No. 22-30373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HALSTEAD BEAD, Incorporated,
Plaintiff-Appellant,

v.

KEVIN RICHARD, in his official capacity as Louisiana Secretary of Revenue; AMANDA GRANIER, in her official capacity as Sales Tax Collector, Lafourche Parish, Louisiana; DONNA DRUDE, in her official capacity as Sales and Use Tax Administrator of Tangipahoa Parish, Louisiana; JAMIE BUTTS, in her official capacity as Sales Tax Auditor, Washington Parish, Louisiana; LAFOURCHE PARISH GOVERNMENT, Incorrectly referred to as Lafourche Parish; TANGIPAHOA PARISH, a Home Rule Chartered Parish; WASHINGTON PARISH, a Home Rule Chartered Parish,
Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Louisiana, No. 2:21-CV-2106

Opening Brief for Plaintiff-Appellant Halstead Bead, Inc.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Fifth Circuit Rule 28.2.1, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiff-Appellant: Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for Plaintiff-Appellant certifies that Halstead Bead, Inc., is a family-owned business, and that it has no parent companies, subsidiaries, or affiliates. No publicly held company owns more than 10 percent of Halstead Bead's stock.

Defendants-Appellees: Kevin Richard is the Louisiana Secretary of Revenue. Amanda Granier is Sales Tax Collector of Lafourche Parish. Donna Drude is Sales and Use Tax Administrator of Tangipahoa Parish. Jamie Butts is Sales Tax Auditor of Washington Parish. All are here in their official capacities. Additionally, Lafourche Parish Government, Tangipahoa Parish Government, and Washington Parish Government are three home-rule-chartered parishes with local sales and use tax collection.

Counsel for Plaintiff-Appellant: Joseph Henchman and Tyler Martinez from the National Taxpayers Union Foundation; Sarah Harbison and James Baehr from the Pelican Institute for Public Policy; and Timothy Sandefur from the Goldwater Institute represent Halstead Bead, Inc.

Counsel for Defendants-Appellees: Russell J. Stutes, Jr., and Russell J. Stutes, III, of Stutes & Lavergne, LLC, and Antonio Charles Ferachi of the Louisiana Department of Revenue represent Secretary of Revenue Kevin Richard. Patrick M. Amedee, Cathrerine Masterson, and Joseph Z. Landry of the Law offices of Patrick M. Amedee represent Amanda Garnier. Ross F. Lagarde, Jeffrey G. Lagarde, and Alexander L.H. Reed of the Law Office of Ross F, Legarde, APLC represent Jamie Butts. Drew M. Talbot of Rainer, Anding & Talbot represent Donna Drude. Michael G. Gee and Mallory Fields Maddocks of Porteous, Hainkel & Johnson, LLP represent the Lafourche Parish Government.

s/ Joseph Henchman
Joseph Henchman
Counsel of Record for Plaintiff-Appellant Halstead Bead, Inc.

Dated: October 11, 2022

STATEMENT REGARDING ORAL ARGUMENT

Halstead Bead requests oral argument. This case involves important issues arising under multiple Supreme Court interpretations of the Commerce Clause, the Fourteenth Amendment's Due Process Clause, and the Tax Injunction Act. The importance of the issues and complexity of the pertinent case law suggest that oral argument will be helpful to the Court.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction to hear Halstead's constitutional claims pursuant to 28 U.S.C. § 1331 (federal question) and the Civil Rights Act of 1871 (42 U.S.C. §§ 1983 and 1988). The District Court dismissed the action on May 23, 2022, and granted judgment in favor of Defendants-Appellees the next day. ROA.1896, 1898. Halstead Bead timely filed its notice of appeal on June 21, 2022. ROA.1899. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

(1) Whether the Tax Injunction Act bars a preenforcement challenge to a state's tax scheme that is not a challenge to any "assessment, levy, or collection" of a tax but instead the regulatory burdens imposed by the state's method of registering and remitting taxes.

(2) Whether a state provides a "plain, speedy, and efficient remedy" under a general state jurisdictional statute when recent state court precedent establishes that state fora are not available unless there is a dispute on the amount of taxes owed—in other words, only suits for refunds, no preenforcement challenges.

(3) Whether tax comity can apply where there is no available state forum for a challenge to a registration and reporting requirement.

STATUTES AND REGULATIONS

> The Congress shall have Power… To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, § 8 cl. 3.

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend XIV § 1.

> 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.

> (A) The legislature shall prohibit the issuance of process to restrain the collection of any tax. It shall provide a complete and adequate remedy for the prompt recovery of an illegal tax paid by a taxpayer.
>
> (B)(1) Notwithstanding any contrary provision of this constitution, sales and use taxes levied by political subdivisions shall be collected by a single collector for each parish. On or before July 1, 1992, all political subdivisions within each parish which levy a sales and use tax shall agree between and among themselves to provide for the collection of such taxes by a single collector or a central collection commission. The legislature, by general law, shall provide for the collection of sales and use taxes, levied by political subdivisions, by a central collection commission in those parishes where a single collector or a central collection commission has not been established by July 1, 1992.
>
> (2) The legislature, by local law enacted by two-thirds of the elected members of each house of the legislature, may establish an alternate method of providing for a single collector or a central collection commission in each parish.
>
> (3) Except when authorized by the unanimous agreement of all political subdivisions levying a sales and use tax within a parish, only those

political subdivisions levying a sales and use tax shall be authorized to act as the single collector or participate on any commission established for the collection of such taxes.

(4) The legislature shall provide for the prompt remittance to the political subdivisions identified on the taxpayers' returns of funds collected pursuant to the provisions of this Paragraph by a single collector or under any other centralized collection arrangement.

La. Const. art. VII, §§ 3(A) and (B).

A. In accordance with the provisions of Article VII, Section 3 of the Constitution of Louisiana, the sales and use taxes levied by taxing authorities within a parish shall be collected by a central collection commission in those parishes where a single collector of sales and use taxes has not been established by July 1, 1992.

B. (1) The parish central collection commission shall consist of one representative from each political subdivision within the parish which levies a sales and use tax.

(2) Except when authorized by the unanimous agreement of all taxing authorities within the parish levying a sales and use tax, only those taxing authorities levying a sales and use tax shall be authorized to participate on any commission established for the collection of such taxes.

(3) The expenses of the central collection commission shall be paid monthly by the taxing authorities levying a sales and use tax on a proportional basis; however, the cost of collection shall in no case exceed one and one-half percent of the tax collected for each political subdivision, unless otherwise authorized by the unanimous agreement of all taxing authorities within the parish levying a sales and use tax.

(4) The sales and use taxes collected by the central collection commission shall be remitted to the taxing authorities levying a sales and use tax no later than ten days after receipt of the taxes by the central collection commission.

(5) The central collection commission shall be a body corporate and have the power to sue and be sued. Any decision of the commission shall be made by a majority vote of the members of the commission.

(6) The provisions of this Section shall not apply in those parishes which have a single collector or a centralized collection arrangement for the collection of sales and use taxes levied by all taxing authorities within the parish as of July 1, 1992.

La. Rev. Stat. §§ 47:337.14(A) and (B) (powers of parish tax collecting commissions).

G. The commission shall have the power, duty, and authority:

(1) To serve as the single entity within the state of Louisiana responsible for all state and local sales and use tax administration, return processing, and audits for remote sales delivered into Louisiana.

(2) To serve as the central, single agency to which remote sellers shall make state and local sales and use tax remittances.

(3) To assign and direct a single audit of remote sellers for the state and all local taxing authorities.

(4) To serve as the single state of Louisiana agency to represent both state and local taxing authorities in taking appropriate action to enable Louisiana to participate in programs designed to allow Louisiana to more efficiently enforce and collect state and local sales and use taxes on sales made by remote sellers.

(5) To conduct administrative hearings as requested by aggrieved remote sellers, administer oaths, and make adjustments to assessments when justified by the facts and the law, and render decisions following such hearings.

(6) To require remote sellers to register with the commission.

(a) No later than thirty calendar days after surpassing either of the criteria of R.S. 47:301(4)(m)(i), a remote seller shall submit an

application for approval to collect state and local sales and use tax on remote sales for delivery into Louisiana to the commission on a form prescribed by the commission. A remote seller shall commence collection of state and local sales and use tax, once notified the commission has approved the application, no later than sixty days after surpassing either of the criteria of R.S. 47:301(4)(m)(i).

