.ca.gov/#1>

Let me know if you have any questions.

Thank you

Saman Khan

Tax Compliance Specialist, Out-of-State Office

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California Department of Tax and Fee Administration
3321 Power Inn Rd., Ste. 130, Sacramento, CA 95826

Phone: 916-227-6653 Fax: 916-227-6641

<https://www.cdtfa.ca.gov/taxes-and-fees/survey-hawd.aspx>

Thank You for Connecting with Us:

[ICONS]

www.cdtfa.ca.gov

[SEAL] California Department of
Tax and Fee Administration

The information contained in this e-mail is private, confidential, or legally privileged. It is intended only for the use of the person(s) name herein as sender and recipients of the communication. Any retention, display, dissemination, distribution, disclosure, publication or copying of the contents of the attached message by individuals other than the sender or recipient of the said communication is strictly prohibited. If you have received this e-mail message in error, please immediately notify the sender (the California Department of Tax and Fee Administration) by e-mail or at the sender's telephone number, then immediately delete this e-mail. Persons who copy or disclose such confidential information are subject to applicable legal penalties.

Any written advice is intended to provide general information regarding the application of the tax and will not serve as a basis for relief of liability under Revenue and Taxation Code section 6596.

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From: Fowler, Lelania <Lelania.Fowler@cdtfa.ca.gov>
Sent: Wednesday, March [REDACTED] 2018 [REDACTED]
To: [REDACTED]
Subject: [REDACTED]

Good Morning,

I am writing to set up an appointment with you for registration.

It takes about 15-20 minutes.

I am available from 7:00 a.m. to 3:00 P.M. Pacific Standard Time, Monday through Friday.

Please let me know when you would like me to call you to complete registration.

I also wanted to advise you that operating unlawfully you can be prosecuted and billed, become unable to receive penalty relief per :

Law codes
<https://www.boe.ca.gov/lawguides/business/archive/2010/vol1/sutl/sales-and-use-tax-law-chapter10-all.html>

Business Taxes Law Guide – SALES AND USE TAX LAW

www.boe.ca.gov

The mission of the State Board of Equalization is to serve the public through fair, effective, and efficient tax administration

- **6071. Unlawful acts.** A person who engages in business as a seller in this state without a permit or permits or after a permit has been

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suspended or revoked, and each officer of any corporation which so engages in business, is guilty of a misdemeanor punishable as provided in Section 7153.

- 7153. **Same.** Any violation of this part by any person, except as otherwise provided, is a misdemeanor. Each offense shall be punished by a fine of not less than one thousand dollars (\$1,000) and not more than five thousand dollars (\$5,000), or imprisonment not exceeding one year in the county jail, or both the fine and imprisonment in the discretion of the court.
- 7153.5. **Same.** Notwithstanding any other provision of this part, any person who violates this part with intent to defeat or evade the reporting, assessment, or payment of a tax or an amount due required by law to be made is guilty of a felony when the amount of unreported tax liability aggregates twenty-five thousand dollars (\$25,000) or more in any 12-consecutive-month period. Each offense shall be punished by a fine of not less than five thousand dollars (\$5,000) and not more than twenty thousand dollars (\$20,000), or imprisonment for 16 months, two years, or three years, or both the fine and imprisonment in the discretion of the court.

Thank You,

Lelania Fowler
Tax Technician III
California Department of Tax and Fees Administration
3321 Power Inn Rd., Ste. 210
Sacramento, CA 95826-3889

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Phone: 916-227-6636 | Fax: 916-227-6641
E: Lelania.Fowler@cdtfa.ca.gov | www.cdtfa.ca.gov

----- Forwarded message -----

From: **Fowler, Lelania** <Lelania.Fowler@cdtfa.ca.gov>

Date: [REDACTED] Feb [REDACTED], 2018 [REDACTED]

Subject: [REDACTED]

To: [REDACTED]

Dear [REDACTED]

The California Department of Tax and Fee Administration (CDTFA) has issued your company the permit

number listed above. Please refer to this number when corresponding with CDTFA.

Your company is required to file Sales and Use Tax returns on a Quarterly basis with a start date of

9/5/2012. All sales of tangible personal property are retail sales and subject to tax, unless supported by

documentation as being exempt. Electronic filing is the CDTFA's method for filing your Sales and Use Tax

returns and making payments. Publication 159, E-file Guide and other online services are available on our

website, www.cdtfa.ca.gov.

You are required to file past due return(s) for the period(s) 3rd Quarter 2012 through 4th Quarter 2017 by

4/13/2018. I have attached BOE 504, A-B-C (XYZ letter) that can be used to contact your customers to

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determine if the sales were previously reported to the BOE. You should retain the completed XYZ letters and other documentation should it be requested at a later date.

As an advisory, any delinquent tax amount is subject to penalty and interest. You may request relief from penalties; however interest is mandatory and enforced on all delinquent tax due.

For additional information, please visit our website at www.cdtfa.ca.gov to obtain, California Sales and Use

Tax laws, regulations, publications and procedures. If you have any questions, please contact me at the number or email listed below.

Lelania Fowler

Tax Technician III

California Department of Tax and Fees Administration

3321 Power Inn Rd., Ste. 210
Sacramento, CA 95826-3889

Phone: [916-227-6636](tel:916-227-6636) | Fax: [916-227-6641](tel:916-227-6641)

E: Lelania.Fowler@cdtfa.ca.gov | www.cdtfa.ca.gov

Date: Thu, Jan 24, 2019 [REDACTED]

Subject: California Department of Tax and Fee Administration [REDACTED]

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To: [REDACTED]

Hello

This is a follow up email regarding delinquent returns for [REDACTED]. You have delinquent periods from Q1 through Q17. Please file returns as soon as possible and let me know once they are completed.

Here is a link to log into your account:

<https://onlineservices.cdtfa.ca.gov/#1>

Let me know if you have any questions.

Thank you

Saman Khan

Tax Compliance Specialist, Out-of-State Office

California Department of Tax and Fee Administration

3321 Power Inn Rd., Ste. 130, Sacramento, CA 95826

Phone: 916-227-6653 Fax: 916-227-6641

<https://www.cdtfa.ca.gov/taxes-and-fees/survey-hawd.aspx>

Thank You for Connecting with Us:

[ICONS]

www.cdtfa.ca.gov

[SEAL] **California Department of
Tax and Fee Administration**

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dissemination, distribution, disclosure, publication or copying of the contents of the attached message by individuals other than the sender or recipient of the said communication is strictly prohibited. If you have received this e-mail message in error, please immediately notify the sender (the California Department of Tax and Fee Administration) by e-mail or at the sender's telephone number, then immediately delete this e-mail. Persons who copy or disclose such confidential information are subject to applicable legal penalties.

Any written advice is intended to provide general information regarding the application of the tax and will not serve as a basis for relief of liability under Revenue and Taxation Code section 6596.

*Candice Fields
Candice Fields Law
520 Capitol Mall, Suite 750
Sacramento, California 95814
SBN 172174
916-414-8050
cfields@candicefieldslaw.com
Counsel for the Online Merchants Guild*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION
OF BRIAN
FREIFELDER**

1. My name is Brian Freifelder. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony I make this declaration on the basis of personal knowledge.
2. I am a member of the Online Merchants Guild.
3. I live and work in the Philadelphia area. I run a small eCommerce business supplying goods for Amazon's FBA program. I mostly supply items like clothing, shoes, and DVDs. My story was featured in *The Philadelphia Inquirer*.¹ The *Inquirer* article accurately describes my experience to that point.

¹ Harold Brubaker, "California Hits Philly-Area Amazon Seller with \$1.6 Million Sales Tax Bill," *The Philadelphia Inquirer* (November 5, 2019), <https://www.inquirer.com/business/california-sales-tax-amazon-seller-philadelphia-business-20191105.html>.

4. In 2019, California's Department of Tax & Fee Administration sent me a sales tax bill for \$1,652,395.68 million for just six months of sales.² According to CDTFA, that was because I participate in Amazon's FBA program, Amazon chooses to store items I supply in warehouses in California, and Amazon failed to collect sales tax on the sale of those items.³ CDTFA also demanded that I register with the agency and "report all retroactive sales taxes."⁴
5. I cannot imagine where CDTFA got the \$1.6+ million figure. I told the *Inquirer* the figure was "absurd" because it was. To generate that much in sales tax, I would have needed \$15-20 million in sales in six months just in California. If only I did that kind of business.
6. After I spoke with CDTFA, they apologized but did not explain the source of the error and changed the assessment to about \$25,000 for just one quarter.
7. As an Amazon FBA supplier, I do not and cannot tell Amazon where to store items. Amazon decides where to store the inventory. Amazon also chooses the FBA facility from which to fulfill sales. Suffice it to say, given Amazon's control over FBA, I do not deliberately store items in California for sale in California and have no say in the process.