(b) The commission shall publish the date remote sellers are required to be registered by policy statement as authorized by LAC 61:III.101 no later than thirty days prior to the effective date of the enforcement. In no event shall the date of enforcement be later than July 1, 2020.

(c) Notwithstanding the duty to register with the commission, the state and local sales and use tax required to be collected by the remote seller shall be due and payable monthly. For the purpose of ascertaining the amount of tax payable, all remote sellers shall transmit to the commission returns on forms prescribed, prepared, and furnished by the commission showing the gross sales arising from all transactions during the preceding calendar month, on or before the twentieth day of the month following the month in which this tax is required to be collected. These returns shall show any further information the commission may require to correctly compute and collect the tax levied. At the time of making the return required pursuant to this Subparagraph, every remote seller shall compute and remit to the commission the required tax due for the preceding calendar month, and failure to remit the tax shall cause the tax to become delinquent. In the event the tax becomes delinquent, interest and penalties imposed by this Subtitle shall be an obligation to be assessed, collected, and enforced against the remote seller in the same manner as if it were a tax due. The commission shall collect interest and penalties on delinquent taxes and distribute such collections to the state or local collector in the same manner as provided by Subsection E of this Section. For purposes of Paragraph (E)(3) of this Section, "state and local sales and use tax collected on remote sales" shall include interest and penalties collected on delinquent taxes.

(d) Vendor's compensation shall be allowed as a deduction against tax due if the return is filed timely on or before the twentieth day of the month following the month of collection and all tax shown due on the return is remitted on or before the twentieth day of the month following

> the month of collection. The commission shall apply each taxing jurisdiction's specific rate of vendor's compensation as a deduction against tax due and shall reduce the monthly distribution provided for by Paragraph (E)(2) of this Section accordingly.
>
> (7) To provide to the single tax collector for each parish an annual report of revenues collected and distributed for the previous calendar year, which report shall be provided on or before June first of each year.
>
> (8) To enter into agreements to waive or suspend prescription with remote sellers as to state and local taxes.
>
> (9) With the consent of the affected local taxing authority, to issue notices of intent to assess, notices of assessments, enforce collection of local sales and use taxes by distraint and sale, and institute summary proceedings or ordinary proceedings for collection of local taxes.
>
> (10) To sue and be sued.
>
> (11) To enter into voluntary disclosure agreements with remote sellers as to state and local sales and use taxes.

La. Rev. Stat. § 47:340(G) (powers of the Louisiana Sales and Use Tax Commission for Remote Sellers).

> H. Nothing in this Chapter shall be construed to:
>
> (2) Limit the right of local taxing authorities to levy and collect sales and use taxes as provided in the Constitution of Louisiana, statutory law, and jurisprudence.
>
> (3) Authorize the commission to exercise any right or perform any function presently exercised by local sales and use tax authorities under present law.
>
> (4) Create, repeal, or amend any local tax exclusions or exemptions.
>
> (5) Authorize the commission to grant local tax amnesty.

> (6) Authorize the commission to promulgate rules, regulations, issue private letter rulings or give to dealers or taxpayers other advice that is inconsistent with the Constitution of Louisiana, statutory law, or controlling jurisprudence.
>
> (7) Require local taxing authorities to make refunds, give tax credit, waive penalties, or waive audit costs.
>
> (8) Repeal or amend any provisions of any local tax ordinances.
>
> (9) Extend to any local taxes any state exclusions, exemptions, credits, rebates, or other tax relief provisions that do not presently apply to local taxes.
>
> (10) Repeal or amend any provision of the Uniform Local Sales Tax Code, R.S. 47:337.1 et seq.
>
> (11) Make the state of Louisiana a member of the Streamlined Sales and Use Tax Agreement.
>
> (12) Authorize the commission to serve as a central state collection agency for local sales and use taxes.
>
> (13) Limit any statutory and ordinal provisions in place as of June 16, 2017, that require dealers and taxpayers, with respect to non-remote sales, to pay and remit directly to the single sales and use tax collector in each parish the sales and use taxes due to each local taxing authority within each parish.
>
> (14) Limit or amend any provision of R.S. 47:1508 and 1508.1.
>
> (15) The sums of money collected by the remote seller for payment of sales and use taxes imposed by the state and local taxing authorities shall, at all times, be and remain the property of the respective taxing authorities and deemed held in trust for taxing authorities, including while in the possession of the commission.

La. Rev. Stat. §§ 47:340(H)(2)-(15) (limitations of authority of the Louisiana Sales and Use Tax Commission for Remote Sellers).

STATEMENT OF THE CASE

Halstead Bead, Inc. ("Halstead" or "Halstead Bead" or "company") is a family owned and operated jewelry and craft supplier based in Prescott, Arizona. ROA.21 ¶5. The company sells beads, chains, and other items used by artisans and hobbyists alike to make jewelry and other crafts. ROA.22 ¶20. Halstead's sales are all online or via catalog, and everything is shipped via mail or services like UPS. ROA.23-24. But Louisiana has one of the most difficult sales tax systems in the country—so burdensome, in fact, that Halstead could no longer comply. ROA.25 ¶¶ 44-48. It was forced to cease sales into Louisiana as a result—and it brought this challenge, not to the amount of taxes but to the regulations governing how taxes are recorded and paid.

Halstead's principal officers are married couple Hilary Halstead Scott and Robert ("Brad") Scott, who serve as President and Treasurer, respectively. ROA.22 ¶13. Hilary oversees many aspects of the business founded by her parents. ROA.22 ¶18. Brad is the one-man compliance and finance department: he handles payroll and employee benefits, company finances, and tax compliance. ROA.22 ¶19.

For tax compliance, Brad needs to oversee the filing and remitting of sales taxes to 20 states. ROA.24 ¶40. He either does this on his own or hires third-party software for some of it, but such outside help is costly. ROA.25 ¶42. Brad is careful and compliant with all rules and regulations. He wants to make sure each state gets

what it asks for, and that includes remitting the sales taxes they owe. He has no objection to paying Louisiana whatever it is due. ROA.29 ¶¶71-72.

But Louisiana's sales tax system is uniquely difficult. The state requires that registration, calculation, record-keeping, and payment be done on a parish-by-parish basis, and each parish has its own distinct exclusions and exemptions. ROA.26 ¶¶49-61. Taxing jurisdictions differ *within* parishes, too—and do not align with ZIP code lines. ROA.27 ¶57. Sellers need to register and file with both the state and each of the 63 parishes that collect their own sales tax. ROA.26 ¶49.

This labyrinth for out-of-state sellers includes many traps for the unwary, and the parishes can be aggressive in auditing any wayward sellers. Even when Halstead receives a buyer's address, Brad cannot know what tax rate to apply. ROA.27 ¶57. Some parishes vary their rates based on things like "Road Zone 2, North of Intercoastal Canal" or "Fire District Number 1." ROA.1115, 1117. There are no state-provided maps or online Geographic Information Systems to help. When Halstead sells a product, Brad can't know if it's taxable, because definitions change parish-by-parish. If Brad and Hilary have a question, there's no one to turn to for a quick answer. And if Brad gets things wrong, he and Hilary are *personally* liable for not remitting the taxes correctly and on time. ROA.28 ¶62 (discussing La. Rev. Stat. § 47:1561.1(A)).

All of this means that Halstead is careful to limit how much it sells into Louisiana, in order to remain below the sales amount that will trigger application of the sales taxes. ROA.25 ¶¶46-48. On December 6, 2021, for example, the company had to stop selling in the state. ROA.1706-07. Even during this appeal, Halstead closely monitors its sales in Louisiana to avoid crossing the compliance threshold. As a result, the company lost revenue for itself, Louisiana lost sales and use tax revenue, and Arizona, the company's home state, lost income tax revenue. Importantly, Louisiana customers could not purchase goods from Halstead at all. But for Louisiana's burdensome, expensive, and fragmented regulations, Halstead would continue to sell into the state. ROA.25 ¶47.

The problems in Louisiana's tax registration and reporting system are well known. For decades, the Louisiana Legislature has tried to impose centralized collection of sales and use taxes via statute, but the state courts stopped those attempts, holding that Louisiana Constitution Article VII, Section 3(B)(1) enshrines the parish-by-parish system. In 2021, the Legislature unanimously sent a constitutional amendment—Amendment 1—to voters as a first step in fixing the state's tax system problem, but Amendment 1 was defeated. ROA.26 ¶54.

After that, Halstead believed it would never be free from the compliance burden imposed by the state's parish-by-parish registration and reporting system. The company is willing to remit the taxes due, but estimates that compliance will

cost far more in time and money than what Halstead would make—and more than what Louisiana would get in tax revenue. (Halstead estimates compliance costs to be about $11,000 to remit only a little more than a few hundred dollars in sales taxes *statewide*. ROA.25 ¶45; *cf.* ROA.1707 (detailing retail sales at the end of the year).

Halstead therefore filed this case, seeking declaratory and injunctive relief, on the grounds that Louisiana's regulations violate the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. At the center of the case is how Louisiana fails to meet the standards approved by the Supreme Court in its landmark decision, *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080 (2018), which allows states to tax sales over the internet if certain safeguards are in place. Those safeguards are not in place here. Unlike South Dakota, Louisiana is not part of the Streamlined Sales and Use Tax Agreement. Streamlined states have a single state-level tax administration per state, uniform definitions of products and services, simplified tax rate structures, and other uniform rules—and they provide free sales tax administration software and immunize sellers who use such software from audit liability. Louisiana does none of those things, which leaves Halstead in the dark on *how* to comply—and facing severe penalties for error.

Defendants separately moved for dismissal under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). ROA.1489, 1618, 1793. Halstead responded to those motions, ROA.1674, 1709, 1833, and on March 17, 2022, the Eastern District

of Louisiana heard oral argument. ROA.1791. On May 23, 2022, it dismissed under the Tax Injunction Act and entered judgment for defendants the next day.[1] ROA.1896, 1898. Halstead timely appealed. ROA.1899.

SUMMARY OF THE ARGUMENT

Halstead challenges the regulatory burdens of registering and remitting sales tax under Louisiana's patchwork parish-by-parish system—a burden so severe as to restrict interstate commerce and deprive it of the due process of law.

Louisiana provides none of the safeguards the Court found critical in *Wayfair*. As a result, for this Arizona-based seller to sell to customers in Louisiana would trigger regulatory costs so complicated and burdensome that Halstead would have to spend $11,000 in compliance costs just to remit a few hundred dollars. ROA.25 ¶45; *see also* ROA.1707 (detailing retail sales at the end of the year). This is so unreasonable that it hinders interstate commerce in a manner forbidden by the Constitution—and not authorized by *Wayfair*—and deprives Halstead of its liberty and property without due process of law.

[1] The lower court granted a Joint Motion to Dismiss by Amanda Granier, Donna Drude, and Jamie Butts who are the tax collectors for Lafourche, Tangipahoa Parish, and Washington Parish. ROA.1895. Pursuant to that dismissal, the court dismissed as "moot" the separate motions to dismiss by Secretary Richard and another by the Lafourche Parish Government. ROA.1897. To comply with Federal Rule of Appellate Procedure 3, Halstead listed all the District Court's judgments that ended its challenge. The other motions to dismiss should be denied on their merits, not because they are "moot."

But the District Court ruled that Halstead could not bring its challenge on the merits. Instead, it held that the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, and related principles of comity, barred Halstead's regulatory challenge because that challenge might affect how taxes are collected. That was reversible error.

Under the TIA, a court cannot "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." *Id*. That bar, however, only applies if there is "a plain, speedy and efficient remedy may be had in the courts of such State." *Id*. Both these tests must be satisfied before the TIA will deprive a court of jurisdiction. But neither apply.

First, Halstead does not challenge the levy or collection of a tax. It challenges the regulatory burden of calculating, recording, and remitting the taxes. The District Court held otherwise because it incorrectly read "assessment" in the TIA so broadly as to include anything that can lead to a tax liability—which is contrary to Supreme Court precedent. Second, Halstead has no remedy in Louisiana state courts. The District Court fashioned a novel theory as to why Halstead could bring its challenge in state court, but recent Louisiana precedents make clear that only suits for *refunds* are permitted in state court—and Halstead is not asking for a refund. It admits taxes would be due if it sold more into Louisiana and *wants* to remit those taxes. It cannot bring suit for refund where it does not contest some aspect of the tax itself. Finally, the District Court relied on common law comity principles to deny taking Halstead's

case. But comity only works when there is a state forum to defer to—and there is none here.

The District Court also said the Louisiana Sales and Use Tax Commission for Remote Sellers ("Commission") is the "sole collector" of sales taxes for remote sellers, and that the Commission's website provides Halstead with the help it needs in complying with the challenged regulations. ROA.1881 (citing La. Rev. Stat. § 47:340(G)(2)) (emphasis removed). But the Commission's website is nothing but a bare-bones portal where sellers input data calculated parish-by-parish. Each parish has its own rates, zones, definitions, and exclusions. La. Rev. Stat. § 47:337.4(B)(6). And the website does not provide that information. Each local taxing authority levies and collects the taxes by itself, and the Commission is barred from granting any amnesty, waiver, or credit. *Id.* § 47:340(H). The Commission may have a web portal for collection, but all policy and enforcement are reserved to the parishes, who retain all power over state tax administration, including registration and remitting. And the parishes regularly bring audit and enforcement actions against remote sellers. The Commission's website does not resolve Halstead's concerns.

On the merits, Halstead brings important claims under both the Commerce Clause and the Fourteenth Amendment. In *Wayfair*, 138 S. Ct. at 2089-90, the Supreme Court highlighted important safeguards that South Dakota has in place to ensure that complying with local sales tax requirements is not overly burdensome

on interstate commerce. Louisiana lacks these protections, and this is the first challenge post-*Wayfair* to examine what procedural safeguards are necessary under both the Dormant Commerce Clause and the Fourteenth Amendment's Due Process Clause when a state taxes sales into the state from other states. Halstead should be allowed to build a record and try its claim in federal court.

ARGUMENT

Dismissal under the TIA, and related comity principles, was legal error. The TIA contains two tests that *both* must be satisfied before the jurisdictional bar applies. First, it only bars cases that seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." 28 U.S.C. § 1341. Second, it only applies "where a plain, speedy and efficient remedy may be had in the courts of such State." *Id*. Neither is the case here. Related comity is also inapplicable, as there is no state forum for the federal courts to defer.

The lower court was also persuaded (albeit in *dicta*) that the Louisiana Sales and Use Tax Commission's website resolves Halstead's injuries. But the Commission does not substitute for the Streamlined Sales Tax Project, nor does its bare-bones website provide the constitutional guardrails contemplated by *Wayfair*. This was a question that should have been resolved at trial; it was not grounds for dismissal under Rule 12(b)(1).

Wayfair said that states may, consistently with the Commerce Clause, require out-of-state sellers to collect and remit sales taxes, 138 S. Ct. at 2099. But, recognizing that "[c]omplex state tax systems could have the effect of discriminating against interstate commerce," the Court allowed this only where states respect certain important guardrails that "prevent discrimination against or undue burdens upon interstate commerce." *Id*. South Dakota had such protections. Louisiana does not. In this case, the first post-*Wayfair* case to examine what safeguards are necessary, Halstead contends that Louisiana's regulatory burdens are so severe that they "have the effect of discriminating against interstate commerce," *id*., and also violate the Fourteenth Amendment's Due Process Clause. Halstead should be allowed to present evidence and try those claims.

I. STANDARD OF REVIEW

This Court reviews dismissals pursuant to Rules of Civil Procedure 12(b)(1) and 12(b)(6) on a *de novo* standard. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Dismissal under 12(b)(1) is strong medicine, and so it "should be granted *only* if it appears certain that the plaintiff *cannot prove any set of facts* in support of his claim that would entitle plaintiff to relief." *Id*. (emphasis added). When a complaint invokes, as here, federal-question jurisdiction, it can only be dismissed "if it is not colorable" or "wholly insubstantial and frivolous." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (citations and quotation marks omitted).

II. THE TAX INJUNCTION ACT IS NO BAR TO THIS CHALLENGE.

The TIA contains two tests that must both be satisfied before the jurisdictional bar applies. First, a court cannot "enjoin, suspend or restrain *the assessment, levy or collection* of any tax under State law." 28 U.S.C. § 1341 (emphasis added). Second, the TIA only applies if there is "a plain, speedy and efficient remedy may be had in the courts of such State." *Id*. Neither element is present here.

a. The District Court Below Read "Assessment" Too Broadly.