² A copy of the "Statement of Proposed Liability" CDTFA sent me is attached.

³ *See id.* ("Philadelphia Media Exchange Corporation (PMEC) established physical nexus in California when inventory was stored in California-based fulfillment centers.").

⁴ *Id.*

8. Many of the items I supply to Amazon's store are fungible commodities like DVDs. For those items, Amazon engages in "commingling," meaning they treat items supplied by different third-party merchants as fungible. Then, when a consumer buys such an item, Amazon fulfills the order from the nearest warehouse, rather than from the inventory I supplied. In those instances, the items I supplied were not even physically stored in Amazon's warehouses in California. Instead, similar items supplied by other people were stored in California. Since it saved Amazon money to ship items from a nearby location, Amazon used those other peoples' items to fulfill orders Amazon then credited to my account. However, CDTFA still thinks I am liable for sales tax on those sales, even though my items were never even in California.
9. CDTFA's demands have led me to cut back on my business. Because of the uncertainty, I am limiting what I sell and how many people I employ, because I am worried about a surprise tax bill years down the road. I am aware that other state tax collectors are pursuing merchants like me, so I am deferring investment in my business to mitigate and prepare for future tax demands.
10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/ Brian Freifelder

Brian Freifelder

STATE OF CALIFORNIA [SEAL]
CALIFORNIA DEPARTMENT OF GAVIN NEWSOM
TAX AND FEE ADMINISTRATION Governor
OUT-OF-STATE OFFICE, NICOLAS MADUROS
SACRAMENTO, CA Director
3321 POWER INN ROAD,
SUITE 130
SACRAMENTO, CA 95826-3893
1-916-227-6600 • FAX 1-916-227-6653
www.cdtfa.ca.gov

PHILADELPHIA MEDIA Date: October 22, 2019
EXCHANGE Case ID: 815-335
3430 PROGRESS DR # G
BENSALEM PA 19020-5812

STATEMENT OF PROPOSED LIABILITY

YEAR	TAX	INTEREST*	PENALTY	TOTAL
1Q19	\$725,000	\$35,645.84	\$72,500	\$ 833,145.76
2Q19	\$725,000	\$21,750.00	\$72,500	\$ 819,249.92
TOTAL AMOUNT DUE			\$1,652,395.68	

**Additional interest will accrue on the amount of tax due each month, or fraction thereof, beginning on 12/01/2019.*

The California Department of Tax and Fee Administration (CDTFA) previously sent you a Notice of Delinquency dated Aug 27, 2019 and has informed you that Pursuant to Revenue and Taxation Code (RTC) section 6203, Philadelphia Media Exchange Corporation (PMEC) established physical nexus in California when inventory was stored in California-based fulfillment

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centers. PMEC is engaged in business in California and is required to register and report all retroactive sales taxes based on the date that physical nexus was first established. This registration requirement and responsibility to collect and remit sales taxes will continue until October 1, 2019, at which point all sales conducted through a marketplace facilitator will be required to be collected by the facilitator per the passage of Assembly Bill No. (AB) 147 (Stats. 2019, ch. 5)

To file a return and make a payment online, please visit the CDTFA Online Services page at <https://online.services.cdtfa.ca.gov>. Click the *Respond to a Letter/Inquiry* link under *Limited Access Functions* and use the Letter ID and date listed at the top of this letter to proceed.

If a return or payment is not received within 15 days from the date of this letter, a Notice of Determination (billing) may be issued to you, as authorized by Section 6481 of the Sales and Use Tax Law.

If you have any questions relating to this letter, you may contact me at the phone number listed above. Your cooperation is appreciated in resolving this matter.

Sincerely,

Saman Khan
Business Taxes Compliance Specialist
Out of State District Office

*Candice Fields
Candice Fields Law
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Sacramento, California 95814
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cfields@candicefieldslaw.com
Counsel for the Online Merchants Guild*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION
OF DENISE
RASBID**

1. My name is Denise Rasbid. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony. I make this declaration on the basis of personal knowledge. I have previously offered similar testimony to the U.S. Congress, which is attached hereto and incorporated herein.¹

¹ Cover Letter and Written Testimony of Denise Rasbid, submitted to the U.S. House Committee on Small Business,

2. I am a member of the Online Merchants Guild. I founded, own, and operate CQC Boutique, LLC, an eCommerce business based in Hawthorn Woods, Illinois.² I am what is known as a third-party merchant on Amazon, meaning that I supply goods that Amazon sells in its store through the Fulfilled by Amazon or FBA program.
3. I started my eCommerce business in 2008. I had an earlier career in healthcare sales, which became impractical after I had twins. Then I was diagnosed with two auto-immune diseases from which I continue to suffer. The complications associated with those diseases—joint and muscle pain, vision problems, numbness and pain in my hands and feet, insomnia, and other ailments—make it difficult for me to work outside the home. Working in eCommerce allows me to support and be present for my family while managing my health.
4. During the last decade or so, I was fortunate to grow an eCommerce business focused on clothing. My business approached \$1 million a year in revenue, and I was able to provide jobs for several employees, but at best I earned \$60,000 in income. In 2019, I paid myself just under \$11,000 for a job that took 40-60 hours per week—less than \$5.50 an hour. Still, I was proud to be self-sufficient after investing blood, sweat, and *a lot* of tears.

Subcommittee on Economic Growth, Tax, and Capital Access, re Hearing on *South Dakota v. Wayfair, Inc.*: How Main Street is Faring and Whether Federal Intervention is Necessary (March 3, 2020), attached hereto.

² I am in the process of relocating to another state (not California).

5. Today, my business is on the verge of bankruptcy, and I have had to file for unemployment. One reason is CDTFA's demand that I pay the State of California tens of thousands of dollars because Amazon unilaterally chose to store some items in Amazon's proprietary warehouses in California.
6. My business is headquartered, incorporated, and registered to do business in Illinois, and I have paid Illinois sales tax since registering in 2008. Like many Amazon merchants I know, I did not know that I was allegedly supposed to collect California sales tax years ago simply because Amazon chose to store goods in California.
7. In July 2019, I received an email from CDTFA demanding that I register with the agency, pay back taxes dating to 2016, and collect California sales tax going forward. CDTFA also told me that I would owe penalties and an undetermined amount of interest. According to CDTFA, I am supposed to do so because I participate in Amazon's FBA program and CDTFA thinks Amazon stored some of my items in California.
8. I did not direct Amazon to store my items in California. As a participant in Amazon's FBA program, Amazon directs me where to ship goods to be offered in Amazon's store, typically to Amazon warehouses near my home northwest of Chicago. I have no control over where Amazon tells me to ship goods to Amazon. I also have no control over where Amazon subsequently chooses to transport and store my items, and I cannot direct Amazon to remove them from any particular warehouse or state. I also cannot realistically "undo" or "cancel"

Amazon's decision to ship goods to customers in California from warehouses in California. It is not possible for me to "watch" Amazon sales in real-time, determine the Amazon location the order might later be shipped from, and then "cancel" the order. Further, if merchants cancel even a small number of orders, Amazon will suspend the merchant's account and effectively turn off their whole business. I also do not solicit business in California specifically on Amazon, and it is not possible to conduct Amazon sales on a state-by-state basis. Selling on Amazon is basically an all-or-nothing enterprise—either I participate in Amazon's marketplace interstate (and internationally), or I don't participate at all.

9. Registering with CDTFA and prospectively collecting sales taxes will impose a serious burden on my business. It is important to bear in mind that not just California, but also other states, have attempted to place that obligation on merchants like me. The compliance costs, for things like accounting, software, legal support, and possible filing fees, would swamp my small business's modest profit margin.
10. I would like to diversify my business away from Amazon, but it is difficult to do so because of CDTFA's regulatory approach. I understand CDTFA's position to be that the existence of any merchandise in an Amazon FBA warehouse in California means the merchant is not at all eligible for the state's tax collection threshold, which is supposed to protect small businesses like mine from onerous compliance costs. In other words, a single item in an Amazon California warehouse

will mean that I cannot take advantage of the \$500,000 threshold available to other small businesses who do not participate in FBA. Although I do not agree that CDTFA's position is lawful, the enforcement threat makes it harder to justify diversifying away from Amazon's platform, since I may be stuck with the compliance burden in any event.