This case is not about whether Louisiana can require collection of sales taxes, nor is it a challenge to the amount of any assessment, or an attempt to block collection of any tax. Indeed, this case is not a challenge to any tax at all. This case is about whether the state can force out-of-state sellers to comply with a bewildering labyrinth of regulatory requirements—requirements so "[c]omplex" that they "have the effect of discriminating against interstate commerce." *Wayfair*, 138 S. Ct. at 2099; ROA.26 ¶¶49-61.

Halstead is happy to remit all taxes due, to whatever entity the law requires. But the rules for determining, calculating, and recording those taxes are so extremely burdensome and complicated—requiring Halstead to register with each individual parish, comply with each individual parish's separate administration, and understand thousands of pages of diverse tax rules that change based on whether an address is

north of a canal or south of it—that they violate the Commerce Clause. It is the regulatory burdens, not the taxes, that are the problem here.

Regulatory challenges are *not* subject to the TIA's jurisdictional bar (or the similar bar under the Anti-Injunction Act ("AIA," 26 U.S.C. § 7421)).[2] *See CIC Servs., LLC v. Internal Rev. Serv.*, 593 U.S. ___, 141 S. Ct. 1582 (2021); *Direct Marketing Assn. v. Brohl*, 575 U.S. 1 (2015) ("*DMA*").

In *CIC Services*, 141 S. Ct. at 1589, the Court held that registration and reporting obligations do not fall with the AIA's bar on federal court jurisdiction. It "did not matter," the Court said, that those reporting requirements would "facilitate collection of taxes." *Id*. (citation omitted). And in *DMA*, the Court made clear that a regulatory challenge like Halstead's is distinct from challenges to the "assessment" of taxes. *See, e.g.*, *DMA*, 575 U.S. at 12.

[2] The two statutes have long been read conterminously. *See, e.g.*, *CIC Servs.*, 141 S. Ct. at 1589 (analyzing the AIA by looking to TIA discussion in *DMA*, 575 U.S. at 8-12); *Cohen v. United States*, 650 F.3d 717, 724 (D.C. Cir. 2011) (en banc) (noting that the AIA and TIA are "comparable"). In *DMA*, where the Court held that sales tax registration and reporting requirements did not fall with the TIA's bar, the Court stated that while the TIA concerns state tax challenges, it was modeled on the older Anti-Injunction Act, which focused on federal tax law and is applied using federal tax definitions. *See DMA*, 575 U.S. at 8. The AIA and the TIA use the same language and the Supreme Court instructs that they be applied in the same way. *See id*.

Indeed, "assessment, levy, and collection" should be read narrowly. *See id*. at 9.[3] The *DMA* Court defined these three terms as (respectively) "the official recording of a taxpayer's liability," the "mode of collection under which the [government authority] distrains and seizes a recalcitrant taxpayer's property," and "the act of obtaining payment of taxes due." *Id.* at 9-10. None of those three things are present here. And *DMA* made clear that, since information gathering is a step before "assessment," it is not subject to the TIA's bar. *See id*. at 7-8. The *CIC Services* decision reiterated that because "[a] reporting requirement is not a tax…. [A] suit brought to set aside such a rule is not one to enjoin a tax's assessment or collection…even if the reporting rule will help the IRS bring in future tax revenue"— and consequently it is not barred by the TIA. 141 S. Ct. at 1588-89.

The First Circuit this summer read *CIC Services* and *DMA* the same way. In a challenge to the IRS subpoenaing information targeting cryptocurrency transactions, it held that "information gathering is a phase of tax administration procedure that occurs *before* assessment or collection." *Harper v. Rettig*, 46 F.4th 1, 7 (1st Cir. 2022) (cleaned up, emphasis added) (quoting *CIC Servs.*, 141 S. Ct. at 1589, and *DMA*, 575 U.S. at 8, 12). The *Harper* court rejected the IRS's contention

[3] To the extent that *Home Builders Association of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998), held that "interference with the administration" of a state tax is barred by the TIA, the Supreme Court's recent case law clarifies that regulatory challenges are permissible.

that the purpose of that suit was to restrain the assessment or collection of taxes—because the aim was at the regulatory burdens and subpoenas, not the taxes themselves. *See id*. at 8-9.

The same is true here. Halstead does not challenge an assessment, collection, or levy. It challenges the burdensome regulatory requirements imposed by Louisiana's locality-by-locality compliance rules. The TIA cannot apply to this case, which like *Harper* involves the paperwork and record-keeping requirements associated with figuring out what taxes might be due. As *DMA* said, "The TIA is keyed to the acts of assessment, levy, and collection themselves, and enforcement of the notice and reporting requirements is none of these." 575 U.S. at 12.[4]

This case challenges the regulatory burdens of registration in each Louisiana parish, a burden which includes payment of registration fees, duplicative submission of monthly tax returns, compliance with a fragmented system of definitions and exemptions that vary by parish, and an impenetrable web of local variations. That burden is so extreme that Halstead is forced to curtail sales into Louisiana—thereby restricting interstate commerce—in order to avoid the costs and risks of liability. Halstead is willing to pay the state and local sales and use taxes due. ROA.29 ¶¶71-

[4] Administrative registration fees are not "taxes" for TIA purposes. *See, e.g.*, *McDonald v. Longley*, 4 F.4th 229, 242 (5th Cir. 2021) ("The TIA does not, however, impede federal courts' review of regulatory fees."). And "[w]hether a charge is a fee or a tax is a question of federal law." *Id*. (citation omitted).

72. This case instead focuses on the complex and burdensome registration and reporting system; it does not seek to stop the collection of any tax, challenge any rates, or disrupt the flow of revenue to the state.

The District Court distinguished *DMA* on the grounds that Colorado has a use tax (the equivalent of sales taxes, but paid directly by the consumer rather than collected by the seller), and taxes on the transactions would still be collected even if the plaintiff prevailed. ROA.1890. But Louisiana also has a use tax, like Colorado's, and similarly leaves intact a way for the state to collect sales tax from consumers. *See* La. Rev. Stat. § 47:302(K). So the District Court's attempt to distinguish *DMA* actually *reinforces* that case's applicability here. And Louisiana takes steps to let residents know that it requires *citizens* to report and remit their use taxes if a seller does not collect sales taxes. *See* La. Dept. of Rev. "Consumer Use Tax."[5] Thus, just as in *DMA*, this case does not risk depriving Louisiana of taxes because use taxes would always be due, collected from the actual taxpayer, and the state and parish coffers could remain full.

What is actually at stake here is whether the Louisiana and its parishes can commandeer businesses to act as tax collecting agents via unruly system with traps for the unwary. Indeed, the District Court recognized this when it noted that Halstead

[5] https://revenue.louisiana.gov/ConsumerUseTax.

cannot take advantage of the state court system since it "only *collect[s]* sales and use taxes under Louisiana's scheme," and, consequently, that Halstead is "not…a taxpayer who can take advantage of" Louisiana's state tax review provisions.[6] ROA.1891-92 (emphasis in original). The reason Halstead is a tax collector and not a taxpayer is because the regulations Halstead challenges here force it to be so, at great cost—and Halstead is challenging *that,* not any assessment or collection or levy of its own tax burden. Consequently, the TIA does not apply.

b. The District Court Below Put Forth a Novel State Jurisdictional Hook, with Recent State Decisions Saying the Opposite.

Not only does this case not challenge the assessment, levy, or collection of a tax, Halstead also has no plain, speedy, or efficient remedy under state law—so that, again, the TIA does not apply.

The District Court said Halstead had a state-law remedy in the form of Louisiana Code of Civil Procedure Article 1872. ROA.1892. But this novel theory is plainly erroneous because Article 1872 is a mere declaration-of-rights statute:

> A person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising

[6] If the District Court's interpretation were correct, the TIA could *not* apply to Halstead's challenge because it is never the taxpayer, only the agent of the state, and it is this role as conscripted agent that it complains of here.