11. In addition to threatening my business, CDTFA's demands have caused me mental anguish. I am aware that CDTFA has been pursuing other merchants and threatening them with jail time. Every day I hold my breath while I check the mail, fearful that CDTFA will send me more threatening messages or seize my bank account.
12. I cannot reasonably afford to challenge CDTFA's unlawful demands on my own in California state court. I do not have the free cash available to surrender to the state while awaiting the resolution of an administrative process and state court lawsuit, much less the legal fees for such matters. I am already no longer putting money into my children's college saving accounts, and I am carrying tens of thousands of dollars in business credit card debt. It would be less costly and less risky for me to simply give up on my business and dream of self-sufficiency through eCommerce. Also, as a citizen of another state who did not seek out the protection of California's laws with respect to items Amazon chose to store in California, I do not believe I should have to "travel" to California, physically or otherwise, to challenge whether the state even has authority to tax me in the first place.

13. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/Denise Rasbid

Denise Rasbid

My name is Denise Rasbid, and I am an eCommerce seller based out of Hawthorn Woods Illinois.

Over the last few years, recent actions by state tax authorities have taken me from being a once thriving, self-reliant eCommerce entrepreneur, to the verge of filing bankruptcy. Just two short years ago I was selling just under a million dollars per year online with my Illinois based business CQC Boutique, LLC. The reality in 2020 is that I am now living on the edge of bankruptcy, and my accountant is urging me to file for unemployment. And to be clear, all of this started to happen before the Wayfair decision in 2018. And since Wayfair, it's only gotten worse.

It all started in 2017, when together, 24 states developed a program called tax amnesty, where they each agreed to forgive back sales taxes (which I had never collected because I was unaware of such an obligation, and ultimately turns out there never was one). I am what Amazon calls a third-party seller. I have never collected sales tax outside of my home state of Illinois. I have, however, always been compliant with my sales tax in Illinois. You see, I am a rule follower (I have been known to make some of my family members crazy because of this). You give me the rule, and I will follow it

to the best of my ability. What I didn't realize when I became an Amazon seller, is that according to Amazon and some states outside Illinois, I, in fact would owe sales tax in numerous states. A representative from this "shamnesty" program, currently administered by the Multistate Tax Commission, even spoke at one of the leading Amazon seller conferences. While addressing an audience of thousands of sellers, most of whom rely on advice from their local accountants, this spokesperson from the Multistate Tax Commission proceeded to tell them they are guilty of tax evasion.

I am in shock, how can thousands of business owners be so wrong, especially when they rely on the advice of their local CPA firms? While 24 states offering to forgive back taxes sounds like a nice carrot, the reality is that in order to qualify for the amnesty, small businesses must register in these states, and agree to file tax returns, not just sales tax, but income tax as well.

The cost of filing all these tax returns monthly, in addition to filing annual income tax returns, is going to far exceed the income I am earning. Even selling roughly a million dollars a year, at my best I only earned \$60,000 in actual income. I am quite proud of this salary, because I earned it through the small business I created from scratch in 2010. I did not have a cookie-cutter template or owner's manual. I created my company with gold old blood, sweat and *a lot* of tears. I was finally self-reliant! Now here we are in 2020. I was practically ashamed when I sat in my accountant's office and admitted out loud that in 2019 I paid myself just under \$11,000 for 40-60 hours per week.

I am not far from an expert on state government, but from what I've learned over the years, I can tell there is one other problem with this amnesty offer; because I know there are fifty states, and this amnesty is for only 24 of them, most of which are insignificant, compared to states like California. So, even if I do participate in this amnesty, I know that as far as other states are concerned, I still owe hundreds of thousands in back taxes, interest and penalties. I simply cannot afford to pay this without filing bankruptcy first.

It wasn't until 2018 that I considered throwing in the towel. That's when Amazon sent an email to thousands of sellers throughout the US (not overseas), telling us they, as required by the state of California, had disclosed our seller information to California's tax division, the CDTFA, and we should expect to hear from them soon. And sure enough, we did. I received a letter from the State of California claiming I needed to register to collect sales tax, and that I owe years of back taxes. That's when I knew I had to throw in the towel. I cannot afford to collect the taxes going forward, and I cannot afford to file all the tax returns, as the states refuse to come up with a workable solution that is appropriate for the new breed of small, but global, businesses selling in eCommerce, like me.

So, what did the accountants get wrong? According to the states, because Amazon places my inventory in warehouses within their borders, this now constitutes physical presence nexus. The problem is, Amazon transfers inventory from one state to another without informing me or any other seller. According to the

states and Amazon, I should have known about this practice, and therefore should have collected tax, while selling through their “store”. This is because in order to be successful on Amazon and gain access to what is known as the “buy-box”, products have to be offered as “Prime.” In order to do that, Amazon offers to store inventory for us, pack and ship it, handle returns, customer communication, etc. just like a consignment store does. However, in the real world, consignment stores pay tax. Afterall, it’s their store.

In Amazon’s world, one where not paying tax is seen as a huge competitive advantage over local retailers, Amazon is able to use their influence to get states to look the other way, and let them perpetuate their tax evasion scheme of portraying themselves as a marketplace, when all the while it really is their store, and their tax responsibility. Only one state has even tried to hold Amazon’s feet to the fire for lying about being a mall, when they are actually the store, and that is South Carolina. Amazon recently lost that case, which they are now appealing.

Meanwhile, in California, a private citizen filed suit against Amazon. He believes the state is derelict in allowing Amazon to avoid its obvious sales tax obligation over the past six years on its so-called marketplace, which by the way. they admittedly told the House Antitrust Committee recently, it is their store, not mine. The California Attorney General has rushed to Amazon’s defense, arguing the state had discretion in choosing to go after me, a small out-of-state business owner, instead of Amazon, who is responsible for over

20,000 jobs in California, and despite the fact that Amazon acted as the store. Coincidence?

I would later learn through my attorney, a former tax lawyer for companies like Microsoft, Walmart and GE, and who is also a constitutional tax law professor in New York, that the state's tax imposition violates my constitutional rights, as well as state law. For one, California's state law has a very clear rule about companies like Amazon, and the rule says Amazon should collect tax, but they refuse to follow it, because it's better for them to bully me, than to hold Amazon accountable. Also, the fact that I do not control my Amazon inventory, and did not even know that it is being placed in Amazon's California warehouses (and many others), means that I didn't have a requisite due process "nexus" with the state, as the states claimed.

Even if I did collect the sales tax in California, the state's departure from holding a retailer like Amazon accountable for the tax is so out-of-the-ordinary, that at the very least they should have been required to warn me of their position, which they didn't do. Apparently, California's tax authorities had wanted to warn sellers earlier on, but Amazon didn't want them to, because Amazon didn't want sellers to collect tax in California because they would lose their competitive advantage. So, the state waited six years to tell me.

It wasn't just my attorney who thought California was behaving badly. California's State Treasurer and Former Head of Sales Tax, Fiona Ma, also found it constitutionally offensive that her state was going after

these small businesses. She wrote a six-page letter to Governor Newsom asking him to order the CDTFA to stop, but he didn't listen. She even submitted that letter, along with her testimony, to Congress, who recently held a hearing on internet tax laws.

Now things have reversed. Forty of the forty-five sales tax states have now passed laws making it clear, not that it wasn't before, that Amazon must be the tax collector. Amazon now uses marketplace facilitator laws, now in effect in forty states like Illinois, to their advantage to deter small business owners like me from selling on my own website. They do this so that I, and so many other Amazon sellers, remain reliant on Amazon for my living, and subject to their unfair treatment of sellers. When the tax laws are as complicated as they are today, what choice do we have? With over 30 million eCommerce sites, and as described in recent testimony to a House Subcommittee hearing on Wayfair, costs of \$50,000-\$100,000 a year to file tax returns in all the states, having your own eCommerce site just is not feasible any longer.

Sometimes I feel hopeless, my problem with California is not going away, and more states like Washington, Massachusetts and Wisconsin are starting to ramp up their efforts and follow California's lead. I have decided to throw in the towel. It may not be the best decision, and it certainly is an emotional one. I simply cannot focus on growing a business knowing that at any given moment, states are going to take it away. The environment is too hostile.

I submitted testimony to Congress for the hearing, in the hopes that they will hear our voices. Many other sellers did the same, and three sellers spoke, including one who has a similar story to mine, except it is Washington going after him, not California. There are thousands of people out there facing down a number of these states, some even threatened with felony jail time, as the Treasurer also pointed out in her letter. For every person like me who has spoken up, there are thousands, if not millions of others who are too scared to speak up. I refuse to be that person any longer.

Unfortunately, now that sellers feel they have to rely on platforms including Amazon and eBay, eCommerce giants are lobbying Congress to stay out of it. I understand that Congressman Nadler is the most opposed to any federal sales tax simplification laws, which is odd, considering the number of eCommerce companies based in New York wanting this as well. It doesn't make sense. I want the right to become a self-reliant woman-owned business owner again, and for that to happen I need Congress to help with this problem.

As far as California goes, my attorney is fighting on behalf of me and many other sellers, but the states are making it difficult. They bully us and they threaten us, and even though they know they have no leg to stand on in court, they also know that for small businesses like us, court is too expensive. Only Fortune 500 companies litigate state tax cases in court, especially one as contentious as this. This is why so many sellers submit and pay the extortion money to these states. It's tyranny, and it's an ironic form of tyranny,

considering how our nation was forged in the wake of a tyrannical tax regime implemented by the British Empire, now it's the states who are doing the very same thing.

Small business through eCommerce has created a culture of self-reliance for millions of Americans, and if Congress doesn't act soon, states will destroy us. I respectfully urge you to read my testimony, the testimony of other sellers, and the testimony of the Online Merchants Guild. We our help!

Respectfully Submitted,

/s/ Denise Rasbid

Denise Rasbid

CQC Boutique, LLC
17 Stone Creek Drive
Hawthorn Woods, IL 60047

The Honorable
Andrew N. Kim
Chairman
U.S. House Committee on
Small Business Subcommittee
on Economic Growth,
Tax and Capital Access
2361 Rayburn HOB
Washington DC, 20515

The Honorable
Kevin R. Hern
Ranking Member
U.S. House Committee
on Small Business
Subcommittee on
Economic Growth,
Tax and Capital Access
2361 Rayburn HOB
Washington DC, 20515

Written Testimony of

Denise Rasbid, Owner of CQC Boutique, LLC

Hearing on *South Dakota v. Wayfair, Inc.*: How Mainstreet is Fairing and Whether Federal Intervention is Necessary

March 3, 2020

Chairman Kim, Ranking Member Hern, and Members of the Subcommittee, thank you for holding this hearing on state taxation. I am honored to offer my perspective as a small woman-owned and operated business, and to share my story with you.

Background

My name is Denise Rasbid, the owner and founder of CQC Boutique, LLC, based in Hawthorn Woods, Illinois. Before starting my eCommerce business in 2008, my previous career was in sales, working for a large healthcare company. I retired from corporate life in 1999 after the birth of my twins. In 2002 I was diagnosed with the first of two serious auto-immune diseases which made life more challenging. My second diagnosis came in late 2007. Combined, these two diseases have taken their toll on me every day with side effects ranging from joint and muscle pain, dry eyes and vision problems, numbness and pain in my hands and feet, chronic insomnia, digestive issues, food intolerance and the list goes on. Due to the complications of my diseases it is important to not only work for myself, but also to work from home. It is imperative that I have

a schedule that is flexible so if I am having experiencing symptoms, I can adjust my schedule accordingly. Working in eCommerce allows me to do both while also being available for my family.

I started my eCommerce business in 2008 shortly after moving to Illinois. As a stay-at-home mom to three children, I wanted to provide income for our family while also being home with my children. What started as a business grossing just a few thousand dollars annually, rapidly grew over the years until I was grossing nearly \$1 million in annual sales. In the beginning I was selling on eBay and on my own Shopify website. Most of my growth came after an Amazon sales representative recruited me as a third party seller in November 2013. Shortly after beginning with Amazon I joined the Fulfillment by Amazon (FBA) program. I was soon paying myself approximately \$60,000 per year for a couple of years due to my Amazon success. I also hired my first four employees, all working part time, at five to twenty hours per week. When I started my business in 2008 I applied for an Illinois sales and use tax license. I have paid my Illinois sales tax as required since 2008.

Back Taxes

In July 2019 I received an email from the state of California (CDTFA) asserting that my business was a “qualifying retailer” for sales into their state between April 1, 2016 and March 31, 2019 because I used the Amazon FBA program to fulfill orders into their state. With the FBA program, I send inventory into Amazon’s

fulfillment centers, and when a customer purchases one of my products, Amazon fulfills the order on my behalf. Most often Amazon has me send inventory into warehouses nearby. From there, Amazon, at their sole discretion, redistributes the inventory to THEIR warehouses across the country, something most sellers, including myself were never aware of until recently. In the email California urged me to register with the CDTFA by September 25, 2019, file completed tax returns dating back to 2016, and either pay the tax due or apply for a payment plan. California not only asserted that because I had inventory in their state that I not only had physical nexus, but I was also a qualifying retailer. I know now that shipping goods to my home state and having it placed in another state by Amazon, at their direction, doesn't amount to nexus, despite what the states have claimed. The Supreme Court has never found that to be the case in the past, and if I could afford to bring my own case, I know they would see this for what it is, just a shakedown.

I'm the out-of-state small business owner, they are the big scary Government, what chance do I have to successfully challenge them? I also know that while Amazon claimed it was not a retailer (i.e. the store), it actually is one, and they should have been collecting the tax. Not me, and the millions of other sellers who are merely their suppliers. After all, when you compare how a retailer operates in a mall, and how Amazon operates, it becomes pretty obvious Amazon is and always has been the retailer, and should have been collecting the whole time. The store belongs to Amazon,

not me. I don't have a retail customer. Amazon forbids contacting customers in order to market products to their customers, something that malls don't do with their tenants, Amazon also controls my inventory and fulfillment, they control the return process – setting the policy and making a determination of when their customers can get their money back outside of it (almost always), and Amazon even keeps my sales proceeds and disburse them only every 14 days, and more. What mall has the final say in who can return your product? Does the Mall of America tell Apple that it must refund its customers money because the customer is unhappy with their two-year-old iPhone, certainly not, but Amazon does these types of things to sellers all the time. After all, it's Amazon's store and their customer, so Amazon calls the shots, just like Costco does in their stores. But unlike Costco that collects tax in their store, why didn't the states make Amazon collect the tax in theirs, they had nexus, that wasn't the issue? Why did states go out of their way to give Amazon a pass, just so they could squeeze whatever they can out of me? This doesn't seem fair, it doesn't seem constitutional, it doesn't seem legal. It's not, but what can I do about it, go to court in California, or however many other states decide to follow suit?

Realizing I was helpless, I became overwhelmed with fear at the receipt of this email, panic ensued. I had no idea how to start determining what I could possibly owe, or how I would pay for it. When I started making very time consuming calculations, it appeared that I could owe more than I could afford to pay the state, and

that was just one state. I also understood I would be told I owe penalties and interest in an undetermined amount. I knew that if I did register, California would then require me to start paying money that I simply did not have. My husband and I weighed all of our options from immediately complying and starting a savings plan, in preparation for when California eventually sends us a “bill” for what they believe we owe, as they have done to so many other sellers. Every day I hold my breath as I look at the mail, knowing that other Amazon sellers are reporting receiving letters from California and other states threatening them to comply with new tax laws. Other sellers I have spoken with have shown me letters and emails with threats of jail time. Sellers have had their bank accounts frozen and levied, and more. And not just by California. California was just the first one to contact me. I expect there will be more states on the way. California always leads the way when it comes to taxes.

Post Wayfair Decision

Unfortunately, my financial success was short lived due to the turmoil caused by the decision in *South Dakota v. Wayfair*, and the fear of back taxes constantly looming over me. As my stress from the new burden imposed by the decision turned into fear of the unknown, I found myself diverting sales away from my independent website and trying to minimize my Amazon sales to reduce my potential risk and exposure. My nearly million dollars in sales has been cut in half in one short year. I paid myself just under \$11,000 in

2019 while working 40-60 hours per week. That's just \$4.31 per hour for 40-60 hours of work per week! Compare this to paying my one part time employee (working an average of 10-15 hours per week at \$16/hour) just under \$10,000 in 2019. Today I am no longer the self-reliant businesswoman I once was thanks to the overindulgent enforcement mentality of these states. I am no longer putting money into the college savings accounts for my three children and I am carrying debt on business credit cards of nearly \$30,000. The stress is almost unbearable at times. Instead of trying to grow my business I have felt pressure to stifle it to protect family and what little I have left to show for the fact that I was once a thriving eCommerce business owner.