> under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

La. Code Civ. Proc. art. 1872. The text is silent about tax or regulatory challenges. What's more, recent decisions by the Louisiana Supreme Court and the Louisiana Board of Tax Appeals have said that only suits for *refunds* can be entertained in the state's fora.[7]

Louisiana state courts have made quite clear that they can only hear suits for *refunds*. *See, e.g., Jackson v. City of New Orleans*, 144 So. 3d 876, 895 (La. 2014) (requiring suit for tax refunds to establish state court jurisdiction).[8] That means state courts are closed to Halstead's challenge, because Halstead does not seek a refund or dispute the rates or the requirement to remit sales taxes: it only complains of Louisiana's unreasonably complex *regulatory* system. There is no "refund" to ask for when the problem is *how* to pay, not *how much* to pay.

[7] All these decisions are subsequent to *ERA Helicopters, Inc. v. State of Louisiana Through Departement of Revenue & Taxation*, 651 F. Supp. 448, 450 (M.D. La. 1987), on which the District Court relied. ROA.1892 n.60. These cases make clear that the state-law remedy that the Middle District of Louisiana identified in that case is no longer available.

[8] The rule for suits for refunds as the only avenue for relief is not new. *See*, *e.g.*, *Austin v. Town of Kinder*, 36 So. 2d 48, 50 (La. Ct. App. 1948) (requiring suits for refunds even when challenging constitutionality of a tax statute).

True, the Board of Tax Appeals has jurisdiction for all matters related to state or local taxes or fees—but this, too, is not an option for Halstead. That is because the law only gives the Board jurisdiction to hear

> A petition for declaratory judgment or other action related to the constitutionality of a law or ordinance or validity of a regulation concerning any matter relating to any state or local tax or fee excluding those tax matters within the jurisdiction of the Louisiana Tax Commission pursuant to the provisions of Article VII, Section 18(E) of the Constitution of Louisiana.

La. Rev. Stat. § 47:1407(7). But none of those apply here, because, again, Halstead is challenging the regulations, not the taxes.

Another state law says the Board or a state court can hear claims of unconstitutionality, *see* Louisiana Revised Statutes § 47:1576(D), but that provision comes after subsection A, which limits the jurisdiction to suits for *refunds* to establish jurisdiction for the Board. *See id*. § 47:1576(A) ("Except as otherwise provided in Subsection B of this Section, any taxpayer protesting…the enforcement of any provision of the tax laws…shall remit to the Department of Revenue the amount due and at that time shall give notice of intention to either file suit or file a petition with the Board of Tax Appeals for purposes of recovery of such tax."). The only exception is for income and corporate franchise taxes, which get an extra 30 days to figure out the exact amount due. *See id.* § 47:1576(B). But, again, that offers

Halstead no relief for its causes of action, which do not concern refunds or amounts due.

Last year, the Board held that it lacks jurisdiction to issue declaratory relief in the absence of a request for a refund of taxes already assessed. *See United Parcel Service of America, Inc. v. Robinson*, No. 12592D, 2021 WL 4296492 (La. Bd. Tax. App. July 14, 2021). There, UPS challenged corporate income and corporate franchise tax liability, arguing that it lacked minimum contacts for such taxes and thus was not required to file at all. *See id.* *2. But no assessment had yet been made, *see id*. at *1, so the Board held that while it could issue declaratory relief, it can only do so after an assessment is issued, whereupon it acquires jurisdiction. *See id*. at *4 ("Where the Department has issued an assessment the case is before the Board and the Board has full jurisdiction to resolve the Constitutional questions raised."). Where, as in this case, the plaintiff is not seeking a refund and is not challenging an assessment, "[t]he Board must refuse an action for a declaration of rights." *Id*.

Louisiana state courts view the Board's authority the same way. In *Bridges v. Smith*, 832 So. 2d 307, 313 (La. Ct. App. 1 Cir. 2002), the court of appeals held that "taxpayers did not have a right to be heard by the [Board] in this case because no formal assessment was made. The right of appeal to the [Board] is a remedy available only to the assessed taxpayer." In other words, a preenforcement challenge is not available until there is a formal assessment. But registration and reporting

requirements—which are what Halstead challenges here—are steps before assessment. So, Halstead cannot bring a case to the Board. It has no state forum.

Even aside from binding state case law, Article 1872 is a general jurisdictional provision, and state tax law limits remedies to suits for *refunds*. This Circuit applies the doctrine of *lex generalis* to weighing potentially conflicting statutes. Under that doctrine, the specific jurisdictional statute for tax system challenges controls over a general jurisdictional law. *See Lewis v. Intermedics Intraocular, Inc.*, 56 F.3d 703, 707 (5th Cir. 1995) ("The maxim '*lex generalis non derogat speciali*' implies that a special law controls as to the particular matter made the subject of special legislation."); *cf. In re Lazarus*, 478 F.3d 12, 18 (1st Cir. 2007) ("In statutory construction, the more specific treatment prevails over the general."). That makes sense in this context, as tax challenges often have their own, specialized rules. Under this doctrine, too, Article 1872 gives Halstead no forum to seek a remedy for the *regulatory* burdens it challenges.

The District Court also distinguished between Halstead's requests for declaratory relief and for an injunction. But that distinction also makes no difference, since injunctive and declaratory relief are generally read conterminously in the tax context. *See, e.g.*, *Cohen v. United States*, 650 F.3d 717, 730-31 (D.C. Cir. 2011) (en banc) (discussing the combined use of prospective relief under the TIA in *Hibbs v. Winn*, 542 U.S. 88, 99 (2004)). What matters for TIA purposes is only whether there

is a state forum available for Halstead. Since Louisiana state fora are *only* available for refund suits, and Halstead does not seek a refund or challenge any rate or applicability of any tax, it cannot enter a state forum. No state forum is available and therefore the TIA does not apply.

c. Traditional Tax Comity Does Not Apply to Halstead's Challenge.

The District Court also went beyond the TIA's own terms and applied a principle of comity *more expansive* than that found within the TIA. ROA.1894. In reaching that conclusion, it relied upon highly distinguishable case law. Comity only applies when there is a state cause of action to defer to. *See, e.g.*, *Sherwin-Williams Co. v. Holmes Cnty.*, 343 F.3d 383, 394 (5th Cir. 2003) ("The absence of any pending related state litigation strengthens the argument against dismissal of the federal declaratory judgment action" pursuant to notions of comity); *cf. In re Gurst*, 75 B.R. 575, 578 (Bankr. E.D. Pa. 1987) (comity inapplicable where "there would be no state court proceeding against the Debtor to which we could abstain or to which we could defer in the interest of comity."). As explained above, there is no state forum or cause of action available to Halstead—so there is no principle of comity to apply.

The District Court relied primarily on *Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010). ROA.1894. But that case is totally unlike this one. *Levin* involved an Ohio law that gave Ohio energy companies an exemption from sales tax and gross receipts tax that out-of-state companies did not receive. 560 U.S. at 418. The plaintiff

sought "to increase a competitor's tax burden," *id*. at 426, by invalidating those exemptions as unconstitutional. *Id*. at 419-20. But Halstead is not trying to invalidate a competitor's preferential tax exemptions. Indeed, this case is not about a tax at all: Halstead simply argues that Louisiana's incomprehensible and complicated regulatory regime unduly restricts interstate commerce—indeed, burdens *all* retailers selling online in Louisiana.[9]

Even if *Levin* did apply, its three factors for applying the comity doctrine are not present here. Those factors were that (1) the case did not involve any fundamental right that would warrant heightened scrutiny, (2) the respondents were asking the court to improve their competitive position, and (3) state courts were better equipped than federal courts to correct any violation. *See id.* at 431. But Halstead is not asking the Court to improve its competitive advantage: it is asking the Court to invalidate Louisiana's overly burdensome tax regime for *all* online retailers. Second, state courts are not better equipped than federal courts to correct

[9] Brick-and-mortar and online retailers in Louisiana face the same regulatory compliance burdens as remote sellers. But unlike a Louisiana-based seller, Halstead (or, more precisely its employees) has no vote for the Legislature and no vote on any ballot measure to amend Louisiana's Constitution. There is no political path whereby Halstead can effect change in a state in which it has no employees, property, or political representation—a key concern of the framers of the Commerce Clause. *See, e.g.*, THE FEDERALIST No. 42 at 283 (James Madison) (J. Cooke ed., 1961) (noting "the desire of the commercial States to collect, in any form, an indirect revenue from their uncommercial neighbors," as a reason for a stronger national government via the Constitution).

this violation, because no state court remedy is available. As for the first consideration, Commerce Clause cases do involve heightened scrutiny. *See*, *e.g.*, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338–39 (2008); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 345-46 (1996).