But I am resilient, and I'm ready to bounce back and build my next eCommerce business, but not until Congress requires the states to make tax compliance easy. Why was it ever decided that the burden of sales tax compliance should be placed on us, when in the 25 years between Quill and Wayfair, the states have done nothing to effectively streamline the process of sales tax. Why doesn't Congress put the burden on them for a change. Congress doesn't need to rewrite the sales tax code, they just need to mandate that the states come up with a 21st century solution to a 21st century problem, instead of forcing us as small businesses to adapt to their medieval one. Thresholds are like plugging the hole of a leaky boat with your finger until you can implement a permanent fix, and they aren't even very effective. Because Amazon's FBA is so crucial to

so many eCommerce companies, most states say that the mere use of FBA in one part of your business, negates the economic nexus threshold altogether. For example, I could sell \$5,000 of goods to California, \$4,900 via Amazon, and \$100 via my website. Now even though Amazon will collect sales tax (as of October 2019 – but should have since 2012), the state of California will say that I'm not entitled to their \$500,000 threshold because I used FBA, meaning I should be registered and collecting \$7.25 of tax on the website sales. It's pointless in today's modern eCommerce environment to have a threshold if the states are just going to ignore because you use the one dominant marketplace platform and their mandatory service called FBA, which is the only way to get the benefit of your product being featured as Prime. But the states don't get that, or they do, but they don't care.

How Do We Fix This?

I believe the only way to fix this is by asking Congress to intervene. Congress can and should stop individual states from bullying and threatening small businesses. In today's world, a law from 1948 called the Tax Injunction Act prevents me from asserting my core constitutional rights in my home state of Illinois. So anytime a state wants to bully me, I am required to go through years of litigation, hiring attorneys that are typically reserved for Fortune 500 companies, no matter how baseless. All a state has to do is send me a piece of paper, and if I don't fight them, they can get a judgement.

This law prevents me from seeking sanctuary in my home state, and it needs to be fixed.

I know that small businesses want to be in 100% compliance, but most do not know how to do that affordably and without complicated and time-consuming processes. I feel that a national tax clearing house for small businesses owning their own website is the solution in addition to requiring marketplace facilitator laws for online marketplaces such as Amazon, Ebay, Poshmark etc. in every state that requires the collection of sales tax.

However, I know that a streamlined solution to sales tax will take time for Congress to figure out. But what won't take time is for Congress to pass an emergency tax sanctuary law for small business owners who are facing tax assessments from foreign states. Give us the protection to assert our core constitutional rights and let us defend ourselves from states who trample all over them. Allow me the right to seek protection from a federal court in my home state when a foreign state rely on bullying, not sound administration, in order to fill their coffers. Amend the tax injunction act and allow small businesses the right to sanctuary and due process in their home state federal courts.

Conclusion

I am respectfully asking you to sponsor and support an emergency small business tax sanctuary bill, that allows small sellers to seek the right of sanctuary in their home federal court. This cannot wait. This must

be done now and with urgency! While a more simplified system for the collection and remittance of sales tax for small businesses is of the utmost priority, we know it won't happen overnight. But we can't let states crush the small business movement in the meantime. So many women-owned business owners and people with disabilities, like me, have found a path to self-reliance in eCommerce, it would be a tragedy if states were free to crush our opportunities because Congress was asleep at their post. Until a technologically sound solution to the sales tax issue can be implemented, small businesses needs to be given an immediate life-raft to navigate these choppy, shark-infested waters of interstate commerce, or else we will drown.

Thank you for your time.

Sincerely,

/s/ Denise Rasbid

Denise Rasbid
Owner
CQC Boutique, LLC

*Candice Fields
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SBN 172174
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cfields@candicefieldslaw.com*

Counsel for the Online Merchants Guild

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION
OF MINDY
WRIGHT**

1. My name is Mindy Wright. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony. I make this declaration on the basis of personal knowledge.
2. I am a member of the Online Merchants Guild.
3. My husband and I run a small eCommerce business out of our home in Washington. We mainly sell kitchen wares like coffee mugs, plates, and

bowls. Our business is small, but allows us to provide for our family. Like many in eCommerce, we depend on Amazon's FBA program. Recently, we have been winding down our kitchen ware business and focusing on a supplies for teaching children. Although we would like to expand that business—including by focusing on sales channels outside of Amazon—our efforts have been hampered because of CDTFA's position that merely using Amazon's FBA program can justify California's taxation of an entire business unrelated to FBA. For example, CDTFA takes the position that California could tax sales from our own website because unrelated Amazon sales were fulfilled from Amazon's California warehouse. CDTFA's position means that we could not take advantage of the tax thresholds designed to aid small eCommerce businesses, which would be available but for Amazon's FBA warehouses in California. Without that tax treatment, it is difficult for us to compete and meet the compliance burdens of the state's tax regime. CDTFA's position basically increases the cost of diversifying away from Amazon. And even now that Amazon is collecting sales tax, CDTFA still expect us to incur additional registration and compliance costs.

4. Treasurer Ma used our story as an example in her letter to the Governor of California. As Treasurer Ma explained, CDTFA insisted that we register with the agency because Amazon stored some products we supplied to Amazon's FBA program in Amazon's California warehouse space. What we didn't realize would happen is that CDTFA then told us they wanted sales tax for the last eight

years. We are now facing tens of thousands of dollars in back taxes, interest, and penalties.

5. We did not ask Amazon to store any of our items in California. In fact, we can't tell Amazon what to do. As a supplier of Amazon's FBA program, we have no control over where Amazon chooses to warehouse products or ship sales. Amazon chose not to collect sales tax on sales in its store, but now CDTFA wants us to pay for Amazon's actions.
6. This situation has left us distraught and frightened, and we still do not know what to do. We cannot afford to pay the money CDTFA is seeking, and we also cannot pay to challenge CDTFA because that would require paying the money first and hoping to get it back in several years after spending thousands we don't have on legal fees. We may have to shut our business and seek other work, but given the economy that is a scary thought, too. This whole system seems rigged to benefit Amazon and CDTFA at the expense of people like me.
7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/ Mindy Wright

Mindy Wright

App. 202

*Candice Fields
Candice Fields Law
520 Capitol Mall, Suite 750
Sacramento, California 95814
SBN 172174
916-414-8050
cfields@candicefieldslaw.com
Counsel for the Online Merchants Guild*

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION
OF ARNOLD
NORMAN**

1. My name is Arnold Norman. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony I make this declaration on the basis of personal knowledge.
2. I am a member of the Online Merchants Guild. Along with my wife, Chani Karen Norman, I founded and operate GeriGuard Solutions LLC.

We focus on products that assist people with Alzheimer's, dementia, and memory loss. Our products include special clocks and attention management devices. Our business grew out of personal loss: watching my father, a highly-decorated WWII veteran, suffer from Alzheimer's for years before passing away. Watching my 95-year-old mother suffer from dementia. And watching Karen's mother die after a rapidly-deteriorating two-year affliction with Alzheimer's.

3. Our business also arose from personal setbacks during the Great Recession. After thirty years with the same company, I was laid off in my mid-50s. My wife, also then in her mid-50s, was laid off after nearly three decades with the same company. Given our age and the state of the economy, we were unable to find comparable work and were at risk of falling out of the middle class. We entered eCommerce, which has kept us afloat and allowed us to serve a market we feel deeply connected to.
4. We supply inventory to Amazon for Amazon's FBA sales. We have no control over where Amazon chooses to store and ship inventory. Amazon forbids us from contacting FBA customers and often we do not even have contact information for customers. Simply put, in Amazon's FBA system, I have no say over whether Amazon stores products in California or sells them to California residents.

5. Since we are New York residents with our inventory in New York, we set up to collect New York taxes and file quarterly sales taxes with New York.
6. In December 2018, I was shocked to receive a letter from the California Department of Tax & Fee Administration telling me that we needed to register with the agency because Amazon stored some of our products in FBA warehouses in California. I was unsure that CDTFA's position was accurate, but due to the letter's tone, I was afraid not to comply, so I registered with CDTFA. Then CDTFA informed me that I owe taxes for all sales to California back a number of years.
7. I was forced to retain legal counsel and a separate accounting firm to reconstruct years of Amazon sales. Professional fees and specialized software have already cost over \$3,000, and we will continue incurring compliance costs that are significant for our small business.
8. Fearful of CDTFA's threats, I paid over \$4,000 for 2019 sales taxes. Most of that was out of pocket, since Amazon did not collect taxes on those sales and thus we did not have the money. Then CDTFA "determined" that we owe more than \$20,000 in additional amounts for April 2016-December 2018, plus interest that continues to accrue. Again, we don't have those funds because Amazon didn't collect taxes on those sales. CDTFA's auditors are actually working out of New York. We did not seek out business in California via Amazon's FBA

program, but CDTFA is coming to our home state to target us. Since CDTFA thinks there is nexus via FBA, the agency may also try to tax sales outside of FBA as well.

9. All told, CDTFA's demands will cost us more than \$30,000—money that we don't have. If this situation continues, CDTFA may very well put us out of business.
10. At the same time, we cannot afford to challenge CDTFA in California state court. We would have to pay the amounts CDTFA demands, and then hire counsel to sue for us in California. At best, we would recover the money that we paid in—less our attorney's fees. That process will take years and dollars we do not have. Rather than actually vindicating our rights, it would make more sense for us to just "give in." As upsetting as that is, we just cannot afford to fight CDTFA.
11. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/ Arnold Norman

Arnold Norman

App. 206

[SEAL] WISCONSIN DEPARTMENT OF REVENUE
PO BOX 8901
MADISON, WISCONSIN 53708-8901

Contact Information:

2135 RIMROCK ROAD PO BOX 8901
MADISON, WISCONSIN 53708-8901
ph: 608-264-4215 fax: 608-224-5790
email: DORCompliance@wisconsin.gov
website: revenue.wi.gov

Letter ID L0678162320
[BARCODE]

Amount Due \$52,363.60

Notice of Intent to Offset Debt

This is to notify you that the Wisconsin Department of Revenue (DOR) is asking the federal government's Treasury Offset Program (TOP) to help collect your tax debt. By law, the U.S. Department of the Treasury will keep any of your eligible payments or reduce your refunds to pay this debt.

Notice Information

Notice date January 06, 2020 Wisconsin Tax
Number [REDACTED]

Important Information

- **Why did I get this notice?** Our records show you owe delinquent taxes. The Treasury Offset Program will send your eligible funds to pay your Wisconsin tax debt.
- **If I have a payment plan with DOR will my federal payment or refund still be taken?** Yes. The terms of payment plan include collecting your state and federal payments and refunds.
- **Will you take my Social Security payment?** No, Social Security is a protected fund.
- **How can I stop TOP from taking my federal payment or refund?** Pay the full amount due shown above.

Included in this notice

- **How do I pay?** You can pay online, by check or by credit card. See page 2.
- **Common questions.** See page 2.

Batch Index: 1948658176-398

Batch Index: 1948658176-398

WINPAS - btL160 (R.06/16) Tear along line. Return bottom portion with your payment.

Notice of Intent to Offset Debt Payment Voucher

<u>Tax period end date</u>	<u>March 31, 2013</u>
<u>Wisconsin tax number</u>	<u>██████████</u>
<u>Tax Type</u>	<u>Sales & Use Tax</u>

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Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

Make check payable to: Wisconsin
Department of Revenue
Send payment to: PO Box 930208,
Milwaukee, WI 53293-0208

Amount Due	\$52,363.60
-------------------	--------------------

Amount Paid: \$_____

Common Questions

What if I filed for bankruptcy?

- If you filed for bankruptcy and an automatic bankruptcy stay is in effect, we will not take your payment or refund.

- Send written proof that you filed for bankruptcy to:

Wisconsin Department of Revenue
PO Box 8901
Madison, WI 53708-8901

What if I already paid this debt?

- Send a copy of your cashed check to the address on the front of this notice.

Why can you take my refunds and payments?

- State law authorizes DOR to enter into debt collections agreements.
- We have a debt collection agreement with the federal government.

How to pay

Pay online

- For businesses, use *My Tax Account*
 - »Go to tap.
revenue.wi.gov
 - »Log in to My Tax Account
 - »Select the tax account

Pay by check

- Make check payable to: Wisconsin Department of Revenue
- Write your tax account number in the memo portion of your check (please print clearly)
- Mail the voucher with your payment to:
Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

Pay by credit card

- Pay by telephone: 1-800-272-9829
- Pay online: official payments.com
- Official Payments Corporation manages credit card payments. There is a fee of 2.5% of the payment amount, with a \$1.00 minimum charge.
- Accepted cards: American Express, Discover, MasterCard, Visa

To pay by credit card you will need:

- Wisconsin Jurisdiction Code-5800
- Payment type-Option 3-Collections
- Your WI Tax Account Number (1029694886)

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- Contact phone number
- Payment amount
- Credit card number and expiration date
- Zip code of credit card billing address
- Name, address and zip code (internet only)
- E-mail address (internet only)

Debt summary

DOR refers all amount due to TOP. Below are new periods we will refer.

Tax Account	Tax Type	Period	Amount Eligible for offset
	Sales & Use Tax	March 31, 2013	\$2,613.27
	Sales & Use Tax	June 30, 2013	\$2,564.95
	Sales & Use Tax	September 30, 2013	\$2,516.63
	Sales & Use Tax	December 31, 2013	\$2,468.31
	Sales & Use Tax	March 31, 2014	\$2,421.57

If you pay by check:

- Make check payable to: Wisconsin Department of Revenue.
- Write your tax account number in the memo portion of your check.

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- Mail this voucher with your payment to:

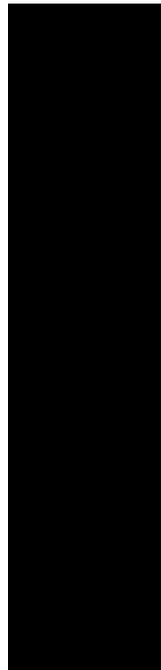
Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

Debt summary

DOR refers all amount due to TOP. Below are new periods we will refer.

Tax Account	Tax Type	Period	Amount Eligible for offset
	Sales & Use Tax	June 30, 2014	\$2,373.25
	Sales & Use Tax	September 30, 2014	\$2,324.94
	Sales & Use Tax	December 31, 2014	\$2,275.57
	Sales & Use Tax	March 31, 2015	\$2,229.88
	Sales & Use Tax	June 30, 2015	\$2,181.57
	Sales & Use Tax	September 30, 2015	\$2,132.21
	Sales & Use Tax	December 31, 2015	\$2,084.41
	Sales & Use Tax	March 31, 2016	\$2,036.61
	Sales & Use Tax	June 30, 2016	\$1,988.81
	Sales & Use Tax	September 30, 2016	\$1,941.03
	Sales & Use Tax	December 31, 2016	\$1,892.72

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	Sales & Use Tax	March 31, 2017	\$1,845.44
	Sales & Use Tax	June 30, 2017	\$1,797.66
	Sales & Use Tax	September 30, 2017	\$1,749.34
	Sales & Use Tax	December 31, 2017	\$1,701.03
	Sales & Use Tax	March 31, 2018	\$1,654.29
	Sales & Use Tax	June 30, 2018	\$1,605.97
	Sales & Use Tax	September 30, 2018	\$1,557.64
	Sales & Use Tax	December 31, 2018	\$1,507.75
	Sales & Use Tax	March 31, 2019	\$1,462.59

[SEAL] WISCONSIN DEPARTMENT OF REVENUE
PO BOX 8901
MADISON, WISCONSIN 53708-8901

Contact Information:

2135 RIMROCK ROAD PO BOX 8901
MADISON, W 53708-8901
ph: 608-2644206 fax: 608-221-6593
email: DORCompliance@wisconsin.gov
website: revenue.wi.gov

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Letter ID L1329438736

[BARCODE]

Amount Due \$50,565.19

Notice of Pending Internet Posting

Notice Information

Notice date November 15, 2019 Wisconsin Tax
Number [REDACTED]

Included in this notice

- **Why did I get this notice?** The Wisconsin Department of Revenue (DOR) is required by law to post information on the internet about individuals and businesses that owe more than \$5,000. Your account meets this requirement.
- **What information do we post?** Your name or business name address, type of tax and the amount you owe.
- **How can I avoid being posted on the Internet?** Pay the full amount due shown above or set up a payment plan. See page 2
- **How do I pay?** You can pay online, by check or by credit card. See page 2.
- **Common questions.** See page 2.

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Batch Index: 2123049472-1062
WINPAS - btL800 (R.04/17) Tear along line. Return
bottom portion with your
payment.