The District Court was persuaded of the need to abstain here because of Louisiana's "regulatory latitude" over tax matters and the greater familiarity of state courts with state tax law. ROA.1894. But comity only bars federal relief when the plaintiff has an adequate remedy at state law, and none exists here. Halstead cannot go to state court or to the Board of Tax Appeals, because Halstead is not seeking a refund, and given that Halstead curtails interstate sales so as to avoid triggering the regulatory burdens it complains of, there is no ongoing enforcement proceeding for it to raise its constitutional claims. There is no state forum at all, and therefore comity is inappropriate, even if comity is more expansive than the TIA.

The cases on which the District Court relied in reaching its contrary conclusion are vastly different than this one. *Levin* has been discussed above. *Normand v. Cox Communications, LLC*, 848 F. Supp.2d 619 (E.D. La. 2012), involved an attempt to sidestep an ongoing state proceeding. Jefferson Parish had imposed a sales tax on cable communications and was pursuing tax delinquency proceedings in state courts when Cox sought to remove the case to federal court on diversity grounds. *See id*. at 620-22. Because there was a state proceeding going on

for the federal court to give comity to, the district court did so. Here, by contrast, there is no ongoing state proceeding, and cannot be, since there is no assessment or refund claim. And footnote 17 of Justice Brennan's concurring opinion in *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971), on which the District Court relied, ROA.1894, was the opinion of only three justices, 401 U.S. at 93—and the majority in that case never addressed the TIA. Moreover, Justice Brennan's footnote was predicated on the idea that a case could be "heard in the state courts," *id*. at 128 n.17, which, as discussed above, is not true here.

Properly understood, comity does not make states immune from all tax collection suits in federal courts; it merely prefers adequate relief in state forums *when that is available*. In *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100, 108 (1981), the Supreme Court held that, before enactment of the TIA, "federal-court restraint in state tax matters was based upon the traditional doctrine that courts of equity will stay their hand when remedies at law are plain, adequate, and complete," and that is the standard the TIA implements. It does *not* bar federal jurisdiction when *no* state remedy is available—which is the situation here.

III. THE LOUISIANA SALES AND USE TAX COMMISSION FOR REMOTE SELLERS DOES NOT RESOLVE HALSTEAD'S INJURY.

a. The Commission's Basic Website Does Not Comport with *Wayfair*.

In *Wayfair*, the Supreme Court said that one reason the South Dakota tax on out-of-state sellers was constitutional was because that state provided safeguards to reduce the burden on interstate commerce: it applied "a safe harbor to those who transact only limited business in South Dakota," and "standardize[d] taxes to reduce administrative and compliance costs." 138 S. Ct. at 2099-2100. Here, the District Court appears to have been of the view that the Louisiana Sales and Use Tax Commission for Remote Sellers's website makes rules clear for out-of-state sellers and therefore provides a similar kind of protection. ROA.1887-88.[10]

[10] At oral argument, the District Court asked Halstead's counsel about the practical operation of the website. *See* ROA.1925-29. Later it sought login credentials for the website from Defendants directly. ROA.1792. There was no docket entry reflecting whether Defendants provided the District Court with those login credentials, but to the extent the District Court relied upon its own investigation, that is beyond the scope of judicial notice in this Circuit and was improper. *See* Fed. R. Evid. 201(b); *cf. Weinhoffer v. Davie Shoring, Inc.*, 23 F.4th 579, 583-84 (5th Cir. 2022) (rejecting use of the Wayback Machine Internet Archive as not self-authenticating to satisfy Rule 201); *In re Schrag*, 464 B.R. 909, 914 (D. Or. 2011) ("Courts are the arbiters of the questions of law and fact presented by the parties, not self-directed investigative agencies."). How the website works is a crucial factual dispute in this case, and "independent judicial investigation is inappropriate." *Schrag*, 464 B.R. at 914 n.3; *see also Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) ("Because the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument

But unlike the website approved in *Wayfair*, or similar systems used in nearly every other state, the Louisiana website does *not* provide the information needed to remit taxes—it merely sends Halstead to a third-party commercial website to look up tax information. The Commission website is simply a portal where Halstead can input data already required by the paper forms—one at a time, parish-by-parish. This is information Halstead must obtain elsewhere before entering the Commission's website. The burdens Halstead alleges therefore remain.

The underlying problem that the website fails to solve is telling sellers what rates apply based on a shipping address. When buyers order products on the internet, they input a house number, street, city, state, and five-digit ZIP code.[11] But this address, particularly the standard five-digit ZIP code, is *not* enough to ascertain the right parish, much less the local taxing districts. Some cities are in more than one parish or county. Even addresses to "New Orleans," for example, may refer to an address in either Orleans Parish (the city proper) or Jefferson Parish (part of the

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to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)."). For that reason alone, reversal is warranted.

[11] Few use their correct nine-digit ZIP code. *See generally* Matt Soniak, *What's the Deal with Those Last 4 Digits on ZIP Codes?* MentalFloss (Nov. 1, 2013) https://www.mentalfloss.com/article/53384/what%E2%80%99s-deal-those-last-4-digits-zip-codes (noting "the ZIP+4 never caught on with people"). For example, this Court's website publishes its address as "600 Camp Street, New Orleans, LA 70130." United States Court of Appeals for the Fifth Circuit, https://www.ca5.uscourts.gov/. This Court's own website does not use the nine-digit code, but the more common (and less precise) five-digit ZIP code.

metropolitan area), despite the shipping address simply saying "New Orleans, Louisiana." *See generally* Graham Martin, *Why 5-Digit ZIP Codes Don't Always Return Correct Sales Tax Rates (And That's OK)*, TAXJAR (May 3, 2017) (describing the safe harbor provisions of the Streamlined Sales Tax agreement, which Louisiana is not a party to).[12]

Even if a city is entirely within one parish, Louisiana's convoluted tax jurisdiction system makes it difficult to tell whether an address is within a special district. So, for example, Tangipahoa Parish has *nine* different jurisdictions and rates. ROA.27 ¶59; ROA.1117. Lafourche Parish's road districts are difficult to figure out based on the shipping address provided by a buyer. ROA.27 ¶58; ROA.1115. And what out-of-state seller can know what is "within the 4th ward but outside Bogalusa limits"? ROA.27 ¶60; ROA.1119.

The Commission's website does nothing to address this; it only replicates the paper forms. *Compare*, *e.g.*, La. Sales and Use Tax Comm'n for Remote Sellers, (using Lafouche Parish in the dropdown menu) *with* ROA.1115 (Lafourche form, with same minimal descriptors).[13] It does not resolve the questions about road districts, or say what is within a ward but outside a city's limits. To use the website, Halstead would need to know the same information the paper forms require. Indeed,

[12] https://www.taxjar.com/blog/calculations/zip-codes-sales-tax.
[13] https://remotesellersfiling.la.gov/lookup/Lookup.aspx.

the Commission's website says: "Remittance rates displayed have been provided by the tax authority. The 3rd party collectors are not responsible for rate discrepancies at any time. If you have any question(s) about the rates displayed, please contact the tax authority directly for confirmation."

Louisiana does not offer any free address tax-rate look up. Instead, it refers users to Sales Tax Explorer, [14] a for-profit entity that charges for tax rate look ups in tiers ranging up to $2,500 for ten thousand look ups. Sales Tax Explorer, Pricing.[15] Each address for each transaction must be researched, one at a time, which is a great burden in compliance costs for a small, family-owned-and-operated company.