Notice of Pending Internet Posting

Wisconsin tax number [REDACTED]

Payment Media Sales & Use Tax

Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

Make check payable to: Wisconsin
Department of Revenue
Send payment to: PO Box 930208,
Milwaukee, WI 53293-0208

Amount Due	\$50,565.19
-------------------	--------------------

Amount Paid: \$ _____



How to pay

Pay online

- For individuals and fiduciaries not in *My Tax Account*
 - N Go to tap.
revenue.wi.gov/pay
- For businesses:
 - N Go to tap.
revenue.wi.gov
 - N Log into *My Tax Account*
 - N Select the tax account

Pay by check

- Make check payable to: Wisconsin Department of Revenue
- Write your tax account number in the memo portion of your check (please print clearly)
- Mail the voucher with your payment to: Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

Pay by credit card

- Pay by telephone: 1-800-272-9829
- Pay online: official payments.com
- Official Payments Corporation manages credit card payments. There is a fee of 2.5% of the payment amount, with a \$1.00 minimum charge.
- Accepted cards: American Express, Discover, MasterCard, Visa

To pay by credit card you will need:

- Wisconsin Jurisdiction Code-5800
- Payment type-Option 3-Collections
- Your WI Tax Account Number (1029694886)
- Contact phone number
- Payment amount
- Credit card number and expiration date

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- Zip code of credit card billing address
- Name, address and zip code (internet only)
- E-mail address (internet only)

How to request a Payment Plan

- | | |
|--|---|
| <ul style="list-style-type: none">• For businesses:<ul style="list-style-type: none">N Go to tap.revenue.wi.govN Log into <i>My Tax Account</i>N Select “Request Payment Plan” | <ul style="list-style-type: none">• For individuals:<ul style="list-style-type: none">N Go to https://www.revenue.wi.gov/Pages/Individuals/home.aspxN Select “Request a payment plan” |
|--|---|

Common Questions

What if I filed for bankruptcy?

- If you filed for bankruptcy and an automatic bankruptcy stay is in effect, we will not post your information the internet.
- Send written proof that you filed for bankruptcy to:

What if I already paid this debt?

- Send a copy of your cashed check to the address on the front of this notice.

Is there any other way to avoid Internet posting?

- If you are not able to pay the debt in full, either now or by installment payments,

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Wisconsin Department of Revenue
PO Box 8901
Madison, WI 53708-8901

contact the agent listed on page 1 to discuss a Petition for Compromise of Taxes.

WINPAS - btL800 (R.04/17)
Batch Index: 2123049472-1062

- Your name will not be posted on the Internet while your Petition for Compromise is being evaluated.
- We have a debt collection agreement with the federal government.

If you pay by check:

- Make check payable to: Wisconsin Department of Revenue.
- Write your tax account number in the memo portion of your check.
- Mail this voucher with your payment to:

Wisconsin Department of Revenue
PO Box 930208
Milwaukee, WI 53293-0208

*Candice Fields
Candice Fields Law
520 Capitol Mall, Suite 750
Sacramento, California 95814
SBN 172174
916-414-8050
cfields@candicefieldslaw.com*

Counsel for the Online Merchants Guild

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF CALIFORNIA
SACRAMENTO DIVISION**

**ONLINE MERCHANTS
GUILD,**

Plaintiff,

vs.

**NICOLAS MADUROS,
DIRECTOR, CALIFORNIA
DEPARTMENT OF TAX &
FEE ADMINISTRATION,**

Defendant

Case No.: _____

**DECLARATION OF
JENNIFER JENSON**

1. My name is Jennifer Jenson. I am over the age of 18, and am under no legal disability that would prevent me from offering the following testimony I make this declaration on the basis of personal knowledge. I have previously offered similar testimony to the U.S. Congress,

which is attached hereto and incorporated herein.¹

2. I am a member of the Online Merchants Guild.
3. I own and operate a Native American-owned eCommerce business based in Utah. I began by selling books online from my home. Now I am proud to help support our family, including four children.
4. Since 2017, we have been receiving threatening and conflicting communications from CDTFA about supposed sales tax liability for Amazon FBA sales. The specific demands appear to have changed over time.
5. We have experienced similar demands from Washington tax collectors. In 2016, we received a letter from Washington stating that we may have “nexus” in that state. Now, we never sent anything to be stored in Washington. But apparently Amazon directed a single customer to return a single item to an Amazon warehouse in Washington in 2010. According to the tax collectors, that meant we owed sales tax, interest, and penalties on any item shipped to Washington since 2010. The assessment was more than \$185,000. We hired counsel and tried to appeal through the

¹ Written Testimony of Jennifer Jenson submitted to the U.S. House Committee on Small Business, Subcommittee on Economic Growth, Tax, and Capital Access, re Hearing on *South Dakota v. Wayfair, Inc.*; How Main Street is Faring and Whether Federal Intervention is Necessary (March 3, 2020), attached hereto.

administrative process, including offers to settle the tax liability, to no avail. Now we are on a payment plan, making forced payments to Washington every month for taxes we weren't responsible for, plus paying Business and Operating taxes for a state we have no presence in. Our understanding is that it could take 3-4 years just to complete the administrative component with Washington, only after which we could challenge the tax assessment in court.

6. We have also been contacted by the Minnesota Department of Revenue, and we fear that other state tax collectors are not far behind.
7. Our business cannot afford the money CDTFA (and other state tax collectors) are demanding on past sales. Often, the assessed taxes, interest, and fees on an item are more than the profit we received. Not to mention, Amazon is the one who decided where to store and ship the goods; Amazon is the one who collected 100% of the funds from their customer; and Amazon is the one who failed to collect the sales taxes.
8. Facing these burdens in one state is hard enough; facing the burden across multiple states is untenable for a small business. Those concerns have deterred the growth of our business and our participation in the interstate economy. Since 2016, our business was shrinking (even before Covid-19) as we were afraid to borrow, expand, and take risk due in part to the unpredictable and burdensome

nature of these taxing issues. We are probably one tax judgment away from collapsing. It doesn't really make economic sense for us to fight, because we have to risk the cash, plus pay attorney's fees and wait years, just to recover the cash we surrender under duress. In some ways, it would make more sense to just "give in" and start over with a different business.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 29, 2020

s/ Jennifer Jenson

Jennifer Jenson

Jenson Online Inc.
1189 W 1700 N Suite 150
Logan, UT 84321

The Honorable
Andrew N. Kim
Chairman
U.S. House Committee
on Small Business
Subcommittee on
Economic Growth, Tax
and Capital Access
2361 Rayburn HOB
Washington, DC 20515

The Honorable
Kevin R. Hern
Ranking Member
U.S. House Committee
on Small Business
Subcommittee on
Economic Growth, Tax
and Capital Access
2361 Rayburn HOB
Washington, DC 20515

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Written Testimony of
Jennifer Jenson, Owner, of Jenson Online Inc.
Hearing on South Dakota v. Wayfair, Inc.:
How Mainstreet is Fairing and
Whether Federal Intervention is Necessary
March 3, 2020

Chairman Kim, Ranking Member Hem, and Members of the Subcommittee, thank you for holding this hearing on state taxation. I am honored to offer my perspective as a small Utah business owner, and to share my story with you.

Background

My name is Jennifer Jenson and I am the Owner of Jenson Online Inc. based in Logan, Utah. As a woman, minority (Native American) business owner, and mother of 4, eCommere was a way for me to help our family financially. To that end, I started selling used books online from my home in 2003 and founded Jenson Online Inc.

Back Taxes

In 2016 we received a letter from the State of Washington stating that we may have Nexus in their state. I was not even familiar with what Nexus was. After Googling what Nexus was I was confident that we did not have Nexus as we had no physical presence in Washington. We filled out the questionnaire to be compliant and were immediately told that we did indeed

have Nexus because Amazon had a customer return an item to a warehouse in WA in 2010. Just to make this clear – we never sent anything to WA to be stored. Amazon had a customer return something there and according to the Washington Department of Revenue (WADOR) that triggered Nexus and we owed sales tax, interest, and penalties on every item shipped there from any location since. In 2010 we had less than 10 employees - hardly a large corporation with a multi-state tax department. The assessment came in at over \$185,000. We hired attorneys, appealed through the entire WADOR legal department, and offered a settlement - nothing changed. They put a lien on our Utah business, assessed the full amount, and we are currently making forced payments to WADOR each month for taxes that we were not responsible for in the first place not to mention Business and Operating taxes for a state we have no presence in. This simply is not feasible for a small business owner to register and remit on all 50 states.

We have been receiving threatening letters from California on this matter since 2017 and have been frightened to respond because of what happened to us with Washington. The latest email from California says that we are required to pay sales tax from April 1, 2016 forward but the 2017 letters said no such thing - they wanted back taxes for the last several years. The rules keep changing as this has been a gray area since day one and it needs the help of Congress to make a final ruling as currently a California sales tax judgment would certainly put us out of business. On top of that,

we have also been contacted by Minnesota Department of Revenue. When will it end and how much can a small business endure? If other states see these states successfully collecting from out of state sellers what stops them from using the same tactic until every business is belly up? Every year up until 2016 our business was growing and thriving. Since 2016 we have shrunk and become stagnant as we are afraid to borrow money, expand, and take risks - this tax issue has a wide financial impact on all sellers in all states who used the FBA program. I am sure that number is in the tens of thousands having a widespread financial impact on the country.