In contrast, South Dakota allowed a business to import data from an Excel spreadsheet or similar program all in a single batch, and the website produced the relevant tax codes for filing. *See* S.D. Dep't of Revenue, *Sales Tax by Address*.[16] In South Dakota, as long as a seller has a buyer's street address, city, and ZIP code, it can use an online tool that uploads the data and generates an Excel file providing the tax codes needed to file any local taxes on the state's centralized return. From there, reporting is straightforward—the seller reports sales, deductions, and any local taxes

[14] https://www.salestaxexplorer.com.
[15] https://app.salestaxexplorer.com/#/pricing. This is the "Platinum" level, the best per-transaction value option. Halstead's sales last year may allow it to use a lower tier such as Bronze ($500 for 800 lookups), but still at a multiple of what the state or parishes would get in actual tax remittance from retail sales.
[16] https://apps.sd.gov/rv25taxmatch/main.aspx.

applicable by the code provided by state's website lookup tool. Looking up multiple addresses takes seconds, is free, and the state generates the relevant tax codes for the business. Thus, South Dakota's burden was far lighter, and it was *that* system that the *Wayfair* Court said was adequate "to prevent discrimination against or undue burdens upon interstate commerce." 138 S. Ct. at 2099. No such safeguards exist here.

Because Louisiana's Remote Sellers Commission website lacks these features, Halstead is forced to contract with for-profit companies that provide tax rate look-up services—and which are expensive and beyond the reach of many small businesses, including Halstead. (Large companies like Amazon employ entire tax departments for such compliance costs.)[17]

Furthermore, Louisiana provides no guidance on local tax law—and each parish can have its own definitions, exemptions, deductions and other nuances that change tax liability. The Commission website provides none of this key information. Sellers need to contact each parish for help.

[17] Returns must be made even if zero taxes are due because the transaction is wholesale and thus tax-exempt. ROA.29 ¶67; La. Rev. Stat. § 47:306(A)(7). So even when there are no taxes to remit, a seller must *still* go to the Commission's website, look up addresses and fill out forms—all for the state and local governments to get no money. This is the epitome of burdens on interstate commerce for no state benefit.

Louisiana's legislature concluded similarly. A 2020 House Resolution found "Louisiana is one of three states in the United States of America with a decentralized sales and use tax collection system; and non-unified tax base," and that "the decentralized sales and use tax collection system results in compliance challenges for businesses that are mandated to remit taxes and submit returns to hundreds of distinct political subdivisions across Louisiana." La. H.R. 31 at 1 (2020 First Extraordinary Session) (June 17, 2020).[18] The resolution passed overwhelmingly—97-7 in the House. La. H.R. 31 Vote, Final Consideration (2020 First Extraordinary Session) (June 17, 2020).[19] Ultimately Amendment 1 got the requisite two-thirds support in each house and made it to the ballot, but the proposed solution was ultimately not adopted. ROA.26 ¶54.

In any event, the parties' disagreement regarding the extent of the burden Louisiana's scheme imposes shows that this case involves disputes of fact and law that would be appropriately resolved at trial—not on a motion to dismiss. Dismissal under Rule 12 was therefore inappropriate.

b. The Commission's Powers Are Illusory, Subject to Parish Control.

The District Court also opined that the Commission is the "sole *collector*" of sales and use taxes. ROA.1881 (emphasis in original) (citing La. Rev. Stat.

[18] https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182741.
[19] https://www.legis.la.gov/legis/ViewDocument.aspx?d=1182736.

§ 47:340(G)(2)). That's not quite right. Because the Louisiana Constitution requires parish-level collection of sales and use taxes (Art. VII § 3(B)(1)), the Legislature cannot pass a statute to create a central repository for the collection of sales and use taxes. *See Caddo-Shreveport Sales & Use Tax Comm'n v. Off. of Motor Vehicles through Dep't of Pub. Safety & Corr. of State*, 710 So. 2d 776, 779 (La. 1998) (holding a modest centralization of car sales taxes violates the state constitution). The legislature has tried to centralize sales tax collection, but Louisiana Revised Statute § 47:340(H) shows how limited that effort has been. The Commission is a *voluntary* system that can be revoked anytime by the parishes. And the parishes retain their independent powers.

This voluntary system explains why there is so much mismatch between sections 47:340(G) and 47:340(H). Subsection G grants the Commission the "power, duty, and authority" to do various things. La. Rev. Stat. § 47:340(G). But subsection H takes that power away, since "Nothing in this Chapter shall be construed to… limit the right of local taxing authorities to levy and collect sales and use taxes." *Id.* § 47:340(H)(2). The Commission cannot "exercise any right or perform any function presently exercised by local sales and use tax authorities." *Id.* § 47:340(H)(3). Nor can it "[c]reate, repeal, or amend any local tax exclusions or exemptions," *id.* § 47:340(H)(4), or "grant local tax amnesty," *id.* § 47:340(H)(5), or "[r]equire local

taxing authorities to make refunds, give tax credit, waive penalties, or waive audit costs." *Id.* § 47:340(H)(7).

As for the Streamlined Sales and Use Tax Agreement, which the *Wayfair* Court cited as an important reason why South Dakota's taxation of out-of-state sellers was not a burden on interstate commerce, 138 S.Ct. at 2100, subsection H of the Louisiana law *bars* the Commission from participating in that system. La. Rev. Stat. § 47:340(H)(11).

But most importantly, while subsection G says the Commission can serve "as the central, single agency to which remote sellers shall make state and local sales and use tax remittances," subsection H *expressly denies* the Commission the power "to serve as [the] central state collection agency for local sales and use taxes." La. Rev. Stat. § 47:340(G)(2); *id.* § 47:340(H)(12). The Commission's powers exist only at the whims of the parishes which join it, and the parishes retain all their powers to withdraw membership. Meanwhile, the parishes continue to set rates, change definitions and exemptions, and audit, enforce, and administer independently.

Parishes regularly bring independent tax enforcement actions, even after *Wayfair*. *See, e.g.*, *Lerner New York, Inc. v. Normand*, 288 So. 3d 242, 246-47 (La. App. 5th Cir. 2019) (Jefferson Parish collection action against a New York clothier); *Cox Communications*, 848 F. Supp 2d at 620-22 (describing the same parish's

enforcement action against a cable company). And the parish's Tax Collector and parish entities are often co-litigants in these actions. *See*, *e.g.*, *R & B Falcon Drilling USA, Inc. v. Lafourche Par. Sch. Bd. ex rel. Percle*, 950 So. 2d 696, 698 (La. App. 1st Cir. 2006). The parishes have argued that Louisiana's bars legislative attempts to standardize tax collection systems. *See, e.g.*, *W. Feliciana Par. Gov't v. State*, 286 So. 3d 987, 994 (La. 2019).

The bottom line is: the Commission is effectual only on paper. In any event, the helpfulness of the Commission or its website are material disputes of fact. Halstead stands ready to engage in discovery and expert testimony on how the Commission fails to provide the kinds of safeguards *Wayfair* found essential for the preservation of interstate commerce. But because the District Court dismissed, Halstead never got the chance to marshal its evidence. This Court should reverse and allow Halstead its day in court.

IV. HALSTEAD BRINGS MERITORIOUS CONSTITUTIONAL CLAIMS.

a. Halstead Adequately Pleaded A Dormant Commerce Clause Cause of Action.

The Commerce Clause grants Congress the power to regulate interstate commerce, and this bars states from impeding the free flow of interstate commerce, even in the absence of Congressional action. *Wayfair*, 138 S. Ct. at 2089-90. State taxes on interstate commerce are constitutional if they are "applied to an activity

with a substantial nexus with the taxing State," are fairly apportioned, are not facially discriminatory, and are "fairly related to the services provided by the State." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Wayfair upheld South Dakota's taxing of eCommerce, but noted the state had established important safeguards which kept the state's sales taxes from unduly burdening interstate commerce:

> First, the [South Dakota law] applies a safe harbor to those who transact only limited business in South Dakota. Second, [it] ensures that no obligation to remit the sales tax may be applied retroactively…. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Id. at 2099-2100. Absent these conditions, the South Dakota law would likely have been unconstitutional.

Louisiana has adopted a safe harbor: 200 transactions or $100,000 in *gross* sales. *See* La. Rev. Stat. § 47:301(4)(m)(i). This standard is inadequate as a protection against an undue burden upon interstate commerce for two reasons. If a seller, such as Halstead, engages in extensive wholesale transactions, which are exempt from tax under Louisiana law, those sales nonetheless trigger compliance obligations and reporting burdens once they exceed 200 transactions of *any* kind (not

just taxable transactions). *See id*. Furthermore, while $100,000 or 200 transactions may be a sufficient safe harbor for sparsely populated South Dakota, it is much easier for a small seller to trigger that threshold in Louisiana which has five times the population and where the economy is four times larger. Several states have recognized this and adopted higher *de minimis* thresholds that are more likely to be genuine safe harbors. *See, e.g.*, Cal. Rev. & Tax Code § 6203(c)(4)(A) ($500,000 and no transaction trigger); N.Y. Tax Law § 1134(a)(1)(i) ($500,000 *and* 100 transactions); Tex. Admin. Code § 3.286(b)(2)(B)(i) ($500,000 and no transaction trigger); Ala. Code § 40-23-190 ($250,000 and no transaction trigger); Miss. Code § 27-67-3(j) ($250,000 and no transaction trigger).

As for the Streamlined Sales and Use Tax Agreement, as noted above, Louisiana does not adhere to it. *See, e.g.*, La. Rev. Stat. § 47:340(H)(11); Streamlined Sales Tax Governing Board, Inc., *State Information* (listing Louisiana as a non-member state).[20] Louisiana has no single state-level tax administration, or uniform definitions of which goods or services are taxable, or simplified tax rate structures, and does not provide convenient software that calculates out-of-state

[20] https://www.streamlinedsalestax.org/Shared-Pages/State-Detail. Adhering to the Streamlined agreement requires having only a single state-level tax administration per state, uniform definitions of products and services, simplified tax rate structures, and other uniform rules, as well as providing free sales tax administration software and immunizing sellers who use such software from audit liability. *See Wayfair*, 138 S. Ct. at 2100.

sellers' tax liability.

Louisiana exemplifies the opposite of "simplified tax rate structures" emphasized by the Court in *Wayfair*.[21] Disparate tax treatment of the same company between parishes can be seen in Louisiana's case law. For example, St. Mary Parish assessed a use tax against a local marine barge company who bought materials and equipment to repair its barge even though the Parish where those materials were bought exempted them. *See Coastal Drilling Co. v. Dufrene*, 198 So. 3d 108, 110 (La. 2016).

[21] Scholars and practitioners have recognized Louisiana's unique refusal to reduce the regulatory burden of its sales tax system. *See, e.g.*, Karl Frieden and Douglas L. Lindholm, *U.S. State Sales Tax Systems: Inefficient, Ineffective, and Obsolete*, Tax Notes State (Nov. 30, 2020) https://www.taxnotes.com/tax-notes-state/sales-and-use-taxation/us-state-sales-tax-systems-inefficient-ineffective-and-obsolete/2020/11/30/2d6t2 (listing Louisiana as among four states as "clear outliers" on sales tax administration); Nathaniel A. Bessey and Jamie Szal, *The Local Disadvantage*, Tax Notes State (Jan. 10, 2022) https://www.taxnotes.com/tax-notes-state/nexus/local-disadvantage/2022/01/10/7cqmz (describing Louisiana as "notorious"); Paul Williams, *La. Online Sales Tax Lawsuit Puts Other States On Notice*, Law 360 (Nov. 16, 2021) https://www.law360.com/tax-authority/articles/1440916/la-online-sales-tax-lawsuit-puts-other-states-on-notice (Louisiana sales tax system is "so notoriously complicated and difficult to comply with, with all of the local authorities."); David Brunori, *Reform in La. and Tax Havens in Colo.*: SALT in Review, Law 360 (May 21, 2021) https://www.law360.com/tax-authority/articles/1384605 ("Louisiana has been plagued by a complicated and highly inefficient tax system since the state joined the republic. The system makes it hard for the Department of Revenue and hard for taxpayers who want to do the right thing.").

Along with its *Wayfair* argument, Halstead also argues that Louisiana's taxing of out-of-state sales fails the test established in *Pike v. Bruce Church*, 397 U.S. 137 (1970). ROA.31-32 ¶¶84-90. *Pike* asks if the "burden imposed on such commerce is clearly excessive in relation to the putative local benefits," and if so, the Court considers whether the local interest could be accomplished by more reasonable means. 397 U.S. at 142. If the state can accomplish its goals by more reasonable means, then the burden on interstate commerce violates the Commerce Clause. Applying *Pike*, the main question is whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 503 (5th Cir. 2001). The test is simple: "[a] statute imposes a burden when it inhibits the flow of goods interstate." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 163 (5th Cir. 2007).

When Halstead filed its Verified Complaint, only the approximately $2,800 in retail sales would be the basis for any revenue for the state or parishes. ROA.29 ¶71; ROA.1707 ¶7 (detailing final sales figures before stopping sales). In contrast, the costs Halstead would incur to comply with Louisiana's parish-by-parish reporting, filing, and collection requirements would be far greater than the combined tax revenue that Louisiana local governments would receive from Halstead's sales. ROA.32 ¶90. The exact number would be born out in discovery and at trial, but Halstead estimates the costs of compliance at $11,000 over three years. ROA.25 ¶45.

The company averred it would stop sales into Louisiana, ROA.25 ¶48, and in fact did so on December 6, 2021. ROA.1706-07. Stopping sales lest it find itself in a compliance nightmare means Halstead lost revenue for itself *and* Louisiana lost sales and use tax revenue. In other words, the state's interest in revenue would be *better* served by reducing the regulatory burdens challenged here.

b. Halstead Adequately Pleaded A Due Process Cause of Action.

The Fourteenth Amendment prohibits states from depriving people of liberty or property without due process of law. This constrains a state's power to impose tax-related requirements on out-of-state entities. *See, e.g., N.C. Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Fam. Tr.*, 588 U.S. ___, 139 S. Ct. 2213, 2219 (2019). Tax rules that bear no genuine relationship to the protection, opportunities, or benefits given by the state violate the Clause.

For decades *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), stood for the proposition that a mail-order business was not subject to sales and use tax collection in a state, absent physical minimum contacts. Given the rise of e-commerce, the *Wayfair* Court replaced the minimum contacts rule with a substantial nexus rule. Yet the Court made clear that it was not giving states *carte blanche*. *See Wayfair*, 138 S. Ct. at 2099 ("And, if some small businesses with only de minimis

contacts seek relief from collection systems thought to be a burden, those entities may still do so under other theories.").

Under *Kaestner*, the Court considers whether there are (1) minimum contacts between the state and the person being taxed and (2) whether the tax is "rationally related" to "values connected with the taxing State." 139 S. Ct. at 2220. Louisiana's system fails the second *Kaestner* factor. For a state to reach beyond its borders, there must be a reasonable relationship between the tax system and *value* gained in process. *See, e.g.*, *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 325-29 (1968) (state's formula for taxing railroad rolling stock not in line with the benefits to the state).

States can easily fail this test. For example, in *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 560 (1965), the Court held that while a state (or there, the District of Columbia) can have the power to tax, deviating too far from *how* other states tax can implicate due process concerns. In invalidating the District's tax scheme under the Due Process and Commerce Clauses, the Court noted that D.C. was at odds with the "great majority of States." *Id*. at 559. Louisiana is likewise at odds with the great majority of states in requiring out-of-state sellers to abide by a jurisdiction-by-jurisdiction system for calculating sales and use taxes—a system so confusing and byzantine that it results in absurd economic effects.

That system is so arbitrary and irrational as to violate due process. Local governments gain little, if any, revenue from this system, but impose heavy compliance costs on out-of-state sellers and penalize those that err in determining the applicable rate or definitions for a transaction. As Texas and other states show, it is possible to require remote sellers pay a blended rate and let the state allocate funds as they see fit. Indeed, Louisiana does so if a seller is below the *de minimis* threshold and voluntarily remitting the taxes (instead of the buyers). *See* La. Rev. Stat. § 47:302(k). It would appear this blended rate would remove the unreasonable burden and be an "accommodation[] necessary to assure that its taxing power is confined to its constitutional limits." *Norfolk*, 390 U.S. at 329.

The Defendants—state and parish alike—think everything is solved by the state's website. The District Court was persuaded that the website operates like South Dakota's, without giving Halstead the chance to develop its evidence. As we have seen, however, that website does not remedy any of the regulatory burdens Halstead complains about, but instead imposes additional costs. Halstead should have the right to make its due process case before a federal court.

CONCLUSION

The judgment of the district court should be reversed and Halstead's constitutional claims remanded for trial on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing using the court's CM/ECF system which will automatically generate and send by email a Notice of Docket Activity to registered attorneys currently participating in this case, constituting service on those attorneys.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because it contains 9,982 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

s/ Joseph Henchman

Dated: October 11, 2022 Joseph Henchman