It would make more sense for us to let WA have our few assets and restart than pay their back tax judgment but we endure because we believe there will be justice. This being said, we are just one more state sales tax judgment away from collapsing as we simply cannot endure any more tax burdens based on our model. Amazon collects 100% of the money, and remits only 25% to us on average, making it unfeasible for us to ever be able to remit 100% of back taxes, interest, and penalties for multiple states. In many cases, the assessed taxes, interest, and fees on an item outweighed the profit we received. In the Fulfillment by Amazon (FBA) model, Amazon decides where products are stored, Amazon collects the entire amount from THEIR customer and only remits a portion to us, and Amazon handles all shipping and returns.

How were we to know that we were responsible for collecting sales tax in this consignment type business

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when we do not even know where Amazon moves our inventory? Again, we did not transfer the goods OR make the sale, we simply supplied the items to the FBA warehouses, just like any other supplier shipping goods to Target or Walmart.

Further, we later learned that the law as written in Washington State even says it's not our responsibility to pay these taxes, but that has not stopped them from bullying us into near oblivion. The law is quite simple to understand:

Every consignee, bailee, factor, agent or auctioneer authorized, engaged or employed to sell or call for bids on tangible personal property belonging to another, and, so selling or calling, is deemed a seller, and shall collect the retail sales tax upon all retail sales made by him, except sales of certain farm property as hereinafter provided. The tax applies to all such sales even though the sales would have been exempt if made directly by the owner of the property sold. WAC 458-20-159.

And to remove any absence of doubt WA State defines a Consignee under their tax law as:

“Consignee” (or selling agent) has either actual or constructive possession of tangible personal property (the goods), although someone else actually owns the property.

My goods were shipped to Amazon warehouses outside of WA, where they had ACTUAL possession of the goods, and the ability to transfer them to other states or to their customers. It is not surprising, being that

Amazon is a WA state company, that their state tax department chose to go after a small Utah seller, instead of holding Amazon accountable for the back taxes they owed. Amazon had a cozy open-door policy with the state, which we discovered via FOIA requests, yet when we wanted to raise our case with the State Tax Director Vikki Smith. we were denied the opportunity, it's no wonder why the state chose to go after us instead of Amazon.

In 2018, Congresswoman Jayapal stated during the last Wayfair hearing that Washington doesn't do retroactive. While I fundamentally believe that this is what she was told by her tax department, I'm here to say I'm living proof that this is false. Washington is aggressively retroactive and manipulates their interpretation of the law to allow the largest online retailer off the hook while attacking defenseless small businesses, like mine.

States prey on weak out-of-state small businesses, and kowtow to the large corporations, they cannot be trusted or left to their own devices. If Congress doesn't put this to an end at the Federal level it will bankrupt many businesses nationwide. Unless Congress takes action to protect us, small eCommerce businesses like ours will continue to be the Gazelles of interstate commerce.

The bottom line is sellers want to comply, we want to know the rules and abide by them, we want to do the right thing and stay in business but as I learned with Washington - no good deed goes unpunished. We are

being turned into criminals because of loosely interpreted laws. We are scared and need help and closure. I have faith every day that someone will see it for what it is and step in to help but that wanes as each month passes and each payment is made. Again, WA is holding a lien on my business and I'm required to make monthly payments in order to assert my rights to appeal Washington's ruling against me. I am begging Congress to help protect small sellers. Each and every predatory state that comes after another states businesses unjustly takes tax dollars out of that state and I am confident that Congress will be able to see this for what it is before tens of thousands of small businesses are literally burdened to death.

I also plead with you to amend the State Tax Injunction Act and allow me the right to bring an action in Federal Court to save my business. My constitutional rights have been violated, commerce clause, due process clause, 5th Amendment due process clause, but under the current state of the law, I can't even bring a case before my own federal court to assert those constitutional rights. States get their unchecked power to assert anything they want against small out-of-state businesses because they know we can't fight them. Having a federal court remedy, in my state that would allow me to seek an injunction when states are egregiously violating the constitutional rights of businesses and would be a first step in checking these overzealous state tax administrators, who really don't care about the consequences of their actions when it comes to out-of-state business owners.

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Thank you for your time, if you would like to discuss any of this further, I would be honored.

Sincerely,

/s/ Jennifer Jenson
Jennifer Jenson

[SEAL]
FIONA MA, CPA
STATE BOARD OF EQUALIZATION
455 GOLDEN GATE AVENUE, SUITE 10500,
SAN FRANCISCO, CA 94102 •
TEL: 1-415-557-3000 • FAX: 1-415-557-0287
1201 K STREET, SUITE 710,
SACRAMENTO, CA 95814 • TEL: 1-916-445-4081 •
FAX: 1-916-324-2087
EMAIL: Fiona.Ma@boe.ca.gov
WEBSITE: www.boe.ca.gov/Ma

August 31, 2017

Keely Martin Bosler
Cabinet Secretary
Office of Governor Edmund G. Brown Jr.
State Capitol
Sacramento, CA 95814

RE: Amazon

Dear Ms. Bosler,

In May of 2016, Stu Eisenman, President of Avalanche strategies LLC based out of Delaware, contacted my office regarding the State Board of Equalization's audit.

Avalanche Strategies, LLC is a Fulfillment by Amazon (FBA) retailer and has orders fulfilled by Amazon's California fulfillment centers. Amazon offers the following services to its FBA retailers: storage of inventory in Amazon warehouses, packaging, delivery, customer service, and returns and an option to assess/collect sales taxes to a state. The utilization of Amazon's California fulfillment centers, as well as Amazon's FBA services, creates nexus in California and a tax reporting obligation for FBA retailers per Assembly Bill 155 (Charles Calderon).

Once Mr. Eisenman was aware that he was required to remit sales tax to California, he immediately started complying. He expressed concern that he was being punished unfairly for being billed for sales taxes over the prior 3 years that he did not charge/collect but should have. Mr. Eisenman contends that this was "unequal" treatment while most FBA retailers who are having orders fulfilled by Amazon in California are not remitting California sales tax.

Mr. Eisenman raises an important issue for the State of California: California is losing billions of dollars in tax revenue from FBA retailers who are not remitting state sales taxes. Earlier this year, my office and I travelled with David Gau, Executive Director of the Board of Equalization to Amazon's Seattle Headquarters to meet with Kurt Lamp, Vice President of State Tax and Tax Ops on January 13, 2017.

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During the meeting we learned:

- More than 50% of Amazon's California inventory is from 3rd party sellers that use Amazon's FBAs
- Amazon employs 30k+ employees in California
- Amazon has fulfillment centers in Sunnyvale, Tracy, and San Bernardino with planned expansion in Sacramento and the Central Valley

Amazon gives their 3rd party sellers two options:

1. They can request Amazon to assess/collect state sales taxes however the responsibility to file the actual state sales tax returns remains with the 3rd party seller or
2. The 3rd party seller retains the responsibility to assess/collect/remit state sales taxes. There is an internal Amazon website where 3rd party sellers can track where Amazon ships their products around the U.S.

According to a March 2017 report by Capitol Forum, California lost the most in foregone sales taxes, with missing sales tax revenues of \$431 million. Among 5,000 of the top sellers using FBAs, the sales tax compliance rate for cases in which products were stored in fulfillment centers and sold in the same state was a poor 5.5 percent. (<https://thecapitolforum.com/wp-content/uploads/2017/03/Amazon-2017.03.21.pdf>)

We really do not have good figures to even estimate how much Amazon is selling in California however, we know that a vast majority of FBA retailers are not assessing/collecting/remitting the required sales taxes owed to California. It is also inefficient, if not

impossible for the California Department of Tax and Fee Administration (CDTFA) to properly audit thousands of FBA retailers around the U.S. who are having orders fulfilled through Amazon fulfillment centers in the State of California.

Considering the extensive nexus created by Amazon's California fulfillment centers and FBA services, I recommend that the Governor request Amazon to:

1. Assess/collect/remit sales tax on ALL of the FBA retailers who are fulfilling orders with Amazon in the State of California.
2. Assess/collect/remit the DISTRICT sales taxes on all Amazon-owned products. It is our understanding that Amazon only assesses/collects/remits the 7.25% California state level sales tax portion.

We discussed the possibility of accomplishing #1 and #2 with Mr. Lamp back in January, 2017 and hope they would be amenable to furthering the discussion with our office. By doing so, CDTFA would only have to audit one company and compliance would significantly improve. The State of California would also see billions of dollars of additional revenue that could fund vital programs and services.

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Thank you for your attention to this matter.

In Peace and Friendship

/s/ Fiona Ma
Fiona Ma, CPA
Member, Board of
Equalization-District 2